

THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XXV.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BRING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXV.

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*FRAUDULENT AND VOIDABLE
CONVEYANCES.*

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GAMING AND WAGERING.

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In this Volume English Cases reported up to 1st October, 1925, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.

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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	
A. Jur. Rep.	... Australian Jurist Reports	Aus.
A. L. T.	... Australian Law Times	Aus.
A. R.	... Ontario Appeals	Can.
Act.	... Acton's Reports, Prize Causes, 2 vols., 1809-1841	Eng.
Ad. & El.	... Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831-1842	Eng.
Adam	... Adam's Justiciary Reports (Scotland), 1893- (current)	Scot.
Add.	... Addams' Ecclesiastical Reports, 3 vols., 1822-1826	
Agra	... Agra High Court	Ind.
Agra F. B.	... Agra High Court, Full Bench	Ind.
Alc. & N.	... Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813-1833	Ir.
Alc. Reg. Cas.	... Alcock's Registry Cases (Ireland), 1 vol., 1832-1841	Ir.
Aleyn	... Aleyn's Reports, King's Bench, fol., 1 vol., 1616-1619	
All.	... New Brunswick Reports (Allen)	Can.
Alta. L. R.	... Alberta Law Reports	Can.
Amb.	... Ambler's Reports, Chancery, 1 vol., 1716-1783	
And.	... Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535-1605	
Andr.	... Andrews' Reports, King's Bench, fol., 1 vol., 1737-1740	
Anst.	... Anstruther's Reports, Exchequer, 3 vols., 1792-1797	Eng.
App. Cas.	... Law Reports, Appeal Cases, House of Lords, 15 vols., 1875-1890	Eng.
App. Ct. Rep.	... Appeal Court Reports	N.Z.
App. D.	... South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	... Architects' Law Reports, 4 vols., 1901-1909	Eng.
Argus L. R.	... Argus Law Reports	Aus.
Arkley	... Arkley's Justiciary Reports (Scotland), 1 vol., 1846-1848	Scot.
Arm. M. & O.	... Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840-1842	Ir.
Arn.	... Arnold's Reports, Common Pleas, 2 vols., 1838-1839	Eng.
Arn. & H.	... Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840-1841	Eng.
Ashb.	... Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	... Aspinall's Maritime Law Cases, 1870- (current)	Eng.
Atk.	... Atkyns' Reports, Chancery, 3 vols., 1736-1751	Eng.
Ayl. Pan.	... Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	... Ayliffe's Parergon Juris Canonici	
B.	... Barber's Gold Law	S. Af.
B. & Ad.	... Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830-1831	Eng.
B. & Ald.	... Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817-1822	Eng.
B. & C.	... Barnewall and Cresswell's Reports, King's Bench, 10 vols.,	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918- (current) (<i>e.g.</i> , [1918-19] B. & C. R.)	Eng.
B. & S.	... Best and Smith's Reports, Queen's Bench, 10 vols., 1861-1870	Eng.
B. C. R.	... British Columbia Reports	Can.
B. Dig.	... Bose's Digest	Ind.
B. L. R.	... Bengal Law Reports	Ind.
B. L. R. A. C.	... Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	... Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	... Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	... Butterworths' Workmen's Compensation Cases, 1907- (current)	Eng.
Bac. Abr.	... Bacon's Abridgment	
Bail Ct. Cas.	... Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852-1854	Eng.

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Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	Beawes's <i>Lex Mercatoria</i>	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec.	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben.	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch.	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1816—1818	Ir.
Bli.	Bligh's Reports, House of Lords, 1 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca.	Bombay Reports, Crown Cases	Ind.
Bom. O. C.	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R.	et and Puller's New Reports, Common Pleas, 2 vols.,	Eng.
Bott.	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas.	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir R. Brooke's Abridgement	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor.	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lash.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Buch. ...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C. ...	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan. ...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Bull. N. P. ...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bulst. ...	Buller's Nisi Prius (published, London, 1772)	Eng.
Bunb. ...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Burr. ...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1711	Eng.
Burr. S. C. ...	Burrow's Reports, King's Bench, 5 vols., 1756—1772	
Burrell ...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	
	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1618—1810	
C. A. ...	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P. ...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	
C. B. ...	Common Bench Reports, 18 vols., 1845—1856	
C. B. N. S. ...	Common Bench Reports, New Series, 20 vols., 1856—1865	
C. B. R. ...	Canadian Bankruptcy Reports Annotated, 1920—(current)	Can.
C. C. Ct. Cas. ...	Central Criminal Court Cases (Sessions Papers), 1831—1913	Eng.
C. L. Ch. ...	Common Law Chambers	Can.
C. L. J. ...	Cape Law Journal	S. Af.
C. L. J. N. S. ...	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S. ...	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R. ...	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R. ...	Commonwealth Law Reports	Aus.
C. L. R. ...	Calcutta Law Reporter	Ind.
C. L. T. ...	Canadian Law Times	Can.
C. L. T. Occ. N. ...	Canadian Law Times, Occasional Notes	Can.
C. P. ...	Upper Canada Common Pleas	Can.
C. P. D. ...	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D. ...	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C. ...	Canadian Reports, Appeal Cases	Can.
C. T. R. ...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N. ...	Calcutta Weekly Notes	Ind.
Cab. & El. ...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882	Eng.
Cald. Mag. Cas. ...	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	
Calth. ...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	
Cam. Cas. ...	Cameron's Supreme Court Cases	Can.
Cam. Prac. ...	Cameron's Supreme Court Practice	Can.
Camp. ...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ...	Commercial Law Reports of Canada	Can.
Can. Crim. Cas. ...	Canadian Criminal Cases, Annotated	Can.
Can. Gaz. ...	Canadian Gazette	Can.
Can. Ry. Cas. ...	Canadian Railway Cases	Can.
Car. & Kir. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1813—1853	Eng.
Car. & M. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1811—1812	
Car. C. L. ...	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann. ...	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carl. ...	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas. ...	Carpmael's Patent Cases, 2 vols., 1602—1842	
Cart. ...	Carter's Reports, Common Pleas, fol., 1 vol., 1661—1673	Eng.
Cart. ...	Cases on British North America Act (Cartwright)	Can.
Carth. ...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary ...	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch. ...	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B. ...	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett. ...	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. temp. Finch ...	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. temp. King ...	Select Cases temp. King, Chancery, fol., 1 vol., 1721—1733	Eng.
Cas. temp. Talb. ...	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig. ...	Cassell's Digest	Can.
Ch. (preceded by date) ...	Law Reports, Chancery Division, since 1890 (<i>e.g.</i> , [1891] 1 Ch.)	Eng.
Ch. App. ...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch. ...	Choyce Cases in Chancery, 1557—1606	
Ch. Ch. ...	Upper Canada Chancery Chambers Reports	Can.
Ch. D. ...	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob. ...	Christopher Robinson's Reports, Admiralty, 6 vols., 1708—1808	Eng.
Char. Cham. Cas. ...	Charley's Chamber Cases, 2 vols., 1875—1876	
Char. Pr. Cas. ...	Charley's New Practice Reports, 3 vols., 1875—1876	
Chip. ...	New Brunswick Reports (Chipman)	Can.

Chit. ..	...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	Eng.
Cl. & Fin. ..	...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas. ..	...	Clark and Scully's Drainage Cases	Can.
Clay. ...	...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick. ...	...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ...	...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A. ...	...	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent. ...	...	Coke's Entries	Eng.
Co. Inst. ...	...	Coke's Institutes	
Co. L. J. ...	...	Colonial Law Journal	N.Z.
Co. Litt. ...	...	Coke on Littleton (1 Inst.)	Eng.
Co. Rep. ...	...	Coke's Reports, 13 parts, 1572—1616	
Coch. ...	...	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe	...	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll. ...	...	Collyer's Reports, Chancery, 2 vols., 1814—1816	Eng.
Coll. Jurid. ...	...	Collectanea Juridica, 2 vols.	
Colles ...	...	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Coll. ...	...	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com. ...	...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1710	Eng.
Com. Cas. ...	...	Commercial Cases, 1895—(current)	
Com. Dig. ...	...	Comyns' Digest	Eng.
Comb. ...	...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law. ...	...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig. ...	...	Congdon's Digest	Can.
Const. ...	...	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al. ...	...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas. ...	...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg. ...	...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1712	Eng.
Coop. G. ...	...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas. ...	...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. temp. Brough. ...	...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. temp. Cott. ...	...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor. ...	...	Coryton's Reports	Ind.
Corb. & D. ...	...	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud. ...	...	Correspondances Judiciaires	Can.
Couper ...	...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	Scot.
Cout. ...	...	Coutlees' Unreported Cases	Can.
Cout. Dig. ...	...	Coutlees' Digest	Can.
Cowp. ...	...	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk. ...	...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1813—1816	Eng.
Cox, C. C. ...	...	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas. ...	...	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H. ...	...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J. ...	...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M. ...	...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. Ph. ...	...	Craig and Phillips' Reports, Chancery, 1 vol., 1810—1811	Eng.
Cr. App. Rep. ...	...	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R. ...	...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D. ...	...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C. ...	...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas. ...	...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas. ...	...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car. ...	...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz. ...	...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac. ...	...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig. ...	...	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn. ...	...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt. ...	...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
	...	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A. ...	...	Dorion's Queen's Bench Reports	Can.
D. L. R.	Dominion Law Reports	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1516—1574	...	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	Scot.
Dan.	...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	...	Eng.
Dan. & Ll.	...	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	...	Eng.
Dav. & Mer.	...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	...	Eng.
Dav. Ir.	...	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	...	Ir.
Dav. Pat. Cas.	...	...	Davies' Patent Cases, 1 vol., 1785—1816	...	Eng.
Day	...	...	Day's Election Cases, 1 vol., 1892—1893	...	Eng.
Dea. & Sw.	...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	...	Eng.
Deac.	...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	...	Eng.
Deac. & Ch.	...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	...	Eng.
Dears. & B.	...	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	...	Eng.
Dears. C. C.	...	...	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856	...	Eng.
Deas & And.	...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	...	Scot.
De G.	...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	...	Eng.
De G. & J.	...	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	...	Eng.
De G. & Sm.	...	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	...	Eng.
De G. F. & J.	...	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	...	Eng.
De G. J. & Sm.	...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	...	Eng.
De G. M. & G.	...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	...	Eng.
Delane	...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835	...	Eng.
Den.	...	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852	...	Eng.
Dick.	...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798	...	Eng.
Dirl.	...	...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	...	Scot.
Dods.	...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822	...	Eng.
Donnelly	...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	...	Eng.
Doug. El. Cas.	...	...	Douglas' Election Cases, 4 vols., 1774—1776	...	Eng.
Doug. K. B.	...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	...	Eng.
Dow	...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818	...	Eng.
Dow & Cl.	...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	...	Eng.
Dow. & L.	...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	...	Eng.
Dow. & Ry. K. B.	...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	...	Eng.
Dow. & Ry. M. C.	...	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	...	Eng.
Dow. & Ry. N. P.	...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	...	Eng.
Dowl.	...	...	Dowling's Practice Reports, 9 vols., 1830—1841	...	Eng.
Dowl. N. S.	...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	...	Eng.
Dr. & Wal.	...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	...	Ir.
Dr. & War.	...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843	...	Ir.
Dra.	...	...	Draper's King's Bench Reports	...	Can.
Drew.	...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859	...	Eng.
Drew. & Sm.	...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	...	Eng.
Drinkwater	...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1810—1811	...	Eng.
Drury temp. Nap.	...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859	...	Ir.
Drury temp. Sug.	...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844	...	Ir.
Dugd. Orig.	...	...	Dugdale's Origines Juridicales	...	Eng.
Dunl. (Ct. of Sess.)	...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	...	Scot.
Dunning	...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754	...	Eng.
Durie	...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	...	Scot.
Dyer	...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581	...	Eng.
E. & A.	...	...	Upper Canada Error and Appeal	...	Can.
E. & B.	...	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	...	Eng.
E. & D.	...	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	...	Eng.
E. B. & E.	...	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	...	Eng.
E. D. C.	...	...	Reports of the Eastern Districts Court (Cape) from 1880	...	S. Af.
E. D. L.	...	...	South African Law Reports, Eastern Districts Local Division	...	S. Af.
E. L. R.	...	...	Eastern Law Reporter	...	Can.
E. R. (or Eng. Rep.)	...	...	English Reports	...	Eng.
E. R.	...	...	Ontario Election Reports	...	Can.
Eag. & Y.	...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	...	Eng.

East	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	Eng.
East, P. C.	...	East's Pleas of the Crown	...	Eng.
Ecc. & Ad.	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	Eng.
Eden	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	Eng.
Edgar	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	Scot.
Edw.	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	Eng.
Elchies	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	Scot.
Emden's B. C.	...	Emden's Building Contracts, Building Leases and Building Statutes	...	Eng.
Eng. Pr. Cas.	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	Eng.
Eq. Cas. Abr.	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	Eng.
Eq. Rep.	...	Equity Reports, 3 vols., 1853—1855	...	Eng.
Esp.	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	Eng.
Ex. D.	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	Eng.
Exch.	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	Eng.
Exch. C. R.	...	Exchequer Court Reports	...	Can.
F. (Ct. of Sess.)	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	Scot.
F.	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	S. Af.
F. & F.	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	Eng.
F. N. D.	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	S. Af.
Fac. Coll.	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	Scot.
Falc.	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	Scot.
Falc. & Fitz.	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	Eng.
Fenton	...	Fenton, Important Judgments	...	N.Z.
Ferg.	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	Scot.
Fitz. Nat. Brev.	...	Fitzherbert's Natura Brevium	...	Eng.
Fitz-G.	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	Eng.
Fl. & K.	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1810—1812	...	Ir.
Fonbl.	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	Eng.
For.	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	Eng.
Forb.	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	Scot.
Fort. De Laud.	...	Fortesque, De Laudibus Legum Angliæ	...	Eng.
Fortes. Rep.	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	Eng.
Fost.	...	Foster's Crown Cases, 1 vol., 1708—1760	...	Eng.
Fount.	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	Scot.
Fox & S. Ir.	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	Ir.
Fox & S. Reg.	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	Eng.
Fras.	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	Eng.
Freem. Ch.	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	Eng.
Freem. K. B.	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	Eng.
G.	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	S. Af.
G. & R.	...	Nova Scotia Reports (Geldert & Russell)	...	Can.
G. I. Dig.	...	General Index Digest	...	Can.
G. W. L.	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
Gal. & Dav.	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	Eng.
Gale	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	Eng.
Gaz. L. R.	...	New Zealand Gazette Law Reports	...	N.Z.
Geld. Dig.	...	Geldert's Digest	...	Can.
Gib. Cod.	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	Eng.
Giff.	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	Eng.
Gilb.	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	Eng.
Gilb. C. P.	...	Gilbert's History and Practice of the Court of Common Pleas	...	Eng.
Gilb. Ch.	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	Eng.
Gilm. & F.	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	Scot.
Gl. & J.	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	Eng.
Glanv.	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	Eng.
Glanv. El. Cas.	...	Glanville's Election Cases, 1 vol., 1623—1624	...	Eng.
Glascoc	...	Glascoc's Reports (Ireland), 1 vol., 1831—1832	...	Ir.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Godb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	
Gouldsb. ...	...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow ...	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr. ...	...	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases ...	...	Griffin's Patent Cases, 1884—1887	Eng.
Gwill. ...	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	
H. ...	...	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C. ...	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N. ...	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw. ...	...	Hall and Twells' Reports, Chancery, 2 vols., 1818—1850	Eng.
H. & W. ...	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	
H. B. R. (preceded by date)	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	
H. C. ...	...	Reports of the High Court of Griqualand West	S. Af.
H. E. C. ...	...	Hodgin's Election Reports	Can.
H. L. Cas. ...	...	Clark's Reports, House of Lords, 11 vols., 1817—1866	Eng.
Hag. Adm. ...	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	
Hag. Con. ...	...	Haggard's Consistorial Reports, 2 vols., 1789—1824	Eng.
Hag. Ecc. ...	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	
Hailes ...	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	
Hale, C. L. ...	...	Hale's Common Law	
Hale, P. C. ...	...	Hale's Pleas of the Crown, 2 vols.	Eng.
Han. ...	...	New Brunswick Reports (Hannay)	Can.
Har. & Ruth. ...	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865	
Har. & W. ...	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	
Harc. ...	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard. ...	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	
Hare ...	...	Hare's Reports, Chancery, 11 vols., 1811—1853	
Hawk. P. C. ...	...	Hawkins's Pleas of the Crown, 2 vols.	
Hay ...	...	Hay's Reports	Ind.
Hay & Marr. ...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes ...	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo. ...	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M. ...	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het. ...	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob. ...	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	
Hodg. ...	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog. ...	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm. ...	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq. ...	...	W. Holt's Equity Reports, 2 vols., 1845...	
Holt, K. B. ...	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P. ...	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	
Home, Ct. of Sess. ...	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	
Hong Kong L. R. ...	...	Hong Kong Reports	Hong K.
Hop. & Colt. ...	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	
Hop. & Ph. ...	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H. ...	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	
Hov. Supp. ...	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	
How. C. ...	...	Howard's Chancery Practice	Ir.
How. C. S. ...	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E. ...	...	Howard's Equity Exchequer	Ir.
How. P. L. ...	...	Howard on the Popery Laws	Ir.
Hud. & B. ...	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C. ...	...	Hudson on Building Contracts, 2 vols.	
Hume ...	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut. ...	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl. ...	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	
Hyde ...	...	Hyde's Reports	Ind.
I. C. L. R. ...	...	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R. ...	...	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R. ...	...	Irish Equity Reports, 13 vols., 1838—1851	Ir.

xxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. (Vol.) All.	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) Bom.	Indian Law Reports, Allahabad	Ind.
I. L. R. (Vol.) Calc.	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Lah.	Indian Law Reports, Calcutta	Ind.
I. L. R. (Vol.) Mad.	Indian Law Reports, Lahore	Ind.
I. L. R. (Vol.) Pat.	Indian Law Reports, Madras	Ind.
I. L. R. (Vol.) Ran.	Indian Law Reports, Patna	Ind.
I. L. T.	Indian Law Reports, Rangoon	Ind.
I. L. T. Jo.	Irish Law Times, 1867—(current)	Ir.
I. R. (preceded by date)	Irish Law Times Journal, 1867—(current)	Ir.
I. R. (Vol.) C. L.	Irish Reports, since 1893 (<i>e.g.</i> , [1894] 1 I. R.)	Ir.
I. R. Eq.	Irish Reports, Common Law, 11 vols., 1866—1877	Ir.
I. R., R. & L.	Irish Reports, Equity, 11 vols., 1866—1877	Ir.
	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	Ir.
Ind. Awards	Industrial Awards Recommendations	N.Z.
Ind. Jur. N. S.	Indian Jurist, New Series	Ind.
Ind. Jur. O. S.	Indian Jurist, Old Series	Ind.
Ir. Cir. Rep.	Reports of Irish Circuit Cases, 1 vol., 1841—1843	Ir.
Ir. Jur.	Irish Jurist, 18 vols., 1849—1866	Ir.
Ir. L. Rec. 1st ser.	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	Ir.
Ir. L. Rec. N. S.	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	Ir.
Irv.	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	Scot.
J. Bridg.	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	Eng.
J. D. R.	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	S. Af.
J. P.	Justice of the Peace, 1837—(current)	Eng.
J. P. Jo.	Justice of the Peace (Weekly Notes of Cases)	Eng.
J. R.	Jurist Reports	N.Z.
J. R. N. S.	Jurist Reports, New Series	N.Z.
J. Shaw, Just.	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1818—1852	Scot.
ac.	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	Eng.
James	Nova Scotia Reports (James)	Can.
Jebb & B.	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1811—1812	Ir.
Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
Jebb, Cr. & Pr. Cas.	Jebb's Crown and Presentment Cases	Ir.
Jenk.	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Eng.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	Ir.
John.	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur.	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K.	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862	Eng.
K. & J.	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	Eng.
Kames, Dict. Dec.	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec.	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	Eng.
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Aus.
Knox	...	Knox's Reports	Eng.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1901—1908	Eng.
L. & G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Can.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R.	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bey.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	...	Leader Law Reports	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Can.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Can.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Eng.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1813—1860	Can.
L. Th.	...	La Themis	Eng.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Laws. Reg. Cas.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Ld. Raym.	...	Lawson's Registration Cases, 1895—(current)	Eng.
. & Ca.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Leach	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Lee	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee temp. Hard.	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	...	Reporter	...	...	...	...	...	Ir.
Legge	...	Legge's Reports	...	...	...	...	...	Aus.
Leon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	...	...	...	...	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	...	...	...	...	Eng.
Lew. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	...	...	...	...	Eng.
Ley	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	...	...	...	...	Eng.
Lib. Ass.	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	...	...	...	Eng.
Lilly	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	...	...	...	Eng.
Litt.	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	...	Eng.
Lloyd, L. R.	...	Lloyd's List Law Reports, 1919—(current)	...	...	...	...	...	Eng.
Lloyd, Pr. Cas.	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	...	...	...	...	Eng.
Lofft	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	...	...	...	...	Eng.
Long. & T.	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1811—1812	...	...	...	...	...	Ir.
Lords Journals	...	Journals of the House of Lords	...	...	...	...	...	Eng.
Lud. E. C.	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	...	...	...	Eng.
Lunley, P. L. C.	...	Lunley's Poor Law Cases, 2 vols., 1834—1842	...	...	...	...	...	Eng.
Lush.	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	...	...	...	Eng.
Lut.	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1701	...	...	...	...	...	Eng.
Lut. Reg. Cas.	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	...	...	...	Eng.
Lynd.	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	...	...	...	Eng.
M.	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	...	...	S. Af.
M. & S.	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	...	...	...	Eng.
M. & W.	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	...	...	...	Eng.
M. C. R.	...	Montreal Condensed Reports	...	...	...	...	...	Can.
M. H. C. R.	...	Madras High Court Reports	...	...	...	...	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	...	...	...	Can.
M. L. R. (Vol.) S. C.	...	Montreal Law Reports, Superior Court	...	...	...	...	...	Can.
M. M. Cas.	...	Martin's Reports of Mining Cases	...	...	...	...	...	Can.
Mac.	...	Macassey's New Zealand Reports	...	...	...	...	...	N.Z.
Mac. & G.	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1819—52	...	...	...	...	...	Eng.
Mac. & H.	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1817—1852	...	...	...	...	...	Eng.
McCle.	...	McClelland's Reports, Exchequer, 1 vol., 1824	...	...	...	...	...	Eng.
McCle. & Yo.	...	McClelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	...	...	...	...	Eng.
Macfarlane	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	...	...	...	...	Scot.
MacL. & Rob.	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	...	...	...	Scot.
Macph. (Ct. of Sess.)	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	...	...	...	...	Scot.
Macq.	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1819—1865	...	...	...	...	...	Scot.
Maer.	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	...	...	...	...	Eng.
Mad.	...	Madras High Court Reports	...	...	...	...	...	Ind.
Madd.	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	...	...	...	...	Eng.
Madd. & G.	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	...	...	...	Eng.
Madox	...	Madox's Formulæ Anglicanum	...	...	...	...	...	Eng.
Madox, Exch.	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	...	...	...	Eng.
Mag.	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	...	...	...	Eng.
Man & G.	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	...	...	...	...	Eng.
Man. & Ry. K. B.	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	...	...	...	Eng.
Man. & Ry. M. C.	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	...	...	...	Eng.
Man. L. J.	...	Manitoba Law Journal	...	...	...	...	...	Can.
Man. L. R.	...	Manitoba Law Reports	...	...	...	...	...	Can.
Man. R. temp. Wood	...	Manitoba Reports temp. Wood	...	...	...	...	...	Can.
Mans.	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	...	...	...	Eng.
Mar. L. C.	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	...	...	...	Eng.
March	...	March's Reports, King's Bench and Common Pleas, 1 vol.,	...	...	...	...	...	Eng.
Marr.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	...	Eng.
Marsh.	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	...	...	...	Eng.
Marsh.	...	Marshall's Reports	...	...	...	...	...	Ind.
Mayn.	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	...	...	...	Eng.
Meg.	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Men. ...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	
Mer. ...	Merivale's Reports, Chancery, 3 vols., 1815—1817	S. Af.
Milw. ...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Eng.
Mod. Rep. ...	Modern Reports, 12 vols., 1669—1755	Ir.
Mol. ...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	Eng.
Mont. ...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Ir.
Mont. & A. ...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	
Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	
Mont. D. & De G. ...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	
Moo. P. C. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S. ...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
Murd. Epit. ...	Murdoch's Epitome	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. (preceded by date)	Northern Ireland Law Reports, 1925—(current) (<i>e.g.</i> , [1925] N.)	Ir.
N. A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig. ...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ...	New Brunswick Equity Reports	Can.
N. B. R. ...	New Brunswick Reports	Can.
N. B. R. (All.) ...	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.) ...	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.) ...	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.) ...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr) ¹ ...	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.) ...	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.) ...	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.) ...	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.) ...	New Brunswick Reports (Trueman)	Can.
N. L. R. ...	Natal Law Reports	S. Af.
N. P. D. ...	South African Law Reports, Natal Provincial Division	S. Af.
N. S. R. ...	Nova Scotia Reports	Can.
N. S. R. (Coch.) ...	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & R.) ...	Nova Scotia Reports (Geldert & Russell)	Can.
N. S. R. (James) ...	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.) ...	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.) ...	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.) ...	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad. ...	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas. ...	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas. ...	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ...	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts. ...	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.) ...	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.) ...	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S. ...	New South Wales Supreme Court Reports, New Series	
N. S. W. W. N. ...	New South Wales Weekly Notes	Aus.
N. W. ...	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ...	North-West Territories Reports	
N. Z. Jur. ...	New Zealand Jurist	N.Z.
Z. Jur. Mining Law	New Zealand Jurist Mining Law	

xxx REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R. ...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A.	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B.	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C.	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas.	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.
New Pract. Cas.	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep. ...	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas. ...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R. ...	Newfoundland Reports	Nfld.
Nolan ...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases ...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy ...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1619 ...	
O. B. & F. ...	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P. ...	Old Bailey Session Papers	Eng.
O. Bridg. ...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660— 1666	Eng.
O. F. S. ...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R. ...	Ontario Law Reports	Can.
O'M. & H. ...	O'Malley and Hardesty's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R. ...	Ontario Reports	Can.
O. R. ...	Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	Reports of the High Court of the Orange River Colony ...	S. Af.
O. S. ...	Upper Canada Queen's Bench, Old Series	Can.
O. W. N. ...	Ontario Weekly Notes	Can.
O. W. R. ...	Ontario Weekly Reporter	Can.
Old. ...	Nova Scotia Reports (Oldrights)	Can.
Ont.	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date)	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (e.g., [1891] P.)	Eng.
P. & B. ...	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T. ...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas. ...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D. ...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	
P. E. I. ...	Prince Edward Island Reports	Can.
P. R. ...	Ontario Practice	Can.
P. Wms. ...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm. ...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park. ...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	
Pat. App. ...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App. ...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake ...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas.	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck. ...	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham ...	Pelham (S. A.) Reports	Aus.
Per. & Dav. ...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S. ...	Perrault's Conseil Supérieur	Can.
Per. P. ...	Perrault's Prévosté de Québec, 1726—1756	Can.
Ph. ...	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas. ...	Phillips' Election Cases, 1 vol., 1780	Eng.
Phillim. ...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud.	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip. ...	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R. ...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pitc. ...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd. ...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll. ...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph. ...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D. ...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Pratt	Pratt's Supplement to Bott's Poor Laws, 1833	
Prec. Ch.	Precedents in Chancery, fol., 1 vol., 1689—1722	
Price	...	...	Price's Reports, Exchequer, 13 vols., 1811—1824	...	...	Eng.
Pug.	...	...	Price's Mining Commissioners' Cases	...	...	Eng.
Py. R.	...	...	New Brunswick Reports (Pugsley)	...	...	Can.
			Pykes' Lower Canada Reports	...	...	Can.
Q. B.	...	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1811—1852	...	...
Q. B. (preceded by date)			Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	...	...	Eng.
Q. B. D.	...	...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	...	...	Eng.
Q. J. P.	...	...	Queensland Justice of Peace Reports	...	...	Aus.
Q. L. J.	...	...	Queensland Law Journal and Reports, 11 vols., 1879—1901	...	...	Aus.
Q. L. R.	...	...	Quebec Law Reports	...	...	Can.
Q. L. R. (Beor)	...	...	Queensland Law Reports by Beor, 1876—1878	...	...	Aus.
Q. P. R.	...	...	Quebec Practice Reports	...	...	Can.
Q. R. (Vol.) K. B. or Q. B.			Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892 (current)	...	...	Can.
Q. R. (Vol.) S. C.	...	...	Rapports Judiciaires de Québec, Cour Supérieure, 1892 (current)	...	...	Can.
Q. S. C. R.	...	...	Queensland Supreme Court Reports, 5 vols., 1860—1881	...	...	Aus.
Q. S. R.	...	...	Queensland State Reports	...	...	Aus.
Q. W. N.	...	...	Weekly Notes, Queensland	...	...	Aus.
R.	...	...	The Reports, 15 vols., 1893—1895	...	...
R.	...	...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	...	...	S. Af.
R. (Ct. of Sess.)	...	...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	...	...	Scot.
R. A. C.	...	...	Ramsay, Appeal Cases	...	...	Can.
R. & C.	...	...	Nova Scotia Reports (Russell & Chesley)	...	...	Can.
R. & G.	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	Can.
R. C.	...	...	La Revue Critique de Législation et de Jurisprudence de Canada	...	...	Can.
R. de J.	...	...	Revue de Jurisprudence	...	...	Can.
R. de L.	...	...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	...	...	Can.
R. E. D.	...	...	New South Wales, Reserved and Equity Decisions	...	...	Aus.
R. E. D.	...	...	Ritchie's Equity Decisions (Russell)	...	...	Can.
R. J. R. Q.	...	...	Quebec Revised Reports	...	...	Can.
R. L. N. S.	...	...	Revue Légale, New Series, 1895—(current)	...	...	Can.
R. L. O. S.	...	...	Revue Légale, Old Series, 21 vols., 1869—	...	...	Can.
R. P. C.	...	...	Reports of Patent Cases, 1881—(current)	...	...
R. R.	...	...	Revised Reports	...	...	Eng.
Rast.	...	...	Rastell's Entries	...	...
Rayn.	...	...	Rayner's Tithe Cases, 3 vols., 1575—1782	...	...
Real Prop. Cas.			Real Property Cases, 2 vols., 1843—1847	...	...	Eng.
Rep. Ch.	...	...	Reports in Chancery, fol., 3 vols., 1615—1710	...	...
Rep. in C. of A.	...	...	Reports in Courts of Appeal	...	...	N.Z.
Res. & Eq. Jud.			New South Wales Reserved and Equity Judgments	...	...	Aus.
Reserv. Cas.	...	...	Reserved Cases	...	...	Ir.
Rick. & M.	...	...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	...	...	Eng.
Rick. & S.	...	...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1891	...	...	Eng.
Ridg. L. & S.	...	...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	...	...	Ir.
Ridg. Parl. Rep.			Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	...	...	Ir.
Ridg. temp. H.	...	...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	...	...
Ritch. Eq. Rep.			Ritchie's Equity Reports	...	...	Can.
Rob. Eccl.	...	...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	...	...	Eng.
Rob. L. & W.	...	...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1854	...	...	Eng.
Robert. App.	...	...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	...	...	Scot.
Robin. App.	...	...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1810—1841	...	...	Scot.
Roll. Abr.	...	...	Rolle's Abridgment of the Common Law, fol., 2 vols.	...	...
Roll. Rep.	...	...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	...	...	Eng.
Rom.	...	...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	...	...	Eng.
Roscoe's B. C.	...	...	Roscoe, Digest of Building Cases	...	...	Eng.
Rose	...	...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	...	...
Ross, L. C.	...	...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	...	...
Rowe	...	...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	...	...	Eng.
Rul. Cas.	...	...	Campbell's Ruling Cases, 25 vols.	...	...
Russ.	...	...	Russell's Reports, Chancery, 5 vols., 1824—1829	...	...
Russ. & M.	...	...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	...	...

xxxii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports... ..	Can.
Ry. & Can. Cas.	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
Ryde & K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1901	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.)	Aus.
	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	South-West Africa Law Reports	S.-W. Af.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—(current)	Scot.
Sc. R. R.	Scots Revised Reports	
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	Eng.
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P.	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & MacL.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
	Siderlin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

Sim. ...	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	
Skin. ...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ...	Ir.
Sm. & G. ...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	
Smith, K. B. ...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	
Smith, L. C. ...	Smith's Leading Cases, 2 vols. ...	
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current) ...	
Smythe ...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1830—1840 ...	Ir.
Sol. Jo. ...	Solicitors' Journal, 1856—(current) ...	
Spence ...	Spence's Equitable Jurisdiction of the Court of Chancery ...	
Spinks ...	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	
St. R. Qd. (preceded by date) ...	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.) ...	Aus.
Stair Rep. ...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ...	Starkie's Reports, Nisi Prius, 3 vols., 1811—1823 ...	
State Tr. ...	State Trials, 34 vols., 1163—1820 ...	
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858 ...	
Stewart ...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ...	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ...	Story's Commentaries on Equity Jurisprudence ...	
Stra. ...	Strange's Reports, 2 vols., 1716—1747 ...	
Stu. M. & P. ...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ...	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1871 ...	Can.
Stuart, K. B. ...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	
Sw. ...	Swabey's Report, Admiralty, 1 vol., 1855—1859 ...	
Sw. & Tr. ...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	
Swan. ...	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	
Swin. ...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ...	
T. H. ...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	
	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ...	The Times Law Reports, 1884—(current) ...	S. Af.
T. P. ...	Reports of the Supreme Court of the Transvaal, 1910—(current) ...	S. Af.
T. P. D. ...	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ...	S. Af.
T. S. ...	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	Eng.
Taml. ...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Aus.
Tas. L. R.	Tasmanian Law Reports ...	
Taunt. ...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	
Tax Cas.	Tax Cases, 1875—(current) ...	Can.
Tay. ...	Taylor's King's Bench Reports ...	Can.
Temp. Wood	Manitoba Reports <i>temp.</i> Wood ...	
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Can.
Terr. L. R.	Territories Law Reports ...	Can.
Thom. ...	Nova Scotia Reports (Thomson) ...	
Toth. ...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	
Town St. Tr.	Townsend, Modern State Trials ...	
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667 ...	
	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Can.
Tru.	New Brunswick Reports (Trueman) ...	
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law ...	
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property ...	
Turn. & R. ...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	
Tyr. ...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	
U. C. Jur. ...	Upper Canada Jurist ...	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current) ...	Can.

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U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	Can.
Udal	...	Fiji Law Reports (Udal)	Fiji.
V. L. R.	...	Victorian Law Reports	Aus.
V. R.	...	Victorian Reports	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	Aus.
V. R. (Law)	...	Victorian Reports (Law)	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1717—1756	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857...	S. Af.
W. A. L. R.	...	West Australian Law Reports	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	...	Wyatt and Webb	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	S. Af.
W. L. R.	...	Western Law Reporter	Can.
W. L. T.	...	Western Law Times	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866--(current) (<i>e.g.</i> , [1866] W. N.)	---
W. N.	...	Calcutta Weekly Notes	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	...	Sutherland's Weekly Reporter	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	...	Western Weekly Reports	Can.
Wallis by Lync	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	---
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1810	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West <i>temp.</i> Hard.	...	West's Reports <i>temp.</i> Hardwicke, Chancery, 1 vol., 1736—1740	---
West, Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	---
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1712—1774	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1716—1779	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Y. & C. Ch. Cas.	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1811—1843	
Y. & C. Ex.	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1825—1841	Eng.
Y. & J.	...	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	Eng.
Y. B.	...	...	Year Books	Eng.
Y. B. (Rolls Series)	...	...	Year Books (Rolls Series)	Eng.
Y. B. (Sel. Soc.)	...	...	Year Books (Selden Society)	Eng.
Yelv.	...	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	Eng.
You.	...	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xix.—xxxv., *ante*.)

Act.	for Attorney-General.
Admlty.	„ Actiengesellschaft.
Afld.	„ Admiralty.
Affg.	„ Affirmed.
Akt.	„ Affirming.
Anon.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Apld.	„ Anonymous.
Appet.	„ Applied.
Appln.	„ Applicant.
Appln.	„ Application.
Applt.	„ Application to Register a Trade Mark.
Apprvd.	„ Appellant.
Arbn.	„ Approved.
Archbp.	„ Arbitration.
Art.	„ Archbishop.
Ass. Tax Case	„ Article.
Assce.	„ Assessed Tax Case.
Assocn.	„ Assurance.
	„ Association.
B. C.	„ Borough Council.
Bkpcy.	„ Bankruptcy.
Bkpt.	„ Bankrupt.
Bldg. Soc.	„ Building Society.
Bp.	„ Bishop.
C. A.	„ Court of Appeal.
C. & S. L. Ry. Co.	„ City & South London Railway Co.
C. C. A.	„ Court of Criminal Appeal.
C. C. R.	„ County Court Rules.
C. C. R.	„ Court of Crown Cases Reserved.
C. L. P. Act.	„ Common Law Procedure Act.
C. L. Ry. Co.	„ Central London Railway Co.
C. O. R.	„ Crown Office Rules.
C. S. U. C.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	„ Caledonian Railway Co.
Ch.	„ Chancery.
Ch. Div.	„ Chancery Division.
Co.	„ Company.
Co-op. Assocn.	„ Co-operative Supply Association.
Comrs.	„ Commissioners.
Consd.	„ Considered.
Corpn.	„ Corporation.
	„ Court.
Ct. of Ch.	„ Court of Chancery.
Ct. of Eq.	„ Court of Equity.
Ct. of R.	„ Court of Review.
D. C.	„ Divisional Court.
Dbtd.	„ Doubted.
Deft.	„ Defendant.

Distd.	for Distinguished.
Div. Ct.	„ Divisional Court.
Eccel. Comrs.	„ Ecclesiastical Commissioners.
Eccel. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
<i>Ex p.</i>	„ <i>Ex parte</i> .
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Ext'd.	„ Extended.
Extrix.	„ Executrix.
<i>Fi. fa.</i>	„ <i>Fieri facias</i> .
Folld.	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdms.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insee.	„ Insurance.
J.J.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
„ & B. Ry. Co.	„ London & Brighton Railway Co.
„ & N. E. Ry. Co.	„ London & North Eastern Railway Co.
„ & N. W. Ry. Co.	„ London & North Western Railway Co.
„ & S. W. Ry. Co.	„ London & South Western Railway Co.
„ & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
„ B.	„ Local Board.
„ B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
„ C.	„ Lord Chancellor.
„ C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
„ C. C.	„ London County Council.
„ Elec. Ry. Co.	„ London Electric Railway Co.
„ G. Board	„ Local Government Board.
„ J.	„ Lord Justice.
„ J.J.	„ Lords Justices.
„ M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mentd.	„ Magistrates.
Met. Dist. Ry. Co.	„ Mentioned.
Met. Ry. Co.	„ Metropolitan District Railway Co.
Mid. G. W. Ry. Co.	„ Metropolitan Railway Co.
Mid. Ry. Co.	„ Midland Great Western Railway Co.
	„ Midland Railway Co.
	„ Mortgage.
	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.
Ord.	„ Order.
Overd.	„ Overruled.

ABBREVIATIONS.

XXXIX

P. C. .	for Privy Council.
Petn. .	„ Petition or Election Petition.
Pltf. .	„ Plaintiff.
Q. B. Div.	„ Queen's Bench Division.
	„ <i>Quære</i> .
R. C. . . .	„ Rural Council.
R. D. C. . . .	„ Rural District Council.
R. S. A. . . .	„ Rural Sanitary Authority.
R. S. C. . . .	„ Revised Statutes of Canada.
R. S. C. . . .	„ Rules of the Supreme Court, 1883.
Refd. . . .	„ Referred.
Regn. of Trade Mk.	„ Registration of Trade Mark.
Regr. of Trade Mks.	„ Registrar of Trade Marks.
Resp. . . .	„ Respondent.
Restg. . . .	„ Restoring.
Revsd. . . .	„ Reversed.
Revsg. . . .	„ Reversing.
Ry. Co. . . .	„ Rail. Co. or Railway Co.
S. C. (name of colony following)	„ Same Case.
S. E. . . .	„ Supreme Court of a Colony.
S. E. & C. Ry. Co. . . .	„ Settled Estates.
S. E. Ry. Co. . . .	„ South Eastern & Chatham Railway Co.
S. P. . . .	„ South Eastern Railway Co.
	„ Same Point.
Sched. . . .	„ Steamship.
<i>Sci. fa.</i> . . .	„ Schedule.
Sect. . . .	„ <i>Scire facias</i> .
Set. Land Act	„ Section.
Settlmt. . . .	„ Settled Land Act.
	„ Settlement.
Soc. Anon. . . .	„ Society.
Solr. . . .	„ Société Anonyme, etc.
	„ Solicitor.
Trade Mk. . . .	„ Trade Mark.
Tram. Co. . . .	„ Tramways Company.
U. C. . . .	„ Urban Council.
U. D. C. . . .	„ Urban District Council.
U. S. A. . . .	„ United States of America.
Union Assmt. Com.	„ Union Assessment Committee.
Urban S. A. . . .	„ Urban Sanitary Authority.
V.-C. . . .	„ Vice-Chancellor.
Workmen's Comp. Act .	„ Workmen's Compensation Act.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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Harbours and Harbour Authorities	SHIPPING; WATERS	Surrendered Revenues .	CONSTITUTIONAL
	AND WATER-COURSES.	Wreck	LAW.
			CONSTITUTIONAL LAW; SHIPPING.

Part In General.

1. Not an easement.]—A man cannot prescribe to have a necessary easement in the lands of another person for himself & his servants to catch fish in his several fishery.

The word "easement" is known in law, but here the thing itself is set forth, viz. to catch fish, etc., & certainly no instance can be given of a prescription for such a liberty by such a word or name (*per Cur.*).—PEERS *v.* LUCY (1694), 4 Mod. Rep. 355; 87 E. R. 441.

2. A profit à prendre.]—(1) By deed, A. & B. conveyed to D. & his heirs certain lands, excepting & reserving to A., B. & C. their heirs & assigns, liberty to come into & upon the lands, & there to hawk, hunt, fish, & fowl:—*Held*: this was not in law a reservation properly so called, but a new grant by D., who executed the deed, of the liberty therein mentioned; & therefore it might enure in favour of C. & his heirs, although he was not a party to the deed.

(2) The grant to a person, his heirs & assigns, of "free liberty, with servants or otherwise, to come into & upon lands, & there to hawk, hunt, fish, & fowl," is a grant of a licence of profit, & not of a mere personal licence of pleasure; & therefore it authorises the grantee, his heirs & assigns to hawk, hunt, etc., by his servants in his absence.

(3) Such a liberty is, therefore, a *profit à prendre*, within Prescription Act, 1832 (c. 71), s. 2.—WICKHAM *v.* HAWKER (1840), 7 M. & W. 63; 10 L. J. Ex. 153; 151 E. R. 679.

Annotations:—*As to* (1) **Consd.** Pannell *v.* Mill (1846), 3 C. B. 625. *As to* (1) **Refd.** Durham & Sunderland Ry. *v.* Walker (1842), 2 Q. B. 940; Doe d. Croft *v.* Tiddbury (1854), 2 C. L. R. 347; Denison *v.* Holliday (1857), 1 H. & N. 631; Ewart *v.* Graham (1859), 7 H. L. Cas. 331; Gilbertson *v.* Richards (1859), 4 H. & N. 277; Williams *v.* Hayward (1859), 1 E. & E. 1010; Hill *v.* Tupper (1863), 32 L. J. Ex. 217; Proud *v.* Bates (1865), 6 New Rep. 92; Corker *v.* Payne (1870), 18 W. R. 436; Musgrave *v.* Forster (1871), L. R. 6 Q. B. 590; Dennett *v.* Atherton (1872), 20 W. R. 442; Sowerby *v.* Smith (1874), L. R. 9 C. P. 524; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; Ecroyd *v.* Coulthard, [1897] 2 Ch. 554; Thellusson *v.* Liddard, [1900] 2 Ch. 635. *As to* (2) **Consd.** Lonsdale *v.* Rigg (1856), 11 Exch. 654. *As to* (2) **Refd.** Durham & Sunderland Ry. *v.* Walker (1842), 2 Q. B. 940; Kiddle *v.* Kayley (1864), 28 J. P. 805; Owen *v.* Parsons (1874), 38 J. P. 614; Allgood *v.* Gibson (1876), 25 W. R. 60; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; Sutherland *v.* Heathcote, [1892] 1 Ch. 475; Fitzhardinge *v.* Purcell, [1908] 2 Ch. 139. *As to* (3) **Consd.** Race *v.* Ward (1855), 4 E. & B. 702; Lonsdale *v.* Rigg, 11 Exch. 654. *As to* (3) **Refd.** Ewart *v.* Graham (1859), 7 H. L. Cas. 331; Corker *v.* Payne (1870), 18 W. R. 436; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; Sutherland *v.* Heathcote, [1892] 1 Ch. 475. *Generally*, **Mentd.** Walsh *v.* Southwell (1851), 20 L. J. M. C. 165.

3. ———.]—The right of hunting, shooting, etc., is an interest in the realty & a grant of it is a licence of a *profit à prendre*.—EWART *v.* GRAHAM (1859), 7 H. L. Cas. 331; 29 L. J. Ex. 88; 33 L. T. O. S. 349; 23 J. P. 483; 5 Jur. N. S. 773; 7 W. R. 621; 11 E. R. 132, H. L.; *affg.* S. C. *sub nom.* GRAHAM *v.* EWART (1856), 1 H. & N. 550, Ex. Ch.

Annotations:—**Consd.** Bruce *v.* Helliwell (1860), 5 H. & N. 609; Sowerby *v.* Smith (1874), L. R. 9 C. P. 524; Devonshire *v.* O'Connor (1890), 24 Q. B. D. 468. **Refd.** Blades *v.* Higgs (1865), 11 H. L. Cas. 621; Jeffries *v.* Evans (1865), 19 C. B. N. S. 246. **Mentd.** Hilton & Walkerfield Overseers *v.* Bowes Overseers (1866), L. R. 1 Q. B. 359; Leconfield *v.* Dixon (1867), L. R. 3 Exch. 30; Musgrave *v.* Forster (1871), L. R. 6 Q. B. 590; Rogers *v.* St. Germans Union (1876), 35 L. T. 332; Fitzhardinge *v.* Purcell (1908), 99 L. T. 154.

4. ———.]—E. granted by deed to plffs. for a term of years "the exclusive right of fishing" in a defined part of the River C., with a proviso that "the right of fishing hereby granted shall only extend to fair rod & line angling, & to netting for the sole purpose of procuring fish-baits. Deft. wrongfully discharged into the stream water loaded with sediment, the effect of which was to drive away the fish & injure the breeding:—*Held*: the grant did not give a mere licence to fish, but a right to fish & to carry away the fish caught; but this was a *profit à prendre*, & was an incorporeal hereditament; & plffs. had a right of action [for an injunction & damages] against any one who wrongfully did any act by which the enjoyment of the rights given to them by the deed was prejudicially affected.—FITZGERALD *v.* FIRBANK, [1897] 2 Ch. 96; 66 L. J. Ch. 529; 76 L. T. 584; 13 T. L. R. 390; 41 Sol. Jo. 490, C. A.

Annotations:—**Refd.** Ecroyd *v.* Coulthard, [1897] 2 Ch. 554; Lowe *v.* Adams, [1901] 2 Ch. 598; Granby *v.* Bakewell U. D. C. (1923), 87 J. P. 105.

5. ———.]—A.-G. FOR BRITISH COLUMBIA *v.* A.-G. FOR CANADA, No. 9, *post*.

———.]—*See, generally*, EASEMENTS, Vol. XIX., pp. 196–209.

6. An incorporeal hereditament.]—FITZGERALD *v.* FIRBANK, No. 4, *ante*.

7. ———.]—CHESTERFIELD (LORD) *v.* HARRIS, No. 206, *post*.

8. ———.]—A.-G. FOR BRITISH COLUMBIA *v.* A.-G. FOR CANADA, No. 9, *post*.

Tithes of fish.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 480, Nos. 3389–3392.

PART I.

a. Included in term "land."] A fishery comes within the meaning of the term "land," as defined by 21 & 22 Vict. c. 72, s. 1. —GORE *v.* McDERMOTT (1867), 15 W. R. 843.—**IR.**

PART II.—PUBLIC FISHERIES.

Part II.—Public Fisheries.

SECT. 1.—IN TIDAL WATERS.

SUB-SECT. 1.—THE RIGHT TO FISH.

A. In the Sea.

9. Right to fish—Common law right—Subject to regulation.]—(1) It is not competent to the Legislature of British Columbia to authorise the Govt. of that Province to grant the exclusive right of fishing in either the tidal or the navigable non-tidal waters within the railway belt; so far as those waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament; so far as they are not tidal, whether navigable or not, they are matters of private property & under the grant became vested in the Crown in the right of the Dominion.

(2) The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, & that the title to a fishery arises from the right to the *solum*. A fishery may of course be severed from the *solum*, & it then becomes a *profit à prendre in alieno solo* & an incorporeal hereditament. The severance may be effected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act (*per CUR.*).

(3) The subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas & tidal waters alike (*per CUR.*).

(4) To the general principle that the public have a "liberty of fishing in the sea or creeks or arms thereof," LORD HALE makes the exception, "unless in such places, creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty." This passage refers to certain special cases of which instances are to be found in well-known English decisions where separate & exclusive rights of fishing in tidal waters have been recognised as the property of the owner of the soil. In all such cases the proof of the existence & enjoyment of the right has of necessity gone further back than the date of Magna Carta

(5) In the tidal waters, whether on the foreshore or in creeks, estuaries, & tidal rivers, the public have the right to fish, & by reason of the provisions of Magna Carta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise (*per CUR.*).

(6) The fishing in navigable non-tidal waters is the subject of property, & according to English law must have an owner and cannot be vested in the public generally (*per CUR.*).—A.-G. FOR

BRITISH COLUMBIA v. A.-G. FOR CANADA, [1911] A. C. 153; 83 L. J. P. C. 169; 110 L. T. 181; 30 T. L. R. 111, P. C.

Annotations:—*As to* (1) **Apld.** A.-G. for Canada v. A.-G. for Quebec, [1921] 1 A. C. 413. *As to* (2), (3) & (4) **Refd.** A.-G. for Canada v. A.-G. for Quebec, [1921] 1 A. C. 413.

10. ——— .]—ANON. (1168), Y. B. 8 Edw. 4, fo. 18, pl. 30.

Annotations:—**Consd.** Blundell v. Catterall (1821), 5 B. & Ald. 268. **Refd.** Gedge v. Minne (1813), 2 Bulst. 60. **Mentd.** Popham v. Woolcott (1666), 1 Sid. 291; Mercer v. Denne, [1901] 2 Ch. 534.

11. ——— .]—Every subject of common right may fish with lawful nets, etc. in a navigable river, as well as in the sea, & the King's grant cannot bar them thereof; but the Crown only has a right to Royal fish, & that the King only may grant.—WARREN v. MATTHEWS (1703), 1 Salk. 357; 6 Mod. Rep. 73; 91 E. R. 312.

Annotation:—**Consd.** Ward v. Creswell (1711), Willes, 265. And this is not merely the law of this country, but is also the law of nations (WILLES, L.C.J.).

12. ——— .]—**Cannot be prescribed for.]**—The right of fishing in the sea is a right common to all the King's subjects; & therefore a prescription for such a right as annexed to certain tenements is bad.—WARD v. CRESWELL (1711), Willes, 265; 125 E. R. 1165.

13. ——— .]—BLUNDELL v. CATTERALL, No. 48, *post*.

14. ——— .]—FITZHARDINGE (LORD) v. PURCELL, No. 20, *post*.

15. ——— Independent of title of Crown to soil.]—A.-G. FOR BRITISH COLUMBIA v. A.-G. FOR CANADA, No. 9, *ante*.

16. As to locus in quo Arm of the sea.]—ST. BENEDICT, HULM (ABBOT) CASE (1317), Hale de Jure Maris (Hargrave's Tracts), c. 5, p. 20.

Annotation:—**Mentd.** Smith v. Andrews (1891), 65 L. T.

CARTER v. N. ———, No. 182, *post*.

CORPN., No. 181.

19. ——— Formed by new eruption.]—CARLISLE CORPN. v. GRAHAM, No. 108,

20. ——— Between high & low water mark.]—*Acie* every subject has a right to take fish found upon the sea-shore between high & low water mark; but such general right may beridged by the existence of an exclusive right in individual. *Qu.*: whether there is a *prima*

PART II. SECT. 1, SUB-SECT. 1.—A.

9 i. Right to fish—Common law right—Subject to regulation.]—The right of Maoris to fish in the sea or tidal waters is the same as the right of Europeans, & is governed by Fisheries Act, 1908, & the regulations made thereunder.—WAIPAPAKURA v. HEMP-TON (1914), 33 N. Z. L. R. 1065.—N.Z.

9 ii. ——— .]—ROYAL FISHERY ——— BANNE CASE (1610), Dav. Ir. 55.—

15 i. ——— Independent of title of Crown to soil.]—The right of the public

to fish in the sea, whether it & its subjacent soil be or be not vested in the Crown, is common, & is not the subject of property.—BABAN MAYACHA v. NAGU SHRAVUCHA (1876), 1 L. R. 2 Bom. 19.—IND.

16 i. As to locus in quo—Arm of the sea.]—This action was brought to try the right to an inlet on Burlington Bay. Pltf. claimed title by patent. Def. contended that the patent excluded the inlet; & that the *locus in quo* being navigable waters, if the Crown could grant at all, the public had the right to use the fish in it:—**Held**: the *locus*

(1858), 7 C. P. 116. CAN.

16 ii. ——— .]—To an ——— fishery deft. is an right entitled to that the

dict if it in quo was in fact an CRICHTON v. COLLERY 107.—IR.

b. As to ——— Salmon fishing is not within the

. 1.—*In tidal waters: Sub-sect. 1, A. & B.]*

facie right in the subject to take fish-shells found on the sea-shore between high & low water mark.—**BAGOTT v. ORR** (1801), 2 Bos. & P. 472; 126 E. R. 1391.

*Annotations:—***Distd.** **Blundell v. Catterall** (1821), 5 B. & Ald. 268. **Expld.** **Brinckman v. Matley**, [1904] 2 Ch. 313. **Refd.** **Crichton v. Coltery** (1870), 19 W. R. 107; **Saltash Corpn. v. Goodman** (1881), 7 Q. B. D. 106.

21. ———.]—**BLUNDELL v. CATTERALL**, No. 48, *post*.

22. **As to particular fish—Royal fish.]**—**WARREN v. MATTHEWS**, No. 11, *ante*.

23. ——— **Fish-shells—Found on sea-shore.]**—**BAGOTT v. ORR**, No. 20.

24. **Exclusion of public right—By claim of private fishery.]**—**ST. BENEDICT, HULM (ABBOT) CASE** (1317), *Hale de Jure Maris* (Hargrave's Tracts), c. 5, p. 20.

*Annotation:—***Mentd.** **Smith v. Andrews** (1891), 65 L. T. 175.

25. ——— **Claim by prescription.]**—**v. ORFORD CORPN.**, No. 181, *post*.

26. ———.]—**BAGOTT v. ORR**, No. 20, *ante*.

27. **Granted before Magna Carta.]**—**WILSON v. CROSSFIELD** (1885), 1 T. L. R. 601.

28. ——— **FOR COLUMBIA v. A.-G. FOR CANADA**, No.

29. **By grant of sea bed.]**—(1) The right to erect fixed engines on the foreshore & bed of a tidal navigable river indicates the ownership of a several fishery therein & of the soil.

(2) The bed of the sea for some distance at least below low-water mark & the beds of tidal navigable rivers, are *prima facie* vested in the Crown; & the Crown's ownership is, subject to the public rights of fishing & navigation & rights ancillary thereto, a beneficial ownership. The Crown can grant the bed of the sea, so far as it is vested in the Crown, & *a fortiori* the bed of a tidal navigable river, to a subject, in the same way that the foreshore can be so granted; though no such grant can operate to the detriment of the public right of fishing & that of navigation with its ancillary rights, except possibly in connection with rights such as anchorage, when some consideration moves to the public from the grantee.

The rights of fishing & navigation & rights ancillary thereto are the only public rights known to the common law in the sea itself (**PARKER, J.**).

No grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can . . . since Magna Carta operate to the detriment of the public right of fishing (**PARKER, J.**).—**FITZ-HARDINGE (LORD) v. PURCELL**, [1908] 2 Ch. 139; 77 L. J. Ch. 529; 99 L. T. 151; 72 J. P. 276; 24 T. L. R. 561.

n:— **As to (2) Refd.** **Secretary of State for India v. Sri Rajah Chelikani Rama Rao** (1916), 85 L. J. P. C. 222.

rights of the public in the Bay of Douglas.—**YOUNG v. MOORE & HOBSON** (1810), Blactt, 201.—**L. of M.**

c. Whether province has right to grant—Exclusive rights of fishing in tidal waters—Whether right extends to waters beyond low water mark.]—**Re QUEBEC FISHERIES**, [1921] 1 A. C. 413; 35 D. L. R. 28.—**CAN.**

24 l. **of public right By claim of private fishery.]**—All the

Queen's subjects have equal rights on the fishing grounds, & in their uses everywhere on the coasts, & there is no restriction upon them, except the existing law & the rights of those actually occupying portions of the fishing grounds.—**STONE v. WELLAND** (1885), 7 Nfld. L. R. 86.—**NFLD.**

PART II. SECT. 1, SUB-SECT. 1.—B.

30 l. **Common law right.]**—The right of fishing in a public navigable river

Private fisheries generally.]—*See Part III., post.*
Ownership of the soil.]—*See WATERS & WATER-COURSES.*

Statutory covenants relating to sea fishing.]—*See Part VI., post.*

B. In Rivers.

30. **Common law right.]**—**WARREN v. MATTHEWS**, No. 11, *ante*.

31. ———.]—**CARTER v. MURCOT**, No. 182, *post*.

32. ———.]—**R. v. STIMPSON**, No. 526, *post*.

33. ———.]—**MALCOMSON v. O'DEA**, No. 156, *post*.

34. ———.]—**A.-G. FOR BRITISH COLUMBIA v. A.-G. FOR CANADA**, No. 9, *ante*.

35. **Water receding from channel—New channel formed by natural means—Several fishery rights not transferred.]**—**CARLISLE CORPN. v. GRAHAM**, No. 108, *post*.

36. **Limits of tidal part of river—As distinct from sea—How defined.]**—**HORNE v. MACKENZIE**, No. 423, *post*.

37. ——— **As distinct from non-tidal part—Flow affected only by exceptional tides.]**—Where a navigable river ceases to be tidal & a person claims, as one of the public, to fish above that point, this is not a right which can exist in point of law, & therefore, the justices ought to overrule any claim of right set up by debt.

An information was laid against applt. for unlawfully fishing in a river wherein resps. had a private right of fishery. It was proved that the river was navigable, & that at the place where applt. fished the water was not salt, & that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water & caused it upon those occasions to rise & fall with the flow & ebb of the tide. Applt. contended that, the river being navigable & tidal at the place in question, there was a presumption that the public had a right to fish there, & that the jurisdiction of the justices was therefore ousted by a reasonable claim of right:—**Held**: the river at the place in question could not be considered as tidal within the rule of law which gives the public a right to fish in navigable tidal rivers, & therefore there was no claim of title set up sufficient to oust the justices' jurisdiction.—**REECE v. MILLER** (1882), 8 Q. B. D. 626; 51 L. J. M. C. 64; 17 J. P. 37.

*Annotations:—***Expld.** **Calcraft v. Guest** (1897), *Moore's History & Law of Fisheries*, p. 102. **Consd.** **West Riding of Yorkshire Rivers Board v. Tadcaster R. D. C.** (1907), 97 L. T. 136. **Refd.** **Jones v. Llanrwst U. C.**, [1911] 1 Ch. 393.

38. ——— **Ascertainment of—Vertical rise & fall.]**—**CALCRAFT v. GUEST** (1897), *Moore's History*

belongs to the public, & not to the owners of the lands bounded on the river.—**ROSE v. BELYEA** (1868), 1 Han. 109.—**CAN.**

d. ——— Maoris.]—**WAIPAPAKURA v. HEMPTON** (1914), 33 N. Z. L. R. 1065.—**N.Z.**

e. Water receding from channel—New channel formed by natural means.]—Pltf. & deft. had respectively exercised the exclusive right of fishing in an estuary, each to the middle

PART II.—PUBLIC FISHERIES.

& Law of Fisheries, p. 102 ; *subsequent proceedings*, [1898] 1 Q. B. 759, C. A.

Annotation:—**Consd.** West Riding of Yorkshire Rivers Board v. Tadcaster R. D. C. (1907), 97 L. T. 436.

39. ———.]—TRACEY ELLIOT v. MORLEY (EARL), No. 204, *post*.

40. Exclusion of public right—By private fishery—Granted before Magna Carta.]—MALCOMSON v. O'DEA, No. 156, *post*.

41. ———.]—In an action for trespass to a several fishery in a navigable tidal river in Ireland defts. justified on the ground that the public had the right of fishing. Pltf.'s paper title, if the possession and enjoyment were consistent with it, afforded irresistible ground for a presumption that the fishery was put in defence before Magna Carta. As evidence of possession & user pltf. tendered the proceedings & decree in 1687 in a "possessory suit" brought in the Ct. of Ch. in Ireland by C., pltf.'s predecessor in title, against strangers to the present action; by which decree an injunction was awarded to quiet C. & his undertenants in such possession of their fishing as they had at the time of exhibiting the bill & three years before, to continue until evicted by due course of law, both parties being at liberty to take proceedings at law against each other for ascertaining their titles:—*Held*: (1) as the decree was a solemn & final adjudication, not collusive, & as it could not have been made except upon proof of unbroken user & enjoyment for at least three years before the bill, inconsistent with any actual exercise at that time of a public right of fishing, the proceedings & decree were admissible; (2) the effect of this evidence (not being met by any counter evidence applicable to the same period) was extremely strong to establish possession & enjoyment of the fishery in the latter part of the 17th century, consistent with the paper title & exclusive of the public; (3) a judgment obtained by pltf. in 1826 in an action against a stranger for trespass by fishing in the *locus in quo*, in which action deft. appeared but allowed judgment to go by default of pleading, was evidence in the present action of possession in 1826.

Defts. proved that cot-fishing had been carried on in the *locus in quo* with the knowledge of pltf. or his agents, & without interruption by them, as far back as living memory extended:—*Held*: (1) if pltf.'s right to a several fishery were once proved the exercise of cot-fishing could not take it away or confer any right on the public; for the public cannot in law prescribe for a *profit à prendre in alieno solo*, nor acquire any right adversely to the owner under any statute of limitation; (5) an incorporeal hereditament such as a several fishery, which can only pass by deed, cannot be "abandoned."

(6) Without evidence of possession & enjoyment, even the clearest apparent title to a several fishery, on paper only, would not exclude the public right (LORD SELBORNE, C.).

(7) If the fishery of the whole river, so far as it belonged to the Duke or his predecessors in title, was what has been sometimes called a *unum quid*, there can be no doubt that evidence of acts of ownership & enjoyment in any part of it would be

applicable to the whole. There was, as has been seen, important evidence, specifically applicable to the fishery in that particular part of the river which is immediately in question in the present action. But if the title to the fishery in that part of the river were separate, acts of ownership elsewhere would not be evidence of possession under that title (LORD SELBORNE, C.).

(8) Usage, continued during living memory, when there is nothing to the contrary, & when the question is one of prescription, may justify the presumption of a similar usage, as of right, from time immemorial. But when it is relied upon not to establish a prescriptive right, but to displace a prescriptive right, supported by written titles & evidence of long possession for a period earlier than, & coming down to, the time of living memory, it appears to me that such a presumption would be neither reasonable in fact, nor necessary in law (LORD SELBORNE, C.).

(9) The proof of possession of an extensive tract of land or a great river must, of course, vary according to circumstances. What may demonstrate it, in one case, may be quite inadequate for that purpose, in another (LORD O'HAGAN).—NEILL v. DEVONSHIRE (DUKE) (1882), 8 App. Cas. 135; 31 W. R. 622, H. L.

Annotations:—As to (1) & (2) **Consd.** Blount v. Layard (1888), [1891] 2 Ch. 681, n. **Refd.** Hanbury v. Jenkins, [1901] 2 Ch. 401; Johnston v. O'Neill, [1911] A. C. 552. As to (1) & (6) **Refd.** Blount v. Layard (1888), [1891] 2 Ch. 681, n.; Smith v. Andrews, [1891] 2 Ch. 678; A.-G. for British Columbia v. A.-G. for Canada, [1911] A. C. 153. As to (7) **Refd.** A.-G. v. Newcastle-upon-Tyne Corpn., [1897] 2 Q. B. 381. As to (8) **Consd.** v. Andrews, [1891] 2 Ch. 678. **Refd.** Hanbury v. J. [1901] 2 Ch. 401.

42. ———.]—A.-G. FOR BRITISH COLUMBIA v. A.-G. FOR CANADA, No. 9, *ante*.

43. ———.]—Under local Act.]—Under Ipswich Fishery Act, 1867 (c. xlv.), s. 19, the oyster fishery in the river O. & the oysters in the river were to be deemed to belong to the Ipswich Corpn., & they were given power by sect. 20 to demise & lease the oyster fishery. The Act also provided that the lessee under such lease should have the exclusive right of depositing, propagating, & fishing for & taking oysters in the river; & that all oysters in the river should during any such lease be the absolute property of the lessee & be deemed to be in his possession. The Ipswich Corpn. demised the oyster fishery to resp., who marked out the oyster bed by buoys. Applt. who had fished with a trawl within the limits of the oyster bed so marked out, was charged with an offence under Sea Fisheries Act, 1868 (c. 45), which forbids any person other than the owner of a private oyster bed, within the limits of such bed, knowingly to use any instrument of fishing, except a line & hook or a net adapted solely for catching floating fish, & so used as not to disturb or injure in any manner any oyster bed. Applt. alleged that, as the river was an arm of the sea, the members of the public had a right to fish in the river, which right was not defeated by the lease to resp., & that therefore the jurisdiction of the justices was ousted by that claim of right:—*Held*: (1) the right set up by applt. was one which could not exist in law, having regard to the terms of Ipswich Fishery Act, 1867, & Sea Fisheries Act,

thread of a river flowing through it. No grant from the Crown of the fisheries was proved, but it was the common case of both parties that the right of fishing in the entire estuary was vested

in them, to the exclusion of the public. The river changed its course & formed a new channel, still passing through the estuary:—*Held*: the local limit of each fishery was the middle of the

new channel of the river, & not landmark corresponding to what been the *medium flum aquæ* of former course.—MILLER v. J. [1879], 4 L. R. Ir. 302. IR.

Sect. 1.—In tidal waters: Sub-sect. 1, B.; sub-sects. 2 & 3.]

1868 (c. 45), & therefore the jurisdiction of the justices was not ousted; (2) the fact that applt. honestly believed that he had the right to fish in that manner did not prevent his being convicted as a guilty mind was not a necessary ingredient of the offence.—*SMITH v. COOKE* (1914), 84 L. J. K. B. 959; 112 L. T. 864; 79 J. P. 245; 24 Cox, O. C. 691, D. C.

44. — By grant of bed of river.]—FITZ-HARDINGE (LORD) v. PURCELL, No. 29, ante.

Ownership of soil.]—See WATERS & WATER-COURSES.

Statutory provisions relating to river fishery.]—See Part V., post.

Navigation in tidal waters.]—See Part IV., post.

B-SECT. 2.—MODE OF FISHING.

45. Fixed engines — Stake nets — Illegal.] BEVINS v. BIRD, No. 425,

46. — — — — —.] —OLDING v. WILD, No. 427, post.

Statutory regulations.]—See Parts V. & VI., post.

SUB-SECT. 3.—ANCILLARY RIGHTS.

See 1 Jac. 1, c. 23; White Herring Fisheries Act, 1771 (c. 31); Sea Fisheries Regulation Act, 1898 (c. 54).

47. Use of foreshore — Digging — Planting stakes to dry nets.]—ANON. (1168), Y. B. 8 Edw. 4, fo. 18, pl. 30.

Annotations:—Consd. Blundell v. Catterall (1821), 5 B. & Ald. 268. Refd. Popham v. Woolcott (1666), 1 Sid. 291; Mercer v. Denne, [1904] 2 Ch. 534. Mentd. Gedge v. Minne (1613), 2 Bulst. 60.

48. — Access to water — Places appropriated therefor—No right over whole foreshore.]—The public common law rights with respect to the sea independently of usage are rights upon the water, not upon the land, of passage & fishing on the sea & on the seashore, when covered with water; & though as incident thereto, the public must have the means of getting to & upon the water for those purposes yet it is by & from such places only as necessity or usage have appropriated to those purposes & not a general right of lading,

unlading, landing or embarking where they please upon the seashore, or the land adjoining thereto, except in cases of peril or necessity (HOLROYD, J.).—*BLUNDELL v. CATTERALL* (1821), 5 B. & Ald. 268; 106 E. R. 1190.

Annotations:—Consd. Llandudno U. C. v. Woods, [1899] 2 Ch. 705; Brinckman v. Matley, [1904] 2 Ch. 313; Fitzhardinge v. Purcell, [1908] 2 Ch. 139. Refd. A.-G. v. Chambers (1854), 4 De G. M. & G. 206; Whitstable Free Fishers & Dredgers Co. v. Gann (1863), 13 C. B. N. S. 853; Ilchester v. Raishleigh (1889), 61 L. T. 477; Mercer v. Denne, [1904] 2 Ch. 534; Denaby & Cadeby Main Collieries v. Anson, [1911] 1 K. B. 171. Mentd. Benest v. Pison (1829), 1 Knapp, 60; Tyson v. Smith (1839), 9 Ad. & El. 406; Beaufort v. Swansea Corpn. (1849), 3 Exch. 413; A.-G. v. Hammer (1858), 27 L. J. Ch. 837; A.-G. v. Tomline (1879), 40 L. T. 775; Robinson v. Cowpen L. B. (1893), 62 L. J. Q. B. 619; Parker v. (1903), 2 L. G. R. 608; Behrens v. Richards, [1905] 2 Ch. 614; Foster v. Warblington U. C., [1906] 1 K. B. 618.

49. — Approaching or leaving boats—Carrying fish or otherwise.]—A point made on behalf of defts. was that, in pursuit of their lawful calling, all fishermen are at liberty to use the soil above high-water mark, for approaching or retiring from their boats, carrying their fish or otherwise. Much may be found in favour of this view in old books, especially those which derive their authority from the civil law, & something in others of comparatively modern date, but the notion has never really found a place in our law of real property, the principles of which are decidedly averse to it (KEKEWICH, J.).—*ILCHESTER (EARL) v. RAISHLEIGH* (1889), 61 L. T. 477; 38 W. R. 101; 5 T. L. R. 739.

50. — Fixing moorings—For attachment of boats—Claim of immemorial user.]—An immemorial user of the foreshore in tidal & navigable waters, by the owners of fishing-boats & other craft, by fixing moorings in the soil, for the purpose of attaching their boats to them, may be supported either as an ordinary incident of the navigation of such waters, or on a presumption of a legal origin by grant from the Crown of the foreshore subject to such user, or by concession by a former owner of the foreshore to all persons navigating the waters to use it for fixing moorings.—*A.-G. v. WRIGHT*, [1897] 2 Q. B. 318; 66 L. J. Q. B. 834; 77 L. T. 295; 46 W. R. 85; 13 T. L. R. 480; 8 Asp. M. L. C. 320, C. A.

Annotation:—Refd. Denaby & Cadeby Main Collieries v. Anson, [1911] 1 K. B. 171.

51. — Consent of Crown unnecessary.]—The public have no right without the consent of the Crown or its lessees to enter upon the foreshore of the sea, when dry, except for the purposes of navigation and fishing.—*LLANDUDNO URBAN COUNCIL v. WOODS*, [1899] 2 Ch. 705; 68 L. J. Ch.

PART II. SECT. 1, SUB-SECT. 2.

f. Fixed engine — Cross-lines.]—Pltfs. brought an action to restrain from using cross-lines. Defts. 1 that the lake was a public lake, in which every subject of the realm had the right of fishing. They gave some evidence that cross-lines had been used in the lake for over twenty years.—*Held:—*pltfs. were entitled to an injunction to defts. from using such lines.—*PERY v. THORNTON* (1889), 23 L. R. Ir. 402.—*IR.*

g. Drawing nets or laying lines.]—The right which the public have of fishing in a tidal river is limited to drawing nets or laying lines, & they are not allowed to place stake nets nor in any way to interfere with the rights of private individuals.—*DELAP*

v. HAYDEN, [1923] 4 D. L. R. 1102; *reconsd.* 51 N. S. R. 346; (1924) 3 D. L. R. 11.—*CAN.*

h. Stake nets.]—Pltfs. claimed right to catch fish in a tidal river at a certain place by putting up stake nets across the river. This right was alleged to be based on custom which was not denied by defts. & user for thirty years was proved.—*Held:—*pltfs. were not bound to prove sixty years' exclusive use to support their claim.—*NARASAYYA v. SAMI* (1888), 1 L. R. 12 Mad. 43.—*IND.*

i. Cod traps.]—A fishing vessel anchored & fishing with nets set along the coast, was boarded by the residents near by, their tents taken up & placed on board their craft, their anchor weighed; they were informed they would not be allowed to fish, alleging as a reason that the mode of fishing by

cod traps was a violation of the law laid down by the people of the neighbourhood for the govt. of the fishery.—*Held:—*it is not competent for the inhabitants of any particular locality, or for persons engaged in any particular mode of fishery to impose upon others what is not the law of the land.—*STONE v. WELLAND* (1885), 7 Nfld. L. R. 86.—*NFLD.*

PART II. SECT. 1, SUB-SECT. 3.

k. Use of foreshore—For purposes of fishing.]—No common law right exists to the public to use the beach above high water mark for the purpose of fishing when the beach has been conveyed by the Crown to a subject.—*PARKER v. ELLIOTT* (1852), 1 C. P. 470.—*CAN.*

l. — — —.]—The original grants of townships reserved to the

623; 81 L. T. 170; 63 J. P. 775; 48 W. R. 43; 43 Sol. Jo. 689.

Annotations:—**Refd.** Brinckman v. Matley, [1904] 2 Ch. 313. **Mentd.** Behrens v. Richards, [1905] 2 Ch. 614; Yeatman v. Homberger (1912), 107 L. T. 742; A.-G. v. Sewell (1918), 88 L. J. K. B. 425.

52. — Storage of fish caught.] — (1) The oysters in an oyster fishery were, when freshly dredged, unfit for consumption by reason of their being contaminated with impurities in the water, & deft., a fisherman, after dredging, deposited his oysters in a particular portion of the foreshore indicated by boundary marks & left them there until they were ready for market:—*Held*: deft. had no right, as incidental to the exercise by him of the public right of fishing, to appropriate a portion of the foreshore for the storage of his oysters to the exclusion of the rest of the public.

(2) Where a municipal corpn., empowered by charter to hold lands, tenements & hereditaments, & goods & chattels, has obtained an order from the Board of Trade conferring a right of regulating an oyster fishery under Sea Fisheries Act, 1868 (c. 45), it may lawfully take a lease of the foreshore of the fishery to enable it to carry out the purposes of the order.—**TRURO CORPN. v. ROWE**, [1902] 2 K. B. 709; 71 L. J. K. B. 974; 87 L. T. 386; 66 J. P. 821; 51 W. R. 68; 18 T. L. R. 820, C. A.

Annotation:—*As to* (1) **Distd.** Foster v. Warblington U. C., [1906] 1 K. B. 618.

Definition of foreshore.] WATERS & WATER-

53. Use of private land—Necessity—Landing boats.]—**WARD v. CRESWELL** (1711), Willes, 265; 125 E. R. 1165.

54. By custom—Drying fishing nets & tackle.]—A custom for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom (**TINDAL, C.J.**).—**LOCKWOOD v. WOOD** (1814), 6 Q. B. 50; 13 L. J. Q. B. 365; 3 L. T. O. S. 139; 8 Jur. 543; 115 E. R. 19, Ex. Ch.

ns:—**Refd.** Mercer v. Denne, [1904] 2 Ch. **Mentd.** Constable v. Nicholson (1863), 14 C. B. N. S. Hoare v. Metropolitan Board of Works (1874), 1 L. R. 9 Q. B. 296; A.-G. v. Horner (1884), 14 Q. B. D. Anglo-Hellenic S.S. Co. v. Dreyfus (1913), 108 L. T. :

55. Effect of modern methods of drying.]—It was proved in evidence that, so far as living memory went, & by reputation prior to living memory, the fishermen of a certain parish had been in the habit of using a piece of land for the purpose of drying their nets. In modern times the custom had somewhat varied owing to the introduction of the custom of oiling certain nets. The land had been somewhat affected by the action of the sea, which apparently had at times encroached thereon & at times receded therefrom, & land had been gradually added by accretion to the ground in question:—*Held*: (1) the custom was valid, although the user & the kind of nets used had varied from time to time; (2) the land added by accretion took the character of the land to which it had been added & became

Crown five hundred feet from “— water mark on the coast” for the purposes of the fisheries. Under this reservation the Crown claimed 69 acres fronting on St. Peter’s Bay, & 69 acres on the Morell River, in which the tide ebbs & flows:—*Held*: the clause only applied to land fronting on the open sea.—**R. v. COX** (1858), 1 P. F. J. 170.—**CAN.**

m. —.]—Appl. as grantee of the lands in suit from the French king “with all the fishing & hunting & other rights & privileges which the vendor had or might have as seignior, or along its frontage on the seashore,” claimed the exclusive right to fish salmon from the foreshore along their boundary:—*Held*: on the true construction of the grant the claim could

subject to the same custom; (3) official reports made to a Govt. department, depositions in a former suit between other parties, & maps or charts were inadmissible in evidence.—**MERCER v. DENNE**, [1905] 2 Ch. 538; 74 L. J. Ch. 723; 93 L. T. 412; 70 J. P. 65; 54 W. R. 303; 21 T. L. R. 760; 3 L. G. R. 1293, C. A.

Annotations:—*As to* (1) **Refd.** Fitzhardinge v. Purcell (1908), 77 L. J. Ch. 529. *As to* (3) **Refd.** Assheton-Smith v. Owen (1905), 94 L. T. 42; North Staffordshire Ry. v. Hanley Corpn. (1909), 73 J. P. 177; Heyne v. Fischel (1913), 110 L. T. 261; Collis v. Amphlett, [1918] 1 Ch. 232. *Generally, Mentd.* Ramsgate Corpn. v. Debling (1906), 70 J. P. 132; Johnson v. Clark, [1908] 1 Ch. 303; *Re Fountaine*, Fountaine v. Amherst (1909), 78 L. J. Ch. 648; *Re Petition of Right*, [1915] 3 K. B. 619.

56. — — — — —]—**JOHNSON v. GRICE** (1910), 74 J. P. Jo. 220.

57. — — — — — Subsequent statutory authority to impose toll—For use of land.] Where the fishermen of a sea village had been immemorially accustomed to beach their boats in winter on ground adjoining the harbour, & where the proprietor had subsequently obtained a local Act authorising his levy of 5s. yearly for each boat beached, the fishermen’s rights were enforced against him:—*Held*: he could not exclude the fishermen from the ground used for beaching without assigning to them other ground equally well adapted for the purpose. When an Act authorises the exaction of a toll, the accommodation for which the toll is authorised must be provided. **ATTON v. STEPHEN** (1876), 1 App. Cas. 156, H. L.

58. — — — — — Accretion to land by recession of sea—Accretion subject to custom.] **MERCER v. DENNE**, No. 55, *ante*.

59. — — — — — Documentary evidence rebutting custom.]—**MERCER v. DENNE**, No. 55, *ante*.

See, ————, IM & USAGES, Vol. 1-74.

60. Private capstan & windlass — Validity of toll for use of.]—Claim for fish as toll for the use of a capstan & windlass in drawing fishing-boats upon the beach out of the sea. *Indebitatus assumpsit* lies for the fish so claimed. **FALMOUTH (EARL) v. PENROSE** (1827), 6 B. & C. 385; 9 Dow. & Ry. K. B. 152; 5 L. J. O. S. K. B. 156; 108 E. R. 494.

Annotation: **Consd.** Falmouth v. George (1828), 5

61. — — — — —]—Pltf. claimed a right, under a custom, to take the second best fish out of every boat-load of fish, by way of toll, from fishermen frequenting a certain cove & landing fish therein. It was proved that pltf. & his ancestors had, from time immemorial, furnished & maintained a capstan & rope for the use of the fishermen; & that in stormy weather boats could not be drawn up from the sea, with safety to the crews, without them; that the spot on which the capstan stood belonged to pltf., but the rest of the cove, over which the boats were drawn, was the property of a third person: *Held*: that the keeping the

not be sustained. The above was ineffectual to the exclusive use of the foreshore so far as is concerned.—**CAN.** **QUEBEC**, [1907] A. C. 511. **CAN.** **n. Conveniences for** — A person, who, since the year 1855, has built & made a house, & other conveniences for the use of the public, is entitled peaceably & to

Sect. 1.—In tidal waters: Sub-sects. 3 & 4. Sect. 2.]

capstan & rope was a good consideration for the exaction of toll from all boats landing in the cove, whether the capstan & rope were used or not.—**FALMOUTH (LORD) v. GEORGE** (1828), 5 Bing. 286; 2 Moo. & P. 457; 7 L. J. O. S. C. P. 40; 130 E. R. 1071.

Annotations:—*Refd.* Brecon Markets Co. v. Neath & Brecon Ry. (1872), L. R. 7 C. P. 555. *Mentd.* Lancum v. Lovell (1833), 9 Bing. 465; Jenkins v. Harvey (1835), 2 Cr. M. & R. 393; Walker v. Needham (1841), 3 Man. & G. 557; Owen v. Routh (1854), 14 C. B. 327; Shephard v. Payne (1862), 12 C. B. N. S. 414.

Private fisheries.]—*See* Part III., Sect. 7, *post*.

SUB-SECT. 4.—INTERFERENCE WITH FISHING.

62. Interference by other fishermen—Possession of fish not complete—Action for trespass.]—**YOUNG v. HICHENS**, No. 296, *post*.

63. ——— Penalty under local Act.] — By a local Act it was enacted that certain stems or stations shall be bounded as there defined, & that, in cases of interference by one boat with another under specified circumstances, the fish taken by the party interfering shall be forfeited to the party interfered with, & the interfering party shall forfeit £50. *Pltf.* declared in case, setting forth that, after the statute passed, he was proceeding to take fish in his proper turn & station, & would have taken them, but *deft.* prevented him from so doing by unlawfully & wrongfully throwing a net; & the declaration described the proceeding so as to bring it within the statutory prohibition. On motion in arrest of judgment:—*Held*: the declaration showed no cause of action, *pltf.* stating no interference with any common law right, & the statute having only imposed a particular penalty for the act done, & having therefore given no general right of action.—**STEVENS v. JEACOCKE** (1818), 11 Q. B. 731; 17 L. J. Q. B. 163; 11 L. T. O. S. 101; 12 Jur. 177; 116 E. R. 617.

Annotations:—*Refd.* Marshall v. Nicholls (1852), 18 Q. B. 882. *Mentd.* Couch v. Steel (1854), 3 E. & B. 402; Cleeve v. Harwar, Wilde v. Stanner (1857), 1 H. & N. 873; St. Pancras Vestry v. Batterbury (1857), 2 C. B. N. S. 477; Baxendale v. Eastern Counties Ry. (1858), 4 C. B. N. S. 63; Atkinson v. Newcastle & Gateshead Water Co. (1871), 20 W. R. 35; Gorris v. Scott (1874), L. R. 9 Exch. 125; Great Northern Fishing Co. v. Edgehill (1883), 11 Q. B. D. 225; Melliss v. Shirley & Freemantle L. B. of Health (1885), 51 L. J. Q. B. 108; Mid. Ry. v. Edmonton Union (1891), 72 L. T. 206; Clegg, Parkinson v. Earby Gas Co., [1896] 1 Q. B. 592; Peebles v. Oswaldtwistle U. D. C., [1897] 1 Q. B. 625; Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720.

Property in fish—Private fisheries.]—*See* Part III., Sect. 9, *post*.

ART. 2.—IN NON-TIDAL WATERS.

64. Right to fish—Does not vest in the public—Claim of right.]—In answer to an information before two justices under Larceny Act, 1861 (c. 96), s. 21, for unlawfully & wilfully attempting to take fish in water where another person had a private right of fishery,

enjoy the same.—**R. v. Row** (1818), 1 Nfld. L. R. 126.—**NFLD.**

PART II. SECT. 1, SUB-SECT. 4.

6. Interference by other fishermen.]

—*Pltf.* was licensed to fish in the upper waters of a tidal river:—*Held*: entitled to maintain an action against a person, not the owner of a several fishery, who, by unlawfully fishing in the lower waters of the river, within

by angling at an hour not between the beginning of the last hour before sunrise & the expiration of the first hour after sunset, accused justified under a supposed right on the part of the public to fish in that water, on the ground that the public had fished there without interruption for sixty years:—*Held*: (1) such a right of fishery by the public in a non-navigable river could not exist in law; (2) accused justifying himself under the *bond fide*, though mistaken notion, of such a right, did not make such a claim of right as ousted the jurisdiction of the justices; (3) it was no defence that accused, having acted without criminal intent, there was no *mens rea*.—**HUDSON v. MACRAE** (1863), 4 B. & S. 585; 3 New Rep. 76; 33 L. J. M. C. 65; 9 L. T. 678; 28 J. P. 436; 12 W. R. 80; 122 E. R. 579.

Annotations:—*As to* (1) *Fold.* Hargreaves v. Diddams (1875), L. R. 10 Q. B. 582. *Consd.* Pearce v. Scotcher (1882), 46 J. P. 248. *Refd.* Murphy v. Ryan (1868), 16 W. R. 678; Mussett v. Burch (1876), 35 L. T. 486. *As to* (2) *Fold.* Hargreaves v. Diddams (1875), L. R. 10 Q. B. 582. *Refd.* Pearce v. Scotcher (1882), 46 J. P. 248; Reece v. Miller (1882), 8 Q. B. D. 626. *As to* (3) *Refd.* Watkins v. Major (1875), L. R. 10 C. P. 662.

65. ———.] — **PEARCE v. SCOTCHER**, No. 69, *post*.

66. ——— Although public allowed to fish—By owner.]—(1) With regard to the main stream, *pltf.* did not show any acts of fishing which were exclusive of the general public. Everybody who liked fished there & it is well known that all the way down the Thames such fishing is habitual. What is the law applicable to a title of that sort? All the presumptions seem to be in favour of *pltf.* The natural presumption is that a man whose land abuts on a river, owns the bed of a river up to the middle of the stream, & if he owns the land on both sides the presumption is that the whole bed of the river belongs to him unless it is a tidal river. There is also a presumption that the owner of the bed of the river has the right to fish in the stream & to prevent other persons from fishing there. But these are presumptions of fact which may be rebutted, & not rules of law which must apply to every case (**BOWEN, L.J.**).

(2) We are dealing with the Thames, which is not a tidal river at the place in question. There is another most important matter as regards such streams, that, although the public have been in the habit, as long as we can recollect, & as long as our fathers can recollect, of fishing [in them] the public have no right to fish there, I mean they have no right as members of the public to fish there. That is certain law. They may fish by the licence or indulgence, carelessness or good nature of the owner, but right to fish themselves as the public they have none (**BOWEN, L.J.**).—**BLOUNT v. LAYARD** (1888), [1891] 2 Ch. 681, n.; 4 T. L. R. 512, C. A.; *subsequent proceedings* (1889), 5 T. L. R. 371.

Annotations:—*As to* (1) *Refd.* Smith v. Andrews, [1891] 2 Ch. 678; Brinckman v. Matley (1904), 73 L. J. Ch. 160; Foster v. Warblington U. D. C. (1905), 3 L. G. R. 605; Johnston v. O'Neill, [1911] A. C. 552. *As to* (2) *Consd.* Smith v. Andrews, [1891] 2 Ch. 678. *Generally, Mentd.* Simpson v. A.-G., [1904] A. C. 476; A.-G. v. Antrobus, [1905] 2 Ch. 188; Behrens v. Richards, [1905] 2 Ch. 614; Trafford v. St. Faith's R. D. C. (1910), 74 J. P. 297; Folkestone Corp'n. v. Brockman, [1914] A. C. 338; Shearburn v. Chertsey R. D. C. (1911), 12 L. G. R. 622; A.-G. v. Sewell (1918), 88 L. J. K. B. 425.

the prohibited limits of the mouth caused damage to *pltf.* in the exercise of his right to fish.—**WHELAN v. HEWSON** (1871), 1 R. 6 C. L. 283.—**IR.**

67. **Though water navigable — By artificial means.]**—HARGREAVES v. DIDDAMS, No. 76, *post*.

68. ————.]—The right of the public to fish in a non-tidal river which is made navigable by locks cannot exist in law.

Applt. was convicted under Larceny Act, 1861 (c. 96), s. 24, of fishing in water which was private property. The water was part of a navigable river, which was not tidal, & which was navigated by means of locks. At the hearing applt. set up a public right of fishing, & argued that the jurisdiction of the justices was ousted by such *bond fide* claim of right:—*Held*: no such right could exist in law, & therefore the jurisdiction of the justices was not ousted.—MUSSETT v. BURCH (1876), 35 L. T. 486; 41 J. P. 72, D. C.

Annotations:—**Consd.** Pearce v. Scotcher (1882), 46 L. T. 342; Reece v. Miller (1882), 8 Q. B. D. 626.

69. ————.]—There can be no public right of fishing in non-tidal waters, even where they are to some extent “navigable rivers.”

A complaint was preferred against S. for unlawfully fishing in the river Dee at a place above the flow of the tide, & where it was admitted by both parties that the river was a public navigable river & highway for the public to pass & repass in coracles & such light craft as are suitable for such navigation. S. contended that the fishing at this place belonged to the public, or that it had been enjoyed by the public as of right without interruption for so many years that it could not now be taken away:—*Held*: the justices were wrong in dismissing the summons on the ground of there being a *bond fide* claim of right, for the right of fishing did not belong to the public, & they could not acquire it by custom because it was a *profit à prendre*.—PEARCE v. SCOTCHER (1882), 9 Q. B. D. 162; 46 L. T. 342; 46 J. P. 248, D. C.

Annotations:—**Refd.** Reece v. Miller (1882), 47 J. P. 37; Ilchester v. Raishley (1889), 61 L. T. 477; Smith v. Andrews, [1891] 2 Ch. 678.

70. ————.] **Claim of right.]**—REECE v. MILLER, No. 37, *ante*.

71. ————.] — SMITH v. ANDREWS, No. 77, *post*.

72. ————.]—A.-G. FOR BRITISH COLUMBIA v. A.-G. FOR CANADA, No. 9, *ante*.

73. ————.] **Inland lake.]**—R. v. BURROW, No. 529, *post*.

74. ————.] **Size immaterial.]**—The Crown is not of common right entitled to the soil or waters of an inland non-tidal lake, & no right can exist in the public to fish in such waters. One & the same law applies to inland non-tidal waters whatever may be the area of the water space.

Resps. claimed the exclusive right of fishing for eels in lough N. & over a great stretch of the river B., under grants from the Crown to their predecessors in 1605 & later documents; that the Crown had a title to make the grants; that they & their predecessors had continuously possessed & enjoyed the fishery in the river & possessed the fishery on the lough, & that their predecessors had also received rents from others for the fishery

in the lough itself, & that although the public had in fact always fished in the lough, they had done so by indulgence & not of right. Appls. claimed that the public can in law have a right fishery in non-tidal waters, & that resps. had not established their documentary title, & the action of resps. did not lie:—*Held*: resps. had their documentary title, & were entitled to an injunction to restrain appls. from fishing. — JOHNSTON v. O'NEILL, [1911] A. C. 552; 81 L. J. P. C. 17; 105 L. T. 587; 27 T. L. R. 515; 55 Sol. Jo. 686, H. L.

Annotation:—**Refd.** Kirby v. Cowderoy, [1912] A. C. 599.

75. ————.] **Cannot be claimed by prescription.]** — HUDSON v. MACRAE, No. 61, *ante*.

76. ————.]—A stream in which the tide did not ebb & flow was rendered statutorily navigable; the Act did not in any way interfere with the possession of the soil. The public had fished in this stream for many years without interruption:—*Held*: no right to fish could be thereby acquired by the public, & no right was in question so as to oust the jurisdiction of justices conferred by Larceny Act, 1861 (c. 96), s. 24.—HARGREAVES v. DIDDAMS (1875), L. R. 10 Q. B. 582; 44 L. J. M. C. 178; 32 L. T. 600; 40 J. P. 167; 23 W. R. 828.

Annotations:—**Folld.** Mussett v. Burch (1876), 35 L. T. 486; Pearce v. Scotcher (1882), 46 L. T. 342. **Consd.** Reece v. Miller (1882), 8 Q. B. D. 626; Smith v. Andrews, [1891] 2 Ch. 678. **Mentd.** Sherris v. De Rutzen, [1895] 1 Q. B. 918.

77. ————.] **Or otherwise.]**—The public cannot by prescription or otherwise obtain a legal right to fish in a non-tidal river even though it is navigable. In an action for trespass on a several fishery evidence of fishing by the public as of right was admitted in derogation of pltf.'s title.

Entries of the names of tenants in parish rate-books were admitted in proof of ownership of the fishery by the lessors, pltf.'s predecessors in title.

A mere paper title can be challenged & displaced, & it is necessary to consider how far the possession has been in accordance with this title (NORTH, J.). — SMITH v. ANDREWS, [1891] 2 Ch. 678; 65 L. T. 175; 7 T. L. R. 527.

Annotations:—**Apprvd.** Johnston v. O'Neill, [1911] A. C. 552. **Refd.** Hindson v. Ashby, [1896] 2 Ch. 1.

— — — —.]—*See, also*, EASEMENTS, Vol. XIX., p. 201, Nos. 1535-1536.

78. ————.] **Cannot be claimed by custom.]** — PEARCE v. SCOTCHER, No. 69, *ante*.

See, further, EASEMENTS, Vol. XIX., pp. 201, 205, Nos. 1563-1567.

79. **Whether non-tidal — Sufficiency of evidence—Norfolk Broad.]**—B. was charged under Larceny Act, 1861 (c. 96), s. 24, with unlawfully taking fish in a private fishery. The water was part of a Norfolk broad or lake, thirty-five miles from the sea. The evidence showed that the tide did not reach the spot, though occasionally the freshwater was backed up so as to rise three or four inches when there was a high tide. Anglers had occasionally been turned off, if no consent of the adjoining owners had been obtained:—*Held*: there was sufficient evidence to support the finding

PART II. SECT. 2.

75 i. **Right to fish—Cannot be claimed by prescription.]**—The public cannot

acquire by immemorial usage any right of fishing in a river in which, though it be navigable the tide does not ebb & flow.—MURPHY v. RYAN (1868), L. R. 2 C. L. 143.—IR.

to fish in inland — cannot acquired by mere user.—R. v. K KENNY JJ. (1884), 11 L. R. Ir. 349. IR.

Sect. 2.—In non-tidal waters. Part III. Sect. 1:
Sub-sect. 1, A. & B.]

of justices that this was not a tidal navigable river where the public had a right to fish, but was a private fishery.—*BLOWER v. ELLIS* (1886), 50 J. P. 326, D. C.

80. — — — — —.] — A landowner who claimed to be owner of part of one of the Norfolk Broads, brought an action for an injunction to restrain a person, claiming as one of the public, from shooting or fishing over pltf.'s part of the broad, & from boating over such part, except within certain limits comprising what was called "the channel." Pltf. claimed to be owner under an award made in 1808 by comrs. under a local inclosure Act of 1801, & which award purported

to allot the part of the broad so claimed to one of his predecessors in title. Deft. impeached the validity of the award, & challenged the claim to ownership on various grounds, alleging that the broad was a tidal water, & therefore Crown property, & open to the public for all purposes:—*Held*: upon the evidence, the broad was not tidal, deft.'s other contentions against pltf.'s claim to the ownership & exclusive right of shooting & fishing failed, & an injunction must be granted accordingly; but pltf. had not made out his claim to restrict the public right of way & boating to the so-called "channel."—*MICKLETHWAIT v. VINCENT* (1892), 67 L. T. 225; 8 T. L. R. 685; *affd.* (1893), 69 L. T. 57, C. A.

Navigation as affecting fishing.]—See Part IV., post.

Part III.—Private Fisheries.

SECT. 1.—NATURE OF PRIVATE FISHERIES.

SUB-SECT. 1. — SEVERAL FISHERIES.

A. In General.

81. **Definition — Exclusive right to fish.]** — In order to constitute a several fishery, it is requisite that the party claiming it should so far have the right of fishing, independent of all others, as that no person should have a co-extensive right with him in the subject claimed; for, where any person has such co-extensive right, there is only a free fishery. But we think that a partial independent right in another, or a limited liberty, does not derogate from the right of the general owner (*per C.R.*).

A reservation is equal to a grant. Therefore it brings it to the same question as if pltf's., being the general owners, had granted the sole right of fishing for oysters to C.; & taking that to be the case we still think pltf. would have a several fishery to all intents & purposes except as to the taking of oysters. As to the liberty reserved to C. of taking fish for his own table, that is a mere limited liberty & not co-extensive with the right of pltf's. who can take fish at all times & for all purposes (*per C.R.*).

If this is not a several fishery it would not be any species of fishing that the law knows. It could not be a free fishery, because no person has a co-extensive right with pltf's., & as to its being a common of fishery, that is not pretended (*per C.R.*). *SEYMOUR v. COURTENAY* (1771), 5 Burr. 2814; 98 E. R. 478.

Annotations:—*Reid*, *Holford v. Bailey* (1846), 8 Q. B. 1000; *Hindson v. Ashby*, [1896] 2 Ch. 1; *Eccroyd v. Coulthard* (1897), 77 L. T. 357; *Hanbury v. Jenkins*, [1901] 2 Ch. 401.

82. — — — — — **In a given place.]** — *HOLFORD v. BAILEY*, No. 86, *post*.

83. — — — — — *MALCOMSON v. O'DEA*, No. 156,

— — — — — *HANBURY v. JENKINS*, No. 91,

85. — — — — — **A right over soil of another.]**
CLARKE v. MERCER, No. 208,

86. **The term "several"—Not a term of art.]** —A declaration, reciting that deft. had been summoned to answer pltf. in an action of trespass, charged that deft., with force & arms, broke & entered a fishery, to wit the sole & exclusive fishery of pltf., in a certain part of a river then flowing & being over the soil of one F., & then fished in the fishery of pltf., & the fish of the fishery of pltf. there found, & being in the fishery, chased & disturbed: conclusion, *contra pacem*. Pltf. having recovered on this count:—*Held*: (1) the words "sole & exclusive fishery" were, at any rate after verdict, equivalent to "several" fishery; (2) the statement that the soil was in F. did not vitiate the count or render it necessary for pltf. to deduce title from the owner of the fee; (3) trespass lay for the injury described.

(1) The remaining question is whether the description of a "sole & exclusive fishery" is sufficient & equivalent to that of a several fishery. These words contain a description of precisely the same right ordinarily expressed by the term "several fishery" that is, the right of fishing exclusive of all others, in a particular place. The words are not an improper translation of the words "*separalis piscaria*"; & in order to sustain the allegation in this declaration, pltf. must have proved that he was entitled to that precise species of incorporeal right which is usually termed a "several fishery" (*PARKE, B.*).

(5) If the words "several fishery" were terms of art, such as the words "felony," "murder," "burglary," equivalent expressions could not be used, but we are not aware of any authority for that position. Where such technical words are not required the law permits a variety of expressions (*PARKE, B.*).

(6) A several fishery is no doubt, *prima facie*, to be assumed to be in the soil of deft. & therefore *liberum tenementum* is a good plea (*PARKE, B.*).—*HOLFORD v. BAILEY* (1849), 13 Q. B. 426; 18 L. J. Q. B. 109; 13 L. T. O. S. 261; 13 Jur. 278; 116 E. R. 1325, Ex. Ch.

Annotations:—As to (4) *Consd.* *Malcomson v. O'Dea* (1863), 10 H. L. Cas. 393; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96.

PART III. SECT. 1, SUB-SECT. 1.—A. p. Public easement — Interference with exclusive right of

Although the public may have in a river an easement or right to float rafts or logs down & a right of passage up & down in Canada, wherever the

water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite

Refd. *Hindson v. Ashby*, [1896] 2 Ch. 1; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; *Hanbury v. Jenkins*, [1901] 2 Ch. 401. *As to* (5) **Refd.** *R. v. Gray* (1864), Lc. & Ca. 365. *As to* (6) **Folld.** *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732. **Refd.** *A.-G. v. Emerson*, [1891] A. C. 649; *Beaufort v. Aird* (1904), 20 T. L. R. 602. **Generally, Mentd.** *Stacey v. Whitehurst* (1865), 18 C. B. N. S. 344.

87. — **Equivalent expressions** — “Sole & exclusive.”]—*HOLFORD v. BAILEY*, No. 86, *ante*.

88. — — — — — “Separate” or “free.”] — A separate fishery & a free fishery are all one (*HOLT, C.J.*).—*GIPPS v. WOOLLCOT* (1897), Holt, K. B. 323; Comb. 464; Skin. 677; 3 Salk. 360; 90 E. R. 1079.

Annotation :—**Consd.** *Holford v. Bailey* (1846), 8 Q. B. 1000.

89. — — — — — “Exclusive” or “free.”] *MALCOMSON v. O'DEA*, No. 156, *post*.

90. May be divisible—As to kinds of fish — **Oysters & floating fish.**]—*SEYMOUR v. COURTENAY*, No. 81, *ante*.

.]—(1) To prove a prescriptive right of fishery as appurtenant to a manor old licences of the ct. rolls granted by the lords of the manor in considerations of rents, to fish in the *locus in quo* are evidence, without proof of rents being paid if it appears that such rents have been paid in modern times or that the lords of the manor have exercised other acts of ownership over the fishery.

(2) A right of fishery is divisible, & may be lost as to part & preserved as to part. Therefore an exclusive right to dredge for oysters in a navigable river may subsist as appurtenant to a manor although it be lawful for the King's subjects to catch floating fish therein.

(3) In trespass for breaking & entering a several fishery if pltf. prescribes for the sole & exclusive right of fishing over four places in a navigable river upon which right issue is joined, the prescription must be proved as extensively as it is laid, & if the right is shown to exist over three places, but not the fourth, this is a fatal variance notwithstanding the trespasses complained of were committed in part of the river where the sole & exclusive right of fishery prescribed is proved to exist.—*ROGERS v. ALLEN* (1808), 1 Camp. 309.

Annotations :—*As to* (1) **Consd.** *Bristow v. Cormican* (1878), 3 App. Cas. 611. **Refd.** *Malcomson v. O'Dea* (1863), 10 H. L. Cas. 593; *Blandy-Jenkins v. Dunraven* (1899), 81 L. T. 209. *As to* (3) **Refd.** *Pigott v. Bayley* (1826), 6 B. & C. 16; *Bassett v. Mitchell* (1831), 2 B. & Ad. 99.

92. — **Right of other party to fish** — At certain times of year.]—*GOODMAN v. SALTASH* v., No. 262, *post*.

93. Mode of fishing—Net & coble—Includes stake nets.]—Proprietors on the sea-coast having grants from the Crown with right of fishing limited to fishing with net & coble, cannot, on the

their respective lands, *ad medium filum aquæ*.—*R. v. ROBERTSON* (1882), 6 S. C. R. 52.—**CAN.**

q. Weirs & gurgites—*Pass a continuous fishery.*]—(*GABBETT v. CLANCY* (1845), 8 I. L. R. 299.—**IR.**

PART III. SECT. 1, SUB-SECT. 1.—B.

94 i. Incident to ownership in soil.]—*IRISH SOCIETY v. CROMMELIN* (1868), 16 W. R. 315.—**IR.**

94 ii. —.]—A riparian owner, unless the “several fishery” in his waters has been vested in other persons, by grant or otherwise, is proprietor of a “several fishery” in the waters

his land, *usque ad medium filum aquæ*.—*WATERFORD FISHERY DISTRICT CONSERVATORS v. CONNOLLY* (1889), 21 I. L. T. 7.—**IR.**

95 i. May exist without p. soil.]—By the law of Bengal the from the Crown of a several fishery in the river Ganges, in which new channels are frequently formed, can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream & downstream limits of his grant, whether the Govt. owns the subjacent soil or whether it is still in a riparian proprietor as being the site of a recent encroachment of the river.—

suit of owners of fisheries in a river, be restrained from fishing with stake nets.—*KINTORE v. FORBES* li. N. S. 485; 5 E. R. 173, H. L.

v. Mackenzie (1839), 6 Cl. & Fin. Lord

Sc. & Div. 431.

B. Relation to Ownership of Soil.

94. Incident to ownership in soil.]—(1) A several fishery may exist either apart from or as incident to the ownership of the soil over which the river flows; but where a several fishery is proved to exist, the owner of the fishery is to be presumed, in the absence of evidence to the contrary, to be the owner of the soil, whether it is a navigable river or a river neither public nor navigable. (2) The use of the word “several” or “*separalis piscaria*” is not necessary to create a several fishery. (3) The grant of “weirs” is a grant, not of a mere right of fishing, but of a corporeal hereditament consisting not only of the soil on which any particular weir is constructed, but of the soil over which the river runs, & upon which there is a right to construct weirs for the purpose of taking fish. (4) A grant purporting to give a definite length of several fishery may still be a good grant of a several fishery in part of the river so included, though as to other part of it the Crown, at the time, had no several fishery to give.

(5) *Seemble* : an incorporeal right of way along both banks of a river may be appendant to an incorporeal right of fishing, the one being capable of union with the other without any incongruity.

(6) Acts by riparian occupiers, such as placing stakes & wattles on the soil of a river to prevent erosion by flood, taking gravel deposited by flood, & making pens in the stream to prevent cattle from straying, though *prima facie* acts of ownership, but referable to an absence of objection on the part of another person claiming the bed of the river & reasonably necessary or convenient for the protection & enjoyment of the property of the riparian occupiers, are not inconsistent with the ownership of the bed of the river being in such other person.

(7) There is no doubt that a several fishery means an exclusive right to fish in a given place (*BUCKLEY, J.*).—*HANBURY v. JENKINS*, [1901] 2 Ch. 401; 70 L. J. Ch. 730; 65 J. P. 631; 49 W. R. 615; 17 T. L. R. 539.

As to (1) & (2) **Consd.** *Beaufort v. Aird* (1904), 20 T. L. R. 602.

95. May exist without property in soil.]—*PAGET (LORD) v. MILLES*, No. 140, *post*.

96. — — — — — An incorporeal hereditament.]—*SOMERSET (DUKE) v. FOGWELL*, No. 277, *post*.

97. — — — — — *BIRD v. HIGGINSON*, No. 278,

RAJA SRINATH ROY v. ... IND. (1914), 30 T. L. R. 662.

95 ii. —.]—An exclusive of fishery does not of itself pass the to the soil in the bed of the river. *SECRETARY OF STATE FOR INDIA v. BIJOY CHAND MAHATAP* (1918), 1 L. 16 Cal. 390. **IND.**

95 iii. —.]—patent granted lands ent to Loch Erne & also In Erne, & a soil of Lough Erne covered with adjacent to the lands did not pass the grantee to the middle thread of lake. *... v. ...* (1866), 1 L. R. 8 C. L.

Sect. 1.—Nature of private fisheries: Sub-sect. 1, B. & C.; sub-sects. 2, 3 & 4.]

98. —.]—HOLFORD v. BAILEY, No. 86, *ante*.

99. —.]—NEILL v. DEVONSHIRE (DUKE), No. 41, *ante*.

100. —.]—FITZGERALD v. FIRBANK, No. 4, *ante*.

101. —.]—CHESTERFIELD (LORD) v. HARRIS, No. 206, *post*.

102. —.]—A.-G. FOR BRITISH COLUMBIA v. A.-G. FOR CANADA, No. 9, *ante*.

103. —.]—CLARKE v. MERCER, No. 208, *post*.

104. —.]—MALCOMSON v. O'DEA, No. 156, *post*.

105. —.]—MARSHALL v. ULLESWATER STEAM NAVIGATION Co., No. 215, *post*.

106. —.]—FOSTER v. WRIGHT, No. 109, *post*.

107. —.]—HANBURY v. JENKINS, No. 94, *ante*.

108. Change of course of water—Flow into new channel—Whether fishing extends to new channel—Tidal river.]—A several fishery in a tidal river, the waters of which have permanently receded from one channel, & flow in another, cannot be followed from the old to the new channel.

If the right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the common law, a several fishery cannot be acquired even in a tidal river if the soil belong not to the Crown but to a subject; & all the authorities, ancient & modern, are uniform to the effect that if, by the irruption of the waters of a tidal river, a new channel is formed in the land of a subject, although the rights of the Crown & of the public may come into existence & be exercised in what has thus become a portion of a tidal river or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede & the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public (KELLY, C.B.).

The right to grant a several fishery arises from the ownership of the soil (BRAMWELL, B.).—CARLISLE CORPN. v. GRAHAM (1869), L. R. 4 Exch. 361; 38 L. J. Ex. 226; 21 L. T. 333; 18 W. R. 318.

ns. Distd. Foster v. Wright (1878), 1 C. P. D. 438. **Consd.** Hindson v. Ashby, [1896] 2 Ch. 1. **Refd.** Neill v. Devonshire (1882), 31 W. R. 622; Thakurain Ritraj Koer v. Thakurain Sarfaraz Koer (1905), 21 T. L. R. 637.

109. —.]—Pltf. was lord of a manor held under grants giving him the right of fishery in all the waters of the manor, & consequently, in a river running through it. Some manor land on one side of, & near but not adjoining, the river, was enfranchised & became the property of deft. The river, which then ran wholly within lands belonging to pltf. afterwards wore away its bank, & by gradual progress, not visible, but periodically ascertained during twelve years, approached & eventually encroached upon the

deft.'s land, until a strip of it became part of the river bed. The extent of the encroachment could not be defined. Deft. went upon the strip & fished there:—**Held:** an action of trespass against him for so doing could be maintained by pltf. who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on to deft.'s land.—FOSTER v. WRIGHT (1878), 4 C. P. D. 438; 49 L. J. Q. B. 97; 44 J. P. 7.

Annotations:—**Apprvd.** Hindson v. Ashby, [1896] 2 Ch. 1. **Appld.** Mercer v. Denne, [1904] 2 Ch. 534. **Refd.** Ecroyd v. Coulthard, [1897] 2 Ch. 554; Hanbury v. Jenkins, [1901] 2 Ch. 401.

110. Variation in amount of soil—Encroachment by the sea—Benefit of encroachment in owner of fishery.]—SCRATTON v. BROWN, No. 201, *post*.

111. — Accretion to bed of river—Bed & adjoining bank belonging to different owners—To whom accretion belongs.]—Pltfs., under an inclosure award made in 1803, were entitled to a piece of land at W. bounded on one side by the Thames, which is there navigable but not tidal. The land ended in an almost perpendicular bank 5 or 6 feet high, & the bed of the river reached to its foot, the water often reaching some height above the foot. Deft. was entitled to a several fishery in the river & to the bed of the river. The water of the river, owing to the removal of a weir, sank, & at the foot of the bank a deposit took place forming a strip on which some large trees grew, & which during some part of the year was left dry, but it was overflowed during a considerable part of the year. At the foot of the bank deft. dug a ditch which he regularly cleaned out for more than twelve years, & afterwards filled it up with concrete so as to make a footpath. Pltfs. brought an action for an injunction to restrain him from trespassing, & the judge held that whether the strip had ceased to be part of the bed of the river was a question to be determined, not by any hard & fast rule, but by regarding all the material circumstances of the case, including the fluctuations of the river, the nature of the land, & its growths & user, & in the present case, the strip had ceased to be part of the bed & belonged to pltfs. as having been formed by gradual accretion to their land:—**Held:** the above principle determining whether the strip was part of the bed of the river was sound, but on the facts the strip had not ceased to form part of the bed, & belonged to deft., but when it was dry the rights of pltfs. as riparian proprietors were not affected, & they had right of access over it to the water, & could use it to the same extent as they could use the bed of the river in its old state.

Qu.: whether the accretions, if they had ceased to form part of the bed of the river, would have been the property of pltfs. as owners of the adjoining land.

Whether the doctrine of accretion could apply in a case where the steep 6 ft. bank which formed the original boundary between the lands of pltfs. & deft. still remained clearly defined.

If the right to a several fishery in a public navigable river is proved to exist the owner of the fishery is to be presumed to be also the owner of the soil over which his fishery extends, unless there is evidence to the contrary (LINDLEY, L.J.).—**v. ASHBY**, [1896] 2 Ch. 1; 65 L. J. Ch.

109 l. Change of course of water—Flow into new channel—Whether fishery extends to new channel.]—MILLER v. LITTLE (1879), 4 L. R. 1r. 302.—**IR.**

515; 74 L. T. 327; 60 J. P. 484; 45 W. R. 252; 12 T. L. R. 314; 40 Sol. Jo. 417, C. A.

Annotations:—**Consd.** *Ecroyd v. Coulthard*, [1897] 2 Ch. 554. **Refd.** *Pearce v. Bunting*, R. v. Wedd, *Ex p. Pearce*, [1896] 2 Q. B. 360; *Thames Conservators v. Smeed*, Dean, [1897] 2 Q. B. 334; *Hanbury v. Jenkins*, [1901] 2 Ch. 401; *Barwick v. S. E. & C. Ry.*, [1921] 1 K. B. 187.

Presumptions as to ownership.—See Sect. 4,

C. Tenure.

112. Right appendant.—ANON. (1464), Y. B. 4 Edw. 4, fo. 29, pl. 7.

113. Right appurtenant.—CARTER v. MURCOT, No. 182, *post*.

114. — To manor.—ROGERS v. ALLEN, No. 91, *ante*.

115. — — — — ——A.-G. v. EMERSON, No. 199,

See Law of Property Act, 1922 (c. 16), Sched. 12 (5).

116. — Copyhold tenements.—TILBURY v. SILVA, No. 286, *post*.

117. — To demesne land.—EDGAR v. ENGLISH FISHERIES SPECIAL COMRS., No. 245, *post*.

118. — Not to several pasture.—EDGAR v. ENGLISH FISHERIES SPECIAL COMRS., No. 245,

119. Leasehold interest.—SOMERSET (DUKE) v. FOGWELL, No. 277, *post*.

120. — STAFFORDSHIRE WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY, No. 125, *post*.

121. Right in gross—Right to fish bearing no relation to needs of land.—STAFFORDSHIRE & WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY, No. 125, *post*.

SUB-SECT. 2.—FREE FISHERIES.

Equivalent to several fishery.—See No. 88, *ante*, No. 156, *post*.

Grant of free fishery—Effect of.—See No. 115, *post*.

SUB-SECT. 3.—COMMON OF FISHERY.

122. Nature of right—May be appendant.—ANON. (1464), Y. B. 4 Edw. 4, fo. 29, pl. 7.

—*See, also*, COMMONS, Vol. XI., p. 20, Nos. 229, 230.

Who may take.—See COMMONS, Vol. XI., p. 20, Nos. 231–237.

How claimed.—See COMMONS, Vol. XI., pp. 19, 20, Nos. 220–228; EASEMENTS, Vol. XIX., pp. 204, 205, Nos. 1563–1567.

PART III. SECT. 1, SUB-SECT. 1.—C.

113 i. Right appurtenant.—An exclusive right of fishing for oysters may be prescribed for as appurtenant to land, principal & adjunct being *eiusdem generis* & capable of union without repugnance or inconsistency.—HAYES v. BRIDGES (1795), 1 Ridg. L. & S. 390.—IR.

r. Frank-tenement of fishery.—A man may have frank-tenement of

Extent of right.—See COMMONS, Vol. XI., pp. 20, 21, Nos. 238–242.

Effect of inclosure of common.—See COMMONS, Vol. XI., p. 72, No. 945.

Regulation of right.—See COMMONS, Vol. XI., p. 87, No. 1065.

SUB-SECT. 4.—FISHERIES IN CANALS AND ARTIFICIAL WATERCOURSES.

123. Canal constructed under statutory authority—Regulation of fishing rights—Interests of owners of soil.—SNAPE v. DOBBS, No. 295,

—*In an action for fishing in the reservoir of a canal, deft. justified as claiming title under the lord of the manor, who claimed under an Act by which lords of manors through which the canal was cut & reservoir made should be entitled to the right of fishery, & of so much as should be made in, over or through the common or waste lands within their manors, & over or through any other lands or grounds in the waters whereof such lords had the right of fishery. Here the soil, the part of land taken by the company for the reservoir, was not in the lord:—Held: the true construction of the Act was to give lords of manors there referred to the right of fishery only where the ownership of the soil was in them, where there was then no water, fish or fishery, & to continue it in the lords where there were already water & fish, & the fishery was in the lord.*

Deft. also claimed the right of fishery, as owner of the land through or adjoining which the reservoir was made: *Held: such owners were limited to fishing in the canal & collateral cut, omitting reservoirs.* GRAND UNION CANAL CO. v. ASHEY (1861), 6 H. & N. 394; 30 L. J. Ex. 203; 3 L. T. 673.

125. — Subsequent conveyance of soil under general words.—By a local Act authorising the construction of a canal, there was granted to each owner of land through which the canal was made the sole, several, & exclusive right of fishing in so much of the canal as was made in, over, or through his land; but the right of fishery thereby granted was to be exercised so that the canal, towing paths, banks, & other works should not be prejudiced or obstructed. Under a deed of Mar. 31, 1845, a certain manor & estate through which the canal passed became vested in S.; there was no express grant of this particular right of fishery, but there were general words in the deed passing all fisheries, profits, advantages, & appurtenances whatsoever to the manor & estate respectively belonging, or in anywise appertaining.

By a lease of July 23, 1910, S. granted to an angling club, of which deft. was a member, the exclusive right to fish for & take away all fish in a specified portion of the canal, at an annual rent,

—*See* ROYAL FISHERY OF BANNE CASE (1610), Dav. Ir. 55.—IR.

PART III. SECT. 1, SUB-SECT. 3.

a. General rule.—The public has not of common right a common of fishery in large inland waters in which the tide does not flow or reflow, although they are navigable.—BLOOMFIELD v. JOHNSTON (1868), 1 R. 8 C. L. 68.—IR.

PART III. SECT. 1, SUB-SECT. 4.

t. Right to fish—Exercised concurrently with public servitude of passage.—Where waters have become navigable owing to artificial public works, the private right to fishing of the owner of the soil must be exercised concurrently with the public servitude for passage. BEATTY v. — (1890), 20 O. R. 373.—CAN.

*Sect. 1.—Nature of private fisheries: Sub-sects. 4, 5
2 & 3: Sub-sect. 1, A.]*

& the lessees covenanted so to exercise their rights as not to prejudice or obstruct the towing paths, banks, & other works of the canal. Pltfs. having brought an action to test a claim by deft. to fish in the canal from the towing path, without their consent:—*Held*: (1) having regard to all the circumstances, the Act conferred upon the grantees of the exclusive fishery a right to use the towing paths & banks of the canal for the exercise of that right; (2) the right, being one to take fish without stint, & without any relation to the needs of the land in respect of which the right was granted, was not a right appurtenant, or capable of being made appurtenant, to the land, but a right in gross, & not capable of passing under the general words of the deed of Mar. 31, 1845; (3) if the right of fishery had passed under the deed of Mar. 31, 1845, it could properly have been made the subject of a lease. Therefore, in the result, pltfs. were entitled to a declaration that deft. was not entitled to fish from the towing paths of the canal belonging to pltfs. without their consent, & an injunction must be granted to restrain the trespass.—*STAFFORDSHIRE & WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY*, [1912] 1 Ch. 91; 81 L. J. Ch. 147; 106 L. T. 215; 56 Sol. Jo. 91; 75 J. P. Jo. 555.

Canalised non-tidal rivers—Rights of public.]—
See Nos. 68, 76, ante.

Right to use banks.]—See Sect. 7, post.

Canals generally.]—See RAILWAYS.

SUB-SECT. 5. FISHERIES IN PONDS AND

126. Ponds Right to make fish ponds—On a common.]—PELLING v. LANGDEN (1601), as reported in Owen, 111; 74 E. R. 940.

Annotation: **Mentd.** Hadesden v. Gryssel (1607), Cro. Jac. 195.

127. — — — — —.]—In an action for disturbance of common by digging turf & making a fish pond, on issue whether sufficient common remained a verdict finding disturbance as to the turfs, & no disturbance as to the fish-pond, is not repugnant; for it is in different respects. — *REEVE v. DIGBY* (1638), Cro. Car. 495; 79 E. R. 1027.

Annotation: **Mentd.** Bowers v. Nixon (1848), 13 Jur. 334.

128. — — — — —.]—There needs no privilege to make a fish pond (*HOLT, C.J.*).—*ANON.* (1701), 6 Mod. Rep. 183; 87 E. R. 939.

129. — — — — — Mill pond situate in manor—Several fishery in mill owner.]—CLARKE v. MERCER, No.

130. Inland non-tidal lake—Right of several fishery.]—MARSHALL v. ULLESWATER STEAM NAVIGATION CO., No. 215, *post*.

131. — — — — — Right of Crown to fishery—No de jure right.]—(1) The Crown has no *de jure* right to the soil or fisheries of an inland non-tidal lake. If there are acts *in pais*, which would be admissible as evidence of the title of the Crown, they must be

submitted to a jury. They cannot be taken by the judge & made the basis of a decision by himself alone. A general grant by the Crown of a several fishery in a non-tidal lake is not, without more, sufficient to establish the title thereto; &, where there is no evidence of acts of possession by the grantee at the particular part of the lake which is the place in dispute, can have no effect. A claim was made for a several fishery extending over the whole of Lough N., a large non-tidal lake in Ireland, including therein a place called F., where defts. were charged with having unlawfully trespassed on pltfs.' several fishery. The claim was founded on a grant by Charles II., dated in 1660, & upon certain leases since made by persons claiming title under that grant, & payments of rent under grant & leases were shown. No evidence was given of the title of the Crown to the soil or fishings of the lake, the limits of the fishery, as described in the grant, did not appear to include the whole of the lake, &, as to the place, F., which was the subject of dispute, there was no mention of it in the grant, nor was there evidence that the grantee, or those who claimed under him, had enjoyed exclusive possession of the place. Evidence of convictions for trespassing on the lake was given, but that evidence did not apply to F. Defts. set up a claim of right on the part of the public to fish at F., & produced evidence of user in support of their claim. The judge at the trial did not leave the case as a question of fact for the jury, but took upon himself, upon pltfs.' evidence, to direct the jury to find a verdict for pltfs.:—*Held*: the case was, with proper directions from the judge on points of law, one of fact for the decision of the jury, & the order of the ct. below, which had directed a new trial, was affirmed.

(2) Recitals in documents are no evidence of what is there recited, though actual possession, in conformity therewith, would constitute a *prima facie* title.

(3) There is no authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake (*LORD BLACKBURN*).—*BRISTOW v. CORMICAN* (1878), 3 App. Cas. 641, H. L.

Annotations:—As to (1) & (3) **Consd.** Johnston v. O'Neill, [1911] A. C. 552. **Generally, Refd.** Pearce v. Scotcher (1882), 9 Q. B. D. 162.

132. — — — — — No public right to fish.]—R. v. BURROW, No. 529, *post*.

133. — — — — —.]—JOHNSTON v. O'NEILL, No. 74, *ante*.

Escape of stored water—Liability for.]—See NUISANCE.

Property in & larceny of fish.]—See Sect. 9,

Statutory protection of fishing.]—See Parts V., VI., post.

P. 6.—ROYAL FISHERIES AND ROYAL FRANCHISES.

134. Royal fisheries—Right of fishing in non-tidal river—Flowing over soil of subject—Prerogative rights.]—DEVONSHIRE (DUKE) v. PATTINSON, No. 205, *post*.

PART III. SECT. 1, SUB-SECT. 6.

a. Royal fisheries—Right of fishing in tidal rivers.]—Applts. were grantees of lands on both sides of a river which

was shown by the evidence to be navigable & floatable at such locality & from thence to its mouth:—*Held*: the right of fishing in the river vested exclusively in the Crown.—*WYATT*

v. A.-G. OF QUEBEC, [1911] A. C. 489.—**CAN.**

b. — — — — —.]—The River Banne as far as the ebb & flow of the tide

135. ——— Flowing over soil belonging to Crown—Proprietary, not prerogative, right.]—DEVONSHIRE (DUKE) v. PATTINSON, No. 205, *post*.

136. ——— Royal fish—Right of Crown to.]—WARREN v. MATTHEWS, No. 11, *ante*.

———.]—See CONSTITUTIONAL LAW, Vol. XI., p. 589, No. 904.

——— What are Royal fish.]—See CONSTITUTIONAL LAW, Vol. XI., p. 589, Nos. 901–903.

——— Rights of fishing in non-tidal lake.]—See No. 131, *ante*.

137. Royal franchise—To catch Royal fish—Crown may grant.]—WARREN v. MATTHEWS, No. 11, *ante*.

———.]—See, also, CONSTITUTIONAL LAW, Vol. XI., p. 589, Nos. 901, 902.

——— Salmon & mussel fishing.]—See CONSTITUTIONAL LAW, Vol. XI., p. 576, Nos. 769, 770.

——— Grant of several fishery.]—See Sect. 3, sub-sect. 1, B., *post*.

SECT. 2.—ORIGIN OF RIGHT.

138. Origin must be shown—Whether in tidal or non-tidal waters.]—A person claiming a free fishery, a several fishery, or a common of fishery, must show the foundation of his claim; for the is *primâ facie* in all the King's subjects, or in the owner of the soil.

In case of a private river, the lord's having the soil is good evidence to prove that he hath the right of fishing; & it puts the proof upon them that claim *liberam piscariam*. But in case of a river that flows & reflows, & is an arm of the sea, there, *primâ facie*, it is common to all, & if any will appropriate a privilege to himself, the proof lies on his side (HALE, C.J.).—FITZWALTER'S (LORD) CASE (1674), 1 Mod. Rep. 105; 3 Keb. 242; 86 E. R. 766.

Annotations:—Consd. Murphy v. Ryan (1868), 16 W. R. 678. Apld. Crichton v. Coltery (1870), 19 W. R. 107. Refd. Ward v. Creswell (1741), Willes, 265; Pelham v. Pickersgill (1787), 1 Term Rep. 660; Blundell v. Catterall (1821), 5 B. & Ald. 268.

In tidal waters—Grant by Crown.]—See Sect. 3, sub-sect. 1, B., *post*.

In non-tidal waters—Grant by Crown.]—See Sect. 3, sub-sect. 1, B., *post*.

——— Arising from ownership of soil.]—See Sect. 4, sub-sect. 2, *post*.

is a Royal river belonging to the Crown as a Royal fishery & not to those who have the soil on either side.—ROYAL FISHERY OF BANNE CASE (1610), Dav. Ir. 35.—IR.

137 i. Royal franchise—To catch Royal fish—Crown may grant.]—The Crown has the large fish of the sea, whales, sturgeons, etc., which are Royal fish & no subject can have them without special grant from the Crown.—ROYAL FISHERY OF BANNE CASE (1610), Dav. Ir. 35.—IR.

e. ——— For salmon—Round Scottish coast.]—Salmon fishings around the sea coast of Scotland belong exclusively to & form part of the hereditary revenues of the Crown of Scotland, in so far as they have not been expressly granted to subjects by charters or otherwise, &, without such

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grant, no subject is entitled to fish by net & coble, stake-net, or other engine requiring the use of the shore.—GAMMELL v. WOODS & FORESTS COMRS. & LORD ADVOCATE OF SCOTLAND (1859), 21 Dunl. Ct. of Sess. 4; 3 Macq. 419; 31 Sc. Jur. 431, H. L.—SCOT.

d. ———.]—Where in a pending cause it appears that the Crown has a *primâ facie* claim to the salmon fishings in dispute, the Ct. ought to direct intimation to be made to the Crown authorities; & stay the action pending their decision to appear or bring a separate action.—OOSTON v. STEWART, [1896] A. C. 120.—SCOT.

PART III. SECT. 3, SUB-SECT. 1.—A.

a. General rule.]—Fishery lies in

SECT. 3.—HOW CLAIMED.

SUB-SECT. 1.—GRANT.

A. In General.

139. By copy of court roll.]—HOE v. TAYLOR (1594), as reported in Moore, K. B. 355; 72 E. R. 625.

Annotations:—Refd. Musgrave v. Gave (1741), Willes, 319. Mentd. Heydon & Smith's Case (1610), 13 Co. Rep. 67; Wilson v. Mackreth (1766), 3 Burr. 1821.

140. Reservation or exception out of grant.]—A. being seised of a mill, & having a sole fishery in the waters of the mill, granted the mill, with all waters, streams, etc., necessary in working the same, "except, & always reserving, the right & privilege of fishing in the waters of the said mill":—Held: this was an exception of the sole fishery, & not a reservation of a new easement.—PAGET (LORD) v. MILLES (1781), 3 Doug. K. B. 13; 99 E. R. 529.

Annotation:—Refd. Holford v. Bailey (1849), 13 Q. B. 426.

141. ——— Operating as new grant.]—WICKHAM v. HAWKER, No. 2,

——— Leases.]—See Sub-sect. 2,

———.]—See, generally, DEEDS, Vol. XVII., pp. 380–385, Nos. 1886–1930; EASEMENTS, Vol. XIX., pp. 25–26, Nos. 107–111; p. 200, Nos. 1520–1523.

142. What words will pass Grant of fishery—Whole fishery passes.]—LONDON ALDERMAN v. HASTING (1657), 2 Sid. 8; 82 E. R. 1226.

143. ——— Without use of word "several."]—HANBURY v. JENKINS, No. 94, *ante*.

144. ———.]—BEAUFORT (DUKE) v. AIRD (JOHN) & CO., No. 200, *post*.

145. ——— Grant of "free fishery" Right in common with grantor.]—LONDON ALDERMAN v. HASTING (1657), 2 Sid. 8; 82 E. R. 1226.

146. ——— Grant of "soil."]—SCRATTON v. BROWN, No. 201, *post*.

147. ——— "Estate of inheritance."]—E. the owner of a fishery called the B. fishery took by mistake a lease of the same for three years from P., who was a trustee for other parties. The settlement under which E. claimed had conveyed the lands of B., & all other estates of inheritance & hereditaments of which J. was then seised, & J. had previously obtained a conveyance of & was seised in "the lands of B. & the salmon fisheries in the rivers." J. had applied for an Act of Parliament to improve certain parts of the

grant, by the grant of it the ROYAL FISHERY OF BANNE (1610), Dav. Ir. 35.—IR.

f. What words will words.]—A right of fishing in a navigable river is not to be construed as an exclusive right unless made so by specific words in the grant.—BOULLON v. R. (1917), 16 Exch. Ct. R. 443.—CAN.

g. ——— "His water."]—If one grant to another "his water" the fishery therein passes for it is included in the word "water." ROYAL FISHERY OF BANNE CASE (1610), Dav. Ir. 35.—IR.

h. Extent of grant.]—A grant of land bounded by the bank of a navigable river, or an international waterway, does not extend *ad medium flum* as in the case of a non-navigable river.—

Sect. 3.—How claimed: Sub-sect. 1, A. & sub-

river, & as he died while the bill was being passed, the name of H. his heir-at-law, as the owner, was inserted in the bill which recited in effect that H. was a trustee, though H. represented himself to be owner in fee, & hence the mistake:—*Held*: the fishery passed under the words "estate of inheritance."—*COOPER v. PHIBBS* (1867), L. R. 2 H. L. 149; 16 L. T. 678; 15 W. R. 1049, H. L.

Annotations:—*Mentd.* O'Brien v. Hearn (1870), 18 W. R. 514; Trench v. Nolan (1872), 27 L. T. 69; Jones v. Clifford (1876), 3 Ch. D. 779; Allen v. Richardson (1879), 13 Ch. D. 524; Blenkhorn v. Penrose (1880), 42 L. T. 668; Briggs v. Massey (1881), 29 W. R. 926; Daniell v. Sinclair (1881), 50 L. J. P. C. 50; Bettyes v. Maynard (1882), 46 L. T. 766; Soper v. Arnold (1887), 57 L. J. Ch. 145; General Auction Estate & Monetary Co. v. Smith (1891), 40 W. R. 106; Huddersfield Banking Co. v. Lister, [1895] 2 Ch. 273; Allcard v. Walker, [1896] 2 Ch. 369; Debenham v. Sawbridge, [1901] 2 Ch. 98; Scott v. Coulson, [1903] 2 Ch. 249; *Re* Oliver's Settlement, Evered v. Leigh, [1905] 1 Ch. 191; Carnell v. Harrison, [1916] 1 Ch. 328.

148. — General words.]—STAFFORDSHIRE & WIRE CANAL NAVIGATION v. BRADLEY, No.

---.]—*See, generally*, EASEMENTS, Vol. XIX., pp. 32-35, Nos. 149-179.

---.]—*See, generally*, EASEMENTS, Vol. XIX., pp. 32-35, Nos. 149-179; p. 199, No. 1513.

149. Who may take under grant—Grantee or his servants.]—WICKHAM v. HAWKER, No. 2, ante.

150. — v. SALTASH No. 262.

151. What rights included in grant—No right to erect weir Obstructing passage of fish.]—WELD v. HORNBY, No. 322, post.

152. — Right to carry away fish caught.]—FITZGERALD v. FIRBANK, No. 4.

153. Grant of fishery & weir—Passes soil of river.]—HANBURY v. JENKINS, No. 94, ante.

SCOTTEN (1895), 21 S. C. R. 367. **CAN.**

k. — Confers real right—Not usufruct.] Under the law of Quebec a grant by a riparian owner of the right of the river being neither navigable nor floatable confers not merely a usufruct but a real right, at any rate where the terms of the grant are sufficient to pass a right to use the *solum* for the purpose of fishing. — *MATAMAJAW SALMON CLUB v. DUCHAINE*, [1921] 2 A. C. 426.—**CAN.**

l. Terms of grant unknown or uncertain.] Although an exclusive right of fishery does not of itself pass the right to the soil in the bed of the river, still, when the terms of a grant are unknown or uncertain, it is a matter of importance that pltf. has a several fishery in the river, the bed of which he claims.—*SECRETARY OF STATE FOR INDIA v. BIJOY CHAND MAHATAP* (1918), 1 L. R. 46 Cal. 390.—**IND.**

PART III. SECT. 3, SUB-SECT. 1.—B.

154 i. In tidal waters—Grant.]—The Crown cannot grant an exclusive right of fishery in navigable waters in this Province.—*MOFFATT v. RODDY* 4 Ont. Dig. 7323.—**CAN.**

154 ii. —.]—The Crown cannot grant the waters of a navigable arm of the sea, so as to give a right of exclusive fishing therein.—*MEISNER v. FANNING* (1842) 1 N. S. R. (2 Thom.) 97.—**CAN.**

154 iii. —.]—The exclusive

Necessity for deed—Where incorporeal hereditament passed.]—See Sect. 6, post.

Documentary evidence of title.]—See Sect. 5, sub-sect. 1, post.

Grants generally.]—See EASEMENTS, Vol. XIX., pp. 22-38, Nos. 89-200; pp. 199-200, Nos. 1509-1523.

B. Royal Grants.

154. In tidal waters—Grant.]—CARTER v. MURCOT, No. 182, post.

155. — Grant before Magna Carta—Revived corporation—Vested with rights of former body.]—COLCHESTER CORPN. v. BROOKE, No. 356, post.

156. — Fishery made exclusive for Crown—Or private individual.]—(1) The soil of navigable tidal rivers, so far as the tide flows & reflows, is *prima facie* in the Crown, & the right of fishery therein is *prima facie* in the public. But the right to exclude the public therefrom & to create a several fishery existed in the Crown & might lawfully have been exercised by the Crown before Magna Carta & the several fishery could lawfully be afterwards made the subject of grant by the Crown to a private individual, either together with or distinct from the soil.

(2) Though Magna Carta made illegal all grants by the Crown, of a several fishery in a navigable river, which had not been in existence in the reign of Hen. 2, yet if evidence now be given of long enjoyment of a fishery there, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct & separate property, & there is nothing to show that its origin was modern, the reasonable presumption is that it became such in due course of law, & therefore must have been created before legal memory.

In an action by M. against D., for trespass to a several fishery, M., in proving the title of his lessors, a corpn., produced a conveyance from P. to them

154 vii. —.]—BLOOMFIELD v. JOHNSTON (1868), 1 R. 8 C. L. 68.—**IR.**

154 viii. —.]—DEVONSHIRE (DUKE) v. HODNETT (1827), 1 Hud. & B. 322.—**IR.**

154 ix. —.]—A several fishery in the river M. which had been granted by the Crown, anterior to the Statute of Magna Carta & had reverted by forfeiture, was subsequently re-granted in 1669, to G. in fee simple. A lease was afterwards made in 1788, by the representatives of the grantee to a party through whom pltf. claimed. Deft. having, at the trial of an action for a disturbance of pltf.'s right, given evidence of the adverse user by him of a fishery within a portion of the fishery claimed by pltf. opposite G.'s lands, for a period of sixty years & upwards:—*Held*: it was evidence from which the jury were at liberty to presume a grant by the owners of the original fishery to deft.—*LITTLE v. WINGFIELD* (1858), 8 I. C. L. R. 279.—**IR.**

154 x. —.]—Salmon-fishings in the open sea around the coast of Scotland may not only become the subject to a Royal grant, but they may be feudalised.—*GAMMELL v. WOODS & FORESTS COMRS. & LORD ADVOCATE OF SCOTLAND* (1859), 3 Macq. 419.—**SCOT.**

m. — General grant of all fisheries.]—No part of the Royal fishery of the B. can pass by grant of the adjoining land & by general grant of all

right of fishery in tidal navigable rivers may be granted by the Crown to private individuals.—*HOTI DAS MAL v. MAHOMED JAKI* (1885), 1 L. R. 11 Cal. 434.—**IND.**

154 iv. —.]—As regards this side of India, the bed of a tidal navigable river is vested in the Crown; & the right of fishery in such river, as also the bed of the river itself, may be granted by Govt. to private individuals.—*SATCOWRI GHOSE MONDAL v. SECRETARY OF STATE FOR INDIA* (1894), 1 L. R. 22 Cal. 252.—**IND.**

154 v. —.]—A *jalkar*, or exclusive right of fishery, granted by the Govt. in a tidal navigable river in Bengal, extends to all tidal navigable waters formed by the river, whether by a gradual change of course or by a sudden irruption, provided those waters are part of the river system within the upstream & downstream limits of the grant.—*Srinath Roy v. DINABANDHU SEN* (1914), L. R. 41 Ind. App. 221; 18 C. W. N. 1217.—**IND.**

154 vi. —.]—By letters patent of Jac. I. & Car. 2, the Crown granted a several fishery within certain limits in the river Bann, in Ireland. A channel, called the New Cut, divides the river within the limits of the fishery into two branches:—*Held*: the letters patent did not give the right to a several fishery in the New Cut, unless it was a branch of the river Bann at the time of the grant.—*O'NEILL v. M'ERLAINE* (1864), 16 I. Ch. R. 280.—**IR.**

dated 1684. He also put in an ancient bill in Chancery filed by P. against, & the answer of, the same corpn. dated 1674. Pltf. also put in evidence a book called the Assembly-book of the Corpn., containing certain entries about 1676:—*Held*: (3) the bill & answer were rightly received in evidence as part of the history of the adverse claim P., ending in the conveyance of 1684; (4) the book & its relevant entries were admissible as an ancient document coming out of proper custody, & purporting to prove the exercise of ownership.

Ancient documents coming out of proper custody & purporting upon the face of them to show exercise of ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership & proof of possession (*per* CUR.).

(5) Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to have been called in the pleadings (following BLACKSTONE) a "free" instead of a "several" fishery. This is more of the confusion which the ambiguous use of the word "free" has occasioned from a period as early as that of the Year Book 7 Hen. 7 P., fo. 13, down to the case of *Holford v. Bailey*, No. 86, *ante*, where it was clearly shown that the only substantial distinction is between an exclusive right of fishery usually called "several," sometimes "free" (used as in "free warren") & a right in common with others, usually called "common of fishery" sometimes free (used as in free port). The fishery in this case is sufficiently described as a "several" fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil (*per* CUR.).—MALCOMSON *v.* O'DEA (1863), 10 H. L. Cas. 593; 9 L. T. 93; 27 J. P. 820; 9 Jur. N. S. 1135; 12 W. R. 178; 11 E. R. 1155, H. L.

Annotations:—*As to* (1) *Appld.* *Murphy v. Ryan* (1868), 16 W. R. 678. *Refd.* *Mills v. Colchester Corpn.* (1867), 36 L. J. C. P. 210; *Rawstone v. Backhouse* (1867), 17 L. T. 441; *Smith v. Andrews*, [1891] 2 Ch. 678. *As to* (2) *Appld.* *A.-G. for British Columbia v. A.-G. for Canada*, [1914] A. C. 153. *Refd.* *Edgar v. English Special Comrs.* (1870), 23 L. T. 732; *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633. *As to* (3) *Consd.* *Blandy-Jenkins v. Dunraven*, [1899] 2 Ch. 121. *Refd.* *Re Walton-cum-Trinley Manor, Ex p. Tomline* (1873), 28 L. T. 12; *Bristow v. Cormican* (1878), 3 App. Cas. 641; *Neill v. Devonshire* (1882), 8 App. Cas. 135; *Haigh & Baxter v. West* (1893), 68 L. T. 531. *As to* (4) *Refd.* *Carlisle Corpn.*

fisheries for the Royal fishery is not appurtenant to the land but is a fishery in gross, part of the Crown's inheritance.—ROYAL FISHERY OF BANNE CASE (1610), Dav. Ir. 55.—IR.

n. — *Whether prior owner deprived of rights.*—Where a piece of land on the banks of a tidal river is exchanged, the right of salmon fishing therein being expressly reserved, a grant in 1873 of that salmon fishing, though from the Crown, will not deprive the prior owner of his right.—RICHARDSON *v.* GRAY, FLEMING *v.* GRAY (1877), 3 App. Cas. 1.—SCOT.

158 i. — *Grant before Magna Carta.*—When a several fishery in a navigable river has been appropriated by the Crown prior to Magna Carta, a grant in letters patent to A. & his heirs of "all the salmon fisheries, pyke, cyle, & other fishings of & in the river" in question, enures to pass a several fishery therein.—ASHWORTH *v.* BROWN (1855), 7 Ir. Jur. 315.—IR.

o. — *Competing grants.*—

Applts. were the proprietors of salmon fishings derived from the town of Inverness. They produced a Crown charter, dated 1591, purporting to be a renewal grant confirming to the town of Inverness "all & whole the waters of Ness, with all the salmon fishings thereof from the stone 'C.' to the sea." Resp. was the proprietor of the land "H." which bordered one side of the river Ness, & is situated nearly equally above & below "C." He possessed one-half of "H." under a Crown charter of confirmation on resignation, dated 1566, granting "Half the lands of 'H.' with the salmon fishings pertaining to the same, on the water of 'Ness,' with an infeftment taken in 1706, which ran, 'Half the lands of 'H.' & half the fishings.' He held the other half of "H." under a grant which contained no mention of fishings. He & his predecessors had always enjoyed without question the salmon fishings opposite that part of "H." lying above "C." There was no exact description of the two halves of "H." *Applts.* claimed to have the exclusive

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C. P. 592

Johnson *v.*

157. — — — Subsequent reversion to Crown —No merger in prerogative.]—NORTHUMBERLAND (DUKE) *v.* HOUGHTON, No. 252.

158. — — —.]—EDGAR *v.* ENGLISH FISHERIES SPECIAL COMRS., No. 245.

159. — — —.] NEILL *v.* DEVONSHIRE (DUKE), No. 41, *ante*.

160. — — — WILSON (CROSSFIELD (1885), 1 T. L. R. 601.

161. — — — In virtue of ownership of soil.] CARLISLE CORPN. *v.* GRAHAM, No. 108, *ante*.

162. — — — Not if soil belongs to subject.] CARLISLE CORPN. *v.* GRAHAM, No. 108, *ante*.

— — — Exclusion of public right.] — See Part II., Sect. 1, sub-sect. 1, A. & B., *ante*.

163. In non-tidal waters By virtue of prerogative — Where soil belonging to subject.] — DEVONSHIRE (DUKE) *v.* PATTINSON, No. 205.

164. — — — Further & ineffective grant in same deed — First grant not invalidated. HANBURY *v.* JENKINS, No. 91.

SUB-SECT. 2. LEASE.

LANDLORD & TENANT.

165. Lease of land & river therein — Whether fishery passes.] RICH *v.* HALL (1661), 1 Keb. 18; 83 E. R. 785.

166. — — —.] Fishery passes under lease & re-lease of land to which fishery is appurtenant. — MOFFATT *v.* POWER (1889), 5 T. L. R. 655.

167. — — —.] — By a lease of land, whether agricultural or other land, through which a river flows, the right of fishing in the river, not expressly reserved to the lessor passes to this tenant & the lessor cannot prosecute persons for unlawfully taking fish in the river. JONES *v.* DAVIES (1902), 86 L. T. 417; 66 J. P. 439; 20 Cox, C. C. 184; *sub nom.* DAVIES *v.* JONES, 18 T. L. R. 367; 16 Sol. Jo. 319, D. C.

right to the fishing below "C." as against resp.: — *Held*: there was no contradiction between the two titles, & applts. were entitled to the enjoyment below "C." as resp.: his possession of the above "C." fully satisfying his title. WARRAND *v.* MACKINTOSH (1890), 15 App. Cas. 52.—SCOT.

p. *Sea coast of Newfoundland — Whether Governor can grant any part thereof.* The whole of the sea coast of Newfoundland is dedicated to the fishery, & therefore the Governor cannot grant any part thereof. ROWE *v.* STREET (1820), 1 Nfld. L. R. 213. Nfld.

PART III. SECT. 3, SUB-SECT. 2.

q. *Reservation of fishing out of* — To a summons quare *freight* deft. pleaded that A. seized in fee, etc., made a lease 1711 to C. for a subsisting term, containing an exception of the fishing. *Held*: the right of fishing was an incorporeal hereditament, & could not

Sect. 3.—How claimed: Sub-sects. 2, 3 & 4.]

168. Reservation of fishery out of lease—Not strictly a reservation—Privilege to lessor only.]—A reservation & exception of the liberty of fishing is not legally a reservation or exception but a privilege granted to the lessor.—*DOE d. DOUGLAS v. LOCK* (1835), 2 Ad. & El. 705; 4 Nev. & M. K. B. 807; 4 L. J. K. B. 113; 111 E. R. 271.

Annotations:—*Refd.* Wickham v. Hawker (1840), 7 M. & W. 63; Durham & Sunderland Ry. v. Walker (1842), 2 Q. B. 940; Doe d. Croft v. Tidbury (1854), 2 C. L. R. 347; Williams v. Hayward (1859), 5 Jur. N. S. 1417. **Mentd.** Doe d. Egremont v. Stephens (1844), 6 Q. B. 208; Doe d. Biddulph v. Hole (1850), 15 Q. B. 848; Proud v. Bates (1865), 6 New Rep. 92; Thellusson v. Liddard, [1900] 2 Ch. 635.

169. ——— Operating as new grant by lessee.]—A right of way reserved to a lessor is in strictness of law an easement newly created by way of grant from the grantee or lessee in the same manner as a right of sporting or fishing (*TINDAL, C.J.*).—*DURHAM & SUNDERLAND RY. CO. v. WALKER* (1842), 2 Q. B. 940; 3 Ry. & Can. Cas. 36; 2 Gal. & Dav. 326; *sub nom.* WALLIS v. HARRISON, *DURHAM & SUNDERLAND RY. CO. v. WALKER*, 11 L. J. Ex. 440, Ex. Ch.

Annotations:—**Mentd.** Midgley v. Richardson (1845), 14 M. & W. 595; Bowes v. Ravenswood (1855), 15 C. B. 512; Hamilton v. Graham (1871), L. R. 2 Sc. & Div. 166.

170. ———.]—Complainant claimed a right of fishery in certain water under a demise from the mayor, aldermen, & burgesses of the borough of C. under a deed, the counterpart of which was not executed by the lessee, by which the right of fishery in the same water was reserved to "the mayor, aldermen, & councillors of the borough of C."—*Held*: the mayor & one of the aldermen of C., being a justice, were not by reason of the interest created by such reservation disqualified from hearing & deciding the complaint.

As to the interest of the magistrates, I have great difficulty in understanding how it can be put. It is clear that they have no interest in the reversion, because the reversion is to the corpn. *qua* corpn. Then, have they any interest in the reservation? If that reservation is to the corporate body then they have no interest as individual members; if it is to the individual members for the time being, then it can only operate as a grant by the lessee; & it is not such a grant; because the lessee has never executed the deed. But it is said that there is a sort of equitable interest, because the lessee might be compelled to execute; but I asked whether there was any authority for saying that the Ct. of Ch. would, at the instance of strangers, & the persons to whom this reservation is made must for this purpose be so considered, compel a lessee to execute a lease; & none was, or, I dare say, could be cited. I think it very unlikely that a ct. of equity would compel a lessee to execute a lease containing a covenant for the benefit of third parties, at the instance of these third parties, unless the lessor joined in the application. Of course, if the lessor joined, the case would be different, because he would clearly have a right to require the execution by the lessee. Something was said about this operating as a continuing licence until revoked; but such a licence could not be granted except by deed (*PATTESON, J.*).—*FULLER v. BROWN* (1849),

3 New Mag. Cas. 172; 3 New Sess. Cas. 603; 13 L. T. O. S. 301; 13 J. P. 445.

171. ——— Must be expressly reserved.]—*JONES v. DAVIES*, No. 167, *ante*.

Reservation out of grant.]—*See* Nos. 2, 140, *ante*.

172. Non-execution of lease by lessee—Whether compellable to execute.]—*FULLER v. BROWN*, No. 170, *ante*.

173. Necessity for deed.]—The owner of lands, by writing not under seal, agreed to let to A. a house & some lands, & the sole right of shooting & fishing over certain other lands, for a term of years, with the right of renewal. A railway co. under the powers of their Acts, purchased part of the lands over which the land-owner had agreed to let to A. the right of shooting; & a railway was made on it; & the shooting on that part, & also on part which was not purchased, was diminished in value, & A. claimed compensation from the railway co.:—*Held*: as the instrument was not under seal, even if A. could complete his title in equity, he had no interest in land & was therefore not entitled to compensation.

Qu.: whether, even if the instrument had been under seal, the right of shooting is such an interest in land as would entitle A. to compensation.

When a person takes a right of shooting or fishing he takes it as the game or fish may be there; there is no contract on the part of the person letting the right that he will keep up the quantity of game or fish (*ERLE, C.J.*).—*BIRD v. GREAT EASTERN RY. CO.* (1865), 19 C. B. N. S. 31 L. J. C. P. 366; 13 L. T. 365; 11 Jur. N. S. 782; 13 W. R. 989; 144 E. R. 790.

—**Mentd.** *Wright v. Shrubbs* (1887), 4 T. L. R. 32; *Warr v. L. C. C.* (1903), 88 L. T. 689.

— **Fishery passing as incorporeal hereditament.]—***See* Nos. 41, 86, 277, 278, *ante*.

174. Agreement not under seal—Enjoyment of fishing by tenant—Landlord's right to rent—For use & occupation.]—By agreement in writing *pltf.* let to *deft.*, at a yearly rent, the right of fishing in a certain river with rod & line only. *Deft.* having so used the fishery:—*Held*: *pltf.* might recover the rent under an *indebitatus* count for the use & occupation of the fishery, & there was no objection to the particulars so describing his claim.—*HOLFORD v. PRITCHARD* (1849), 3 Exch. 793; 18 L. J. Ex. 315; 13 L. T. O. S. 74; 154 E. R. 1065.

Annotation:—*Refd.* *Fitzgerald v. Firbank*, [1897] 2 Ch. 96.

175. Liability of lessor—To maintain stock of fish.]—*BIRD v. GREAT EASTERN RY. CO.*, No. 173, *ante*.

176. Right of lessee to assign or underlet—Covenant against assignment—Extent of application.]—By an indenture of lease *deft.* demised to *pltf.* the exclusive right of fishing in a certain portion of the river, "together with full liberty of ingress, egress, & regress for the said lessee & his authorised friends at all times" during the term thereby granted "to fish with rods & lines in a proper & sportsmanlike manner" . . . " & the fish which they shall then & there take to have & retain to his & their own use." The lessee covenanted that he would not during the term

be the subject of an exception in a deed, & the lease did not operate as a reservation of the right of fishing.—*CORKER v. PAYNE* (1870), 18 W. R. 436.—**IR.**

r. Lease granted to one—Fishery not reserved—Subsequent lease to another—Whether former lease extinguished.]—*HAMILTON v. MUSGRAVE* (1871), 19 W. R. 443.—**IR.**

s. Right of Dominion Government—To grant exclusive right of fishing—In rivers above flow of tide.]—The Dominion of Canada under British North America Act, 1867 (c. 3), has

"underlet, assign, transfer, or set over, or otherwise by any act or deed procure, the said premises to be assigned, transferred, or set over unto any person or persons whomsoever" without the consent in writing of the lessor, his heirs or assigns:—

Held: inasmuch as the covenant did not expressly apply to "any part" of the premises, the lessee was not precluded from granting a licence to another person, limited to two rods, to fish in the river during the residue of the term granted by the lease.—*GROVE v. PORTAL*, [1902] 1 Ch. 727; 71 L. J. Ch. 299; 86 L. T. 350; 18 T. L. R. 319; 46 Sol. Jo. 296.

Annotation:—*Refd.* *Jackson v. Simons*, [1923] 1 Ch. 373.

Compulsory acquisition of locus in quo—Lessee's right to compensation.—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 123, No. 153.

SUB-SECT. 3.—LICENCE.

See Statute of Frauds, 1677 (c. 3); Real Property Act, 1845 (c. 106), sect. 3.

177. Whether operating as a demise.—*COLCHESTER CORPN. v. BROOKE*, No. 356, *post*.

178. Must be by deed.—*FULLER v. BROWN*, No. 170, *ante*.

179. Consideration for licence—Annual fee payable—Right of licensor to increase fee.—*Pltf.* claimed to be entitled to have a licence to dredge oysters in defts.' fishery on payment of £2 2s., either as the fixed, or as a reasonable fee; the fee had been £2 2s. for one hundred & fifty years; but defts. had refused to grant a licence unless £3 3s. was paid:—*Held*: (1) *pltf.* must show that he paid or tendered a reasonable fee; an advance of £50 per cent. on a fee received one hundred & fifty years ago was not unreasonable, the *onus* lay on *pltf.* to show that it was, & as he had not done so, he was not entitled to succeed.

(2) This claim cannot be supported by custom as being a claim to a *profit à prendre in alieno solo*, nor can it be supported by prescription, as a prescription for "inhabitants" is too indefinite (*KELLY, C.B.*).—*MILLS v. COLCHESTER CORPN.* (1868), L. R. 3 C. P. 575; 37 L. J. C. P. 278; 16 W. R. 987, Ex. Ch.; *affg.* (1867), L. R. 2 C. P. 476.

Annotations:—*As to* (1) *Refd.* *Bryant v. Foot* (1868), L. 3 Q. B. 497; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 7.

SUB-SECT. 4.—PRESCRIPTION.

See Prescription Act, 1832 (c. 71).

180. How pleaded—Nature of fishery must be specified.—*ANON.* (1665), *Hard.* 407; 145 E. R. 521.

181. —.—*Declaration for fishing in pltf's. several fishery in Orford Haven. Plea, averring*

locus in quo to be an arm of the sea, in which all have a right to fish. Replication averring exclusive right of fishery by prescription, traverses the general right. Rejoinder traversing the prescriptive right of *pltf's.* Demurrer thereto. The rejoinder is good; for the traverse in the replication was bad & deft. might pass it by.

The *prima facie* right in all the King's subjects can only be taken away by averment of a contradictory particular right, & the issue must be upon that particular claim (*per CUR.*).—*RICHARDSON v. ORFORD CORPN.* (1793), 1 Aust. 231; 2 Hy. Bl. 182; 145 E. R. 857, Ex. Ch.

Annotation:—*Refd.* *Crichton v. Coltery* (1870), 19 W. R. 107.

182. Must be proved—Cannot be presumed.—Right of fishing is common & public in arms of the sea & navigable rivers, not in private rivers.

In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides, & it generally extends *ad filum medium aquæ* (*LORD MANSFIELD, C.J.*).

It is consistent with all the cases that he [the proprietor of land on either side] may have an exclusive privilege of fishing, although it be an arm of the sea. Such a right shall not be presumed, but the contrary, *prima facie*; but it is capable of being proved (*LORD MANSFIELD, C.J.*).

The cited cases prove only this distinction that navigable rivers or arms of the sea belong to the Crown; & not, like private rivers to the land-owners on each side. The Crown may grant a several fishery in a navigable river where the sea flows & reflows, or in an arm of the sea. Now if it may be granted, it may be prescribed, for a prescription implies a grant. But it can't be presumed, it must be proved (*YATES, J.*).—*CARTER v. MERCOT* (1768), 1 Burr. 2162; 98 E. R. 127.

Annotations:—*Refd.* *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *R. v. Stimpson* (1863), 1 B. & S. 301; *Murphy v. Ryan* (1868), 16 W. R. 678.

183. — As extensively as claimed.—*ROGERS v. ALLEN*, No. 91, *ante*.

184. Who may prescribe—Not inhabitants as such.—*MILLS v. COLCHESTER CORPN.*, No. 179, *ante*.

185. — Not fluctuating & uncertain body.—*GOODMAN v. SALTASH CORPN.*, No. 262.

186. — Not public.—*NEILL v. DEVONSHIRE (DUKE)*, No. 41, *ante*.

187. — Owners occupiers.—*TILBURY SILVA*, No. 286, *post*.

188. — Freeholders.—A prescription in a *que* estate for a *profit à prendre in alieno solo* without stint & for commercial purposes is unknown to the law.

Freeholders in parishes adjoining the river Wye had been in the habit of fishing a non-tidal portion of the river for centuries, not by stealth or indulgence, but openly, continuously, as of right & without interruption, not merely for sport

power to grant by lease an exclusive right of fishing in rivers above the flow of the tide.—*ROBERTSON v. STEADMAN* (1876), 3 Pug. 621.—*CAN.*

t. Lease ultra vires—Whether option in lease severable.—*R. v. BRITISH AMERICAN FISH CORPN.* (1919), 39 S. C. R. 651; 54 D. L. R. *CAN.*

PART III. SECT. 3, SUB-SECT. 4.

186 i. Who may prescribe—Not public.—The public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable the tide does not ebb & flow.—*MURPHY v. RYAN* (1868), 1 R. 2 C. L. 143.—*IR.*

a. Right of public fishery—

exercised by prescription. The right of the public to fish in tidal waters in British India may be curtailed by an exclusive privilege acquired by grant or prescription by certain persons within certain limits.—*VIRESA v. TATAYYA* (1855), 1 L. R. 8 Mad. 467.—*IND.*

b. Forty years' enjoyment.—A grant of "fishings," merely, is not a

Sect. 3.—How claimed: Sub-sects. 4 & 5. Sect. 4: Sub-sects. 1 & 2.]

or pleasure, but commercially, in order to sell the fish & make a living by it. Riparian proprietors claiming to be owners of the bed of the river brought an action for trespass against the freeholders for fishing:—*Held*: a legal origin for the right claimed by the freeholders could not be presumed, & the action lay.—*HARRIS v. CHESTERFIELD (EARL)*, [1911] A. C. 623; 80 L. J. Ch. 626; 105 L. T. 453; 27 T. L. R. 548; 55 Sol. Jo. 686, H. L.; *affg.* S. C. *sub nom.* *CHESTERFIELD (LORD) v. HARRIS*, [1908] 2 Ch. 397, C. A.

Annotations:—*Consd.* *Staffordshire & Worcestershire Canal Navigation v. Bradley*, [1912] 1 Ch. 91. *Refd.* *Hodgson v. McCreagh* (1923), 92 L. J. Ch. 426. *Mentd.* *Malvern Hills Conservators v. Whitmore* (1909), 100 L. T. 841; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140.

— **Common of fishery.**—*See* COMMONS, Vol. XI., p. 20, Nos. 232, 235–237.

189. Prescriptive corporation.—A co. or fraternity of free fishermen existed from time immemorial within the manor of F., all the members of which were admitted tenants of the manor, & took an oath of homage to the lord. No grant to the co. as a corpn. was in existence, but from numerous ancient documents it appeared that the co. had the exclusive right of dredging for oysters & taking other kinds of fish within the manor, for which it paid a rent of £1 3s. 4d. to the lord. By an Act passed in 1810 it was recognised as a co. in the nature of a prescriptive corpn., & it was recited that the members had time out of mind dredged oysters exclusive of all other persons, & that the fishery was of great benefit to the public; it was thereby enacted that the co. might exercise all the powers then vested in it, & fresh powers of raising money & charging the profits of the fishery by way of mtge. were given it, the form of mtge. containing no power of sale. Rules were laid down for the management of the co., but it was provided that nothing in the Act should be construed to incorporate the co. The co. made bye-laws for the regulation of the dredging of oysters, & subject to these bye-laws, the privilege of dredging & fishing was enjoyed by the members for their own benefit. A petition having been brought by a creditor for winding up the co.:—*Held*: the co. was a corpn. in which the exclusive right of fishing within the manor was vested; but the corpn. held the right on a condition or trust for the individual members; & if the co. was wound up this right of fishing could not be sold by the liquidator, & therefore the winding-up order would be useless. The ct. accordingly refused to make any order for winding up. *Re FREE FISHERMEN OF FAVERSHAM (CO. OR FRATERNITY OF)* (1887), 36 Ch. D. 329; 57 L. J. Ch. 187; 57 L. T. 577; 3 T. L. R. 797, C. A.

Annotations:—*Mentd.* *Re South London Fish Market Co.* (1888), 39 Ch. D. 324; *Re Barton-upon-Humber & District Water Co.* (1889), 42 Ch. D. 585; *Re London Health Electrical Institute* (1897), 76 L. T. 98.

grant of salmon fishing; but a grant of "fishings" merely if followed by the requisite endurance of possession, will establish a right of salmon fishing, even against the Crown; for by the positive prescription of forty years under the Act, 1617, c. 12, the rights of private parties are protected against all challenge, whether regal or popular.—*LORD ADVOCATE v. SINCLAIR* (1867), L. R. 1 Sc. & Div. 171.—*SCOT.*

e. —. —.]—Where a base right to salmon fishing has been followed by

forty years' possession & enjoyment it is unimpeachable.—*ZETLAND (EARL) v. GLOVER INCORPORATION OF PERTH* (1870), L. R. 2 Sc. & Div. 70.—*SCOT.*

d. —. —.]—The prescriptive forty years' enjoyment may be by net & coble as well as by stake net.—*MCDONALL v. LORD ADVOCATE* (1875), L. R. 2 Sc. & Div. 431.—*SCOT.*

e. *Barony title*—*Followed by prescriptive possession.*—A barony title is a sufficient title to carry salmon

190. Rights in gross—Cannot be prescribed for.]—Rights in gross are not within Prescription Act.

To a declaration in trespass for breaking & entering pltf.'s close & lands, & landing fishing nets there, deft. pleaded that the land was the shore of an inland lake, & that deft. & all his ancestors, whose heir he was, for sixty years before suit, enjoyed as of right, & without interruption, a free fishery in the said water, with a right of landing their nets on the shore as to the free fishery appertaining. There was a similar plea alleging the enjoyment for thirty years:—*Held*: the pleas were bad.—*SHUTTLEWORTH v. LE FLEMING* (1865), 19 C. B. N. S. 687; 34 L. J. C. P. 309; 11 Jur. N. S. 841; 14 W. R. 13; 144 E. R. 956.

Annotations:—*Folld.* *Warwick v. Gonville & Caius College* (1890), 6 T. L. R. 447; *Mercer v. Denne*, [1904] 2 Ch. 534. *Consd.* *Itansgate Corpn. v. Debling* (1906), 70 J. P. 132. *Refd.* *Mercer v. Denne*, [1905] 2 Ch. 538.

191. —. —.]—WARWICK v. GONVILLE & CAIUS COLLEGE (1890), 6 T. L. R. 447, C. A.

192. Extent of right—No right to erect weir—Obstructing passage of fish.]—WELD v. HORNBY, No. 322, *post*.

193. —. — To fish without stint.]—CHESTERFIELD v. FOUNTAINE, No. 530, *post*.

194. —. — For commercial purposes—Invalid.]—HARRIS v. CHESTERFIELD (EARL), No. 188, *ante*.

Common of fishery.]—See COMMONS, Vol. XI., pp. 19–21, Nos. 224–228, 232, 235–237, 240–242.

Evidence of user.]—See Sect. 5, sub-sect. 2, *post*.

Prescription generally.]—See EASEMENTS, Vol. XIX., pp. 53–75, Nos. 204–149; pp. 200–203, Nos. 1524–1551.

SUB-SECT. 5.—CUSTOM.

195. Cannot be claimed by custom.]—A.-G. FOR BRITISH COLUMBIA v. A.-G. FOR CANADA, No. 9, *ante*.

—.]—*See, further*, EASEMENTS, Vol. XIX., pp. 204, 205, Nos. 1563–1567.

Common of fishery.]—See COMMONS, Vol. XI., p. 19, Nos. 221–223; p. 20, Nos. 231, 233, 238, 239.

SECT. 4.—PRESUMPTIONS AS TO OWNERSHIP OF FISHERIES.

SUB-SECT. 1.—IN TIDAL WATERS.

196. Owner of fishery is owner of soil.]—DEVON (COUNTESS) v. EXETER CORPN., TOPPESHAM

fishings, if followed by prescriptive possession.—*NICOL v. LORD ADVOCATE* (1868), 6 Macph. (Ct. of Sess.) 972; 40 Sc. Jur. 557.—*SCOT.*

PART III. SECT. 4, SUB-SECT. 1.

f. Priority of occupancy.]—To entitle a party claiming to the prior right to a position on the fishing ground it is not sufficient for the grapnel or anchor to be overboard, it should have taken ground.—ARNOLD v.

CASE (1276), *Hale de Portibus Maris* (Hargrave's Tracts), c. 4, p. 55.

Annotation:—Refd. Whitstable Free Fishers v. Foreman (1868), L. R. 3 C. P. 578.

197. —.]—CONSTABLE'S (SIR HENRY) CASE (1599), Moore's History & Law of Foreshore, p. 233.

Annotations:—Refd. Prideaux v. Warne (1673), Freem. K. B. 355; Penryn Corp'n. v. Holm (1877), 37 L. T. 133.

198. —.]—SOMERSET (DUKE) v. FOGWELL, No. 277, *post*.

199. — Presumption against Crown — Fore-shore.]—*Primâ facie* the Crown is entitled to every part of the foreshore of the sea between high & low water-mark. But, proof of the ownership of a several fishery over part of the foreshore raises a presumption against the Crown that the freehold of the soil of that part of the foreshore is in the owner of the fishery.

Qu.: whether a right of several fishery which is appurtenant to a manor may be granted by copy of the Ct. Roll although the right be not exercisable within the ambit of the manor.

Demise by copy of Ct. Roll is an assertion of a right of ownership; enjoyment under it is evidence of ownership (LORD HERSHELL).—A.-G. v. EMERSON, [1891] A. C. 649; 61 L. J. Q. B. 79; 65 L. T. 564; 55 J. P. 709; 7 T. L. R. 522, H. L.

Annotations:—Consd. Hindson v. Ashby, [1896] 2 Ch. 1. *Appld.* Beaufort v. Aird (1904), 20 T. L. R. 602. *Refd.* Eeroyd v. Coulthard, [1897] 2 Ch. 551; Hanbury v. Jenkins, [1901] 2 Ch. 401; Foster v. Warblington U. D. C. (1905), 69 J. P. 42; Fitzhardinge v. Purcell, [1908] 2 Ch. 139. *Mentd.* Holywell Union Assmt. Com. & Northop Churchwardens v. Halkyn District Mines Drainage Co., Holywell Union Assmt. Com. & Halkyn Churchwardens v. Halkyn District Mines Drainage Co. (1894), 71 L. T. 818.

200. — Tidal river — Although "several" omitted in grant.]—In the case of tidal waters, there is a presumption against the Crown that the freehold of the soil of that part of the foreshore over which a several fishery is proved to exist is vested in the owner of the several fishery.

The words "several" or "*separalis piscaria*" did not appear in the various ancient documents that had been produced, but the omission of these words was immaterial (WARRINGTON, J.). — BEAUFORT (DUKE) v. AIRD (JOHN) & CO. (1904), 20 T. L. R.

201. Owner of soil is owner of fishery — Not where grant of soil simpliciter.]—By lease & release dated in 1773, A. B. lord of the manors of M. H. & P. P. bargained & sold unto C. D. E. F. & G. H. "All that messuage, tenement, boat-house, etc., & also all that & those the sea-grounds, oyster-layings, shores, & fisheries of him A. B., commonly called & known by the name & names of M. H. & P. P. shores or sea-grounds, with full & free liberty to C. D. E. F. & G. H. & their heirs & assigns for ever to fish, dredge, & lay oysters thereon, & from thence to take & carry away

the same; which said sea-grounds, oyster shores, & fisheries, extended from the south at low-water mark, to the north at high-water mark, & from certain sea-grounds on the east to other sea-grounds on the west. & all which said sea-grounds, oyster-layings, shores, & fisheries thereby granted, released, etc., contained in the whole by estimation 800 acres of land covered with water, or thereabouts, as the same were beacons, marked, & stubbed out. Reservation to the grantor, his heirs, & assigns, lord of the two manors, of all manner of fish-royal, & all wrecks of the sea, flotsam, jetsam, & ligam within the said manors, & all manner of franchises." & by the *tenendum* the grantees were to hold the messuage, tenement, & boat-house, sea-grounds, oyster-layings, shores or fisheries, hereditaments & premises, with the appurtenances, of the grantor, lord of the two manors, by such suit of ct. & other services as were or of right ought to be done & performed by other the freehold tenants of the same respective manors seised of estates of inheritance in fee: — *Held*: by this deed the right of soil in the sea-shore passed to the grantees. It appeared that since the date of the deed the sea had imperceptibly & gradually encroached upon the land, & consequently that the high & low-water mark had varied in the same degree. By the deed the right of soil in that portion of land which from time to time lay between high & low-water mark passed to the grantees.

The fishery would not pass by the word soil (LITTLEDALE, J.). — SCRATTON v. BROWN (1825), 1 B. & C. 485; 6 Dow. & Ry. 536; 107 E. R. 1110.

Annotations:—Consd. Hindson v. Ashby, [1896] 2 Ch. 1. *Refd.* *Re* Alston's Estate (1856), 28 L. T. O. S. 337; A.-G. v. Chambers, A.-G. v. Rees (1859), 4 De G. & J. 55; Mellor v. Walmesley, [1905] 2 Ch. 161. *Mentd.* A.-G. v. Hammer (1858), 27 L. J. Ch. 837.

Presumption as to public right of fishing. — See Part II., Sect. 1, sub-sect. 1, A. & B., *ante*.

Presumption as to ownership of soil generally. — See WATERS & WATERCOURSES.

IN

202. Owner of land abutting on river Entitled *usque ad medium flum aquæ*.]—Where a private river runs through a manor, the presumption of law is, that each owner of land within the manor & on the bank of the river has the right of fishing in front of his land; & if the lord claims a several fishery, he must make out that claim by evidence.

From the words of a deed under which the lord claimed, it was attempted to raise a presumption that the right of several fishery within the manor passed to him by that deed as appurtenant to the manor: — *Held*: this presumption was rebutted by proof, that, before the date of that deed, owners of land within the manor & on the bank of the river had the right of free-fishery therein. —

WHITEWAY (1883), 6 Nfld. L. R. 518.—NFLD.

g. —.]—Where a party, in accordance with Coast Fisheries Act, set his moorings & cod-net, but fearing injury from ice took in his net, leaving his moorings, which were afterwards carried away by stress of weather. Shortly after other moorings were set in the same place by another party. The first party to occupy the ground claimed in an action against the second party

that he had the right to return as he did & reset the trap so taken up: — *Held*: the first party lost & never after acquired his original place as an intervener.—DORAN v. (1886), 7 Nfld. L. R. 120.—NFLD.

h. River divided by sandbank two streams.]—WEDDERBURN v. PATERSON (1864), 2 Macph. (Ct. of Sess.) 902; 36 Sc. Jur. 452.—SCOT.

k. Right of fishing on one side of river—*Primâ facie* right of

Against fishing on other side. It would seem that even a *primâ facie* title to fish for salmon on one side of a will give a right of challenge fishing for on the side.—STUART v. McBARNET (1868), L. R. 1 Sc. & —SCOT.

PART III. SECT. 4, SUB-SECT 2.

of land abutting on
of joint right of
in the case of a

Sect. 4.—Presumptions as to ownership of fisheries:
Sub-sect. 2. Sect. 5: Sub-sect. 1, A.]

LAMB v. NEWBIGGIN (1844), 1 Car. & Kir. 549, N. P.

Annotations:—Reid. *Devonshire v. Pattinson & Carlisle Corpn.* (1887), 3 T. L. R. 293; *Tracey Elliot v. Morley* (1907), 51 Sol. Jo. 625.

203. ———.]—By a private Inclosure Act, passed in 1796, an allotment was directed of certain waste lands in a manor, the mines, etc., being reserved to the lord, & the allotments were declared freehold of the allottees to all intents & purposes. There was a saving clause providing that nothing in the Act should affect the title of the lord to the mines or to the seignories & royalties, franchises & liberties incident to the manors, but that the lord, his heirs & assigns, should enjoy (*inter alia*) all piscaries, fishing, etc., which could or might be claimed by him or them as owner or owners of the soil of the moors, commons, & waste grounds, in as full, ample, & beneficial a manner to all intents & purposes as if the Act had not been passed. The waste lands were bounded on one side by the river E., & the soil of half the bed belonged to the lord. There was no evidence that any of the tenants had ever enjoyed any rights of fishing, or any other commonable rights, over any part of the bed of the river; but there was evidence that at the time of the passing of the Act the lord exercised & let to tenants the right of fishing over half the bed. The comrs. allotted to L. a part of the waste called E., described as bounded on the west by the river, & gave an acreage which was correct for the land if the half bed was not included. In 1890 the successor of the lord granted to plff. the right of fishing in half the river between two points lying above & below E. Plff. brought his action to establish his right of fishing in front of E., & a right of landing on E. for fishing purposes. The L. family insisted that the allotment to L. passed the soil of the bed *ad medium filum*, & that they had the exclusive right of fishing over so much as adjoined E., & asked for an injunction to restrain plff. from fishing opposite E., & from landing on E. for fishing purposes:—**Held:** as the half bed of the river had been enjoyed & let by the lord as a separate tenement up to the passing of the Act, & the commoners had never exercised any rights of common over it, it did not form part of the waste lands which the comrs. were authorised to allot, & even if they had expressly included half the bed in the allotment to L., he would have taken no interest in the bed, & he had no right of fishing.—**ECROYD v. COULTHARD**, [1898] 2 Ch. 358; 67 L. J. Ch. 458; 78 L. T. 702; 14 T. L. R. 462, C. A.

Annotations:—Reid. *Hanbury v. Jenkins*, [1901] 2 Ch. 401; *Hough v. Clark & Hall* (1907), 23 T. L. R. 682.

204. ———.]—A riparian owner on one bank claimed the exclusive right to the whole bed of a river & of the fishery therein as lord of the manor & also by user from time immemorial. The riparian owner on the opposite bank disputed the claim & brought an action for an injunction against trespass:—**Held:** (1) an ordinary high tide is taken at the point of the line of the medium high tide between the springs & neaps, ascertained by taking the average of the medium tides during the year; (2) plff. having acquired his lands, which

were not part of the manor, by grants, in which the right to half the bed of the river & the fishing rights over such half would be presumed, deft.'s evidence was insufficient in the action to establish his exclusive right to the whole bed of the river or the fishery therein.

The right of fishing in non-tidal rivers or in inland streams is presumptively in the several riparian owners *ad medium filum aquæ*, & if the same person be the owner of both banks he has the entire fishing to the extent of the length of his land (**JOYCE, J.**).—**TRACEY ELLIOT v. MORLEY (EARL)** (1907), 51 Sol. Jo. 625.

205. ——— **Presumption rebuttable—On proof of surrounding circumstances.]**—The presumption, that by a conveyance describing the land thereby conveyed, as bounded by a river, it is intended that the bed of the river *usque ad medium filum* should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of such having been the intention. The owners of a manor by conveyances made respectively in 1767 & 1846 granted to purchasers pieces of riparian land fronting a river, the bed of which formed parcel of the manor. It was proved that, prior to the earliest of the conveyances, a fishery in the river fronting the lands conveyed had for a very long time back been from time to time let to tenants by the lords of the manor as a separate tenement, distinct from the riparian closes; & that at the date of the conveyances in 1846 such fishery was actually under lease to tenants. The grantees under the before mentioned conveyances & their successors in title had until the acts complained of in the action never claimed or exercised any right of fishing over the bed of the river by virtue of any right of soil or otherwise but the owners of the manor or their tenants of the fishery had always fished without interruption:—**Held:** in the circumstances the conveyances ought not to be construed as passing any portion of the bed of the river to the grantees.

Qu.: whether the Crown ever could have as part of its prerogative an exclusive right of fishing in a non-tidal river flowing over the soil of a subject; & whether if the Crown could have such right, it could be granted to a subject as a franchise.

If the Crown were both owner of the bed of the river & of the right of fishing, it is obvious that the right of fishing would be a proprietary & not a prerogative right (**FRY, L.J.**).—**DEVONSHIRE (DUKE) v. PATTINSON** (1887), 20 Q. B. D. 263; 57 L. J. Q. B. 189; 58 L. T. 392; 52 J. P. 276; 1 T. L. R. 161, C. A.

Annotations:—Consd. *Pryor v. Petre*, [1894] 2 Ch. 11. **Reid.** *Tilbury v. Silva* (1890), 45 Ch. D. 98; *Simpson v. Godmanchester Corpn.* (1895), 65 L. J. Ch. 154; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554. **Mentd.** *Eliot v. Bristol Corpn.* (1895), 72 L. T. 752.

206. ———.]—There is a presumption that where a river divides two properties, the true line of division is the middle of the stream . . . this is only a presumption which may be rebutted (**COZENS-HARDY, M.R.**).

A fishery is an incorporeal hereditament (**BUCKLEY, L.J.**).—**CHESTERFIELD (LORD) v. HARRIS**, [1908] 2 Ch. 397; 77 L. J. Ch. 688; 99 L. T. 558; 24 T. L. R. 763; 52 Sol. Jo. 639, C. A.;

grant of lands abutting on an inland loch, with parts & pertinents, there is a presumption that the grantee

a joint right of property in the loch, with the other proprietor or proprietors whose lands abut upon

it.—**MEACHER v. BLAIR-OLIPHANT**, [1913] S. C. 417—**SCOT.**

PART III.—PRIVATE FISHERIES.

affd. sub nom. HARRIS v. CHESTERFIELD (EARL), [1911] A. C. 623, H. L.

Annotations:—**Refd.** Staffordshire & Worcestershire Canal Navigation v. Bradley, [1912] 1 Ch. 91; Hodgson v. McCroagh (1923), 92 L. J. Ch. 426. **Mentd.** Malvern Hills Conservators v. Whitmore (1909), 100 L. T. 841; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140.

207. Ownership of soil of river—Owner of fishery—Presumption rebuttable.—LAMB v. NEW-BIGGIN, No. 202, *ante*.

208. ———.]. trespass by the lord of a manor against owner of an ancient mill for breaking & entering the mill pond, by fishing & taking the fish, the pond having originally been on a portion of the ancient waste of the manor; the mill being copyhold of the manor, & passing with a house by the words “mill, messuage, with appurtenances,” & an Inclosure Act making no mention of the pond; & there being contradictory evidence of acts of ownership:—*Held*: *primâ facie*, if the pond was parcel of the ancient waste at the time of the Act, the soil still continued to be in the lord, but he could not recover unless he had exclusive right to the fishing as well as to the soil, & the jury finding that the soil was in him, but that the mill-owner had a right of fishing, the verdict was entered for pltf. on the pleas not guilty & not possessed, but for deft. on a plea justifying under a prescriptive right of fishing.

A “several fishery,” like a right of free-warren, is a right to go on the soil of another. The right to fish depends, as the right to game, upon the right to the soil on which it is taken; & the lord of a manor has no greater right in this respect than any other person as owner; *primâ facie*, if parcel of the waste, the soil would be in the lord, & as the Act contains no mention of the pond, if the soil was in the lord at the time of the Act, it is so still (MARTIN, B.).—CLARKE v. MERCER (1859), 1 F. & F. 492, N. P.

209. ———.].—CARLISLE CORPN. v. GRAMHAM, No. 108, *ante*.

210. ———.].—A.-G. FOR BRITISH COLUMBIA v. A.-G. FOR CANADA, No. 9, *ante*.

211. Owner of fishery—Owner of soil.—The presumption is, that he who has a separate fishery is owner of the soil.—ANON. (1772), 10ff, 98 E. R. 696.

212. ———.].—The owner of a several fishery is *primâ facie* the owner of the soil.—PATHERICHIE v. MASON (1774), 2 Chit. 658.

213. ———.].—SOMERSET (DUKE) v. FOGWELL, No. 277, *post*.

214. ———.].—HOLFORD v. BAILEY, No. 86, *ante*.

215. ———.].—The allegation of a several fishery, *primâ facie*, imports ownership of the soil. *Qu.*: whether the soil of lakes, like that of fresh water rivers, *primâ facie* belongs to the owner of the land or of the manors on either side, *ad medium filum aquæ*, or whether it belongs to the King in right of his prerogative?

It is admitted that a several fishery may exist independently of the ownership of the soil (COCBURN, C.J.).—MARSHALL v. ULLESWATER STEAM NAVIGATION CO. (1863), 3 B. & S. 732; 1 New Rep. 519; 32 L. J. Q. B. 139; 8 L. T. 416; 27 J. P. 516; 9 Jur. N. S. 988; 11 W. R. 489; 122 E. R. 274; *affd.* (1865), 6 B. & S. 570, Ex. Ch.

Annotations:—**Consd.** Bristow v. Cornican (1878), 3 App. Cas. 641; Hindson v. Ashby, [1896] 2 Ch. 1. **Refd.** Foster v. Wright (1879), 41 J. P. 7; Devonshire v. Pattinson & Carlisle Corpn. (1887), 3 T. L. R. 293; Moffatt v. Power (1889), 5 T. L. R. 655; A.-G. v. Emerson, [1891] A. C. 649; Ecroyd v. Coulthard, [1897] 2 Ch. 554; Beaufort v. Aird (1901), 20 T. L. R. 602.

216. ———.].—A.-G. v. EMERSON, No. 190, *ante*.

217. ———.].—Unless evidence to contrary.—HINDSON v. ASHBY, No. 111, *ante*.

218. ———.].—HANBURY v. JENKINS, No. 94, *ante*.

Presumptions as to ownership of soil generally.—See WATERS & WATERCOURSES.

SECT. 5. EVIDENCE OF TITLE.

SUB-SECT. 1. DOCUMENTARY EVIDENCE.

A. A.

See, generally, EVIDENCE, Vol. XXII., pp. 191 *et seq.*

219. Conveyance.—MALCOMSON v. O'DEA, No. 156, *ante*.

220. Former legal proceedings—Relating to same locus in quo Between different parties Award.—In an action for injuring pltf.'s reversionary interest in a several fishery in an estuary of the sea, & in the soil of the bottom of the sea, both in the possession of F. as her tenant, issues were taken on pltf.'s right to the fishery & ownership of the soil. The controversy was, whether the soil belonged to pltf. or to G. Pltf. gave in evidence the proceedings in an action by F. against G. One count in that action was for injuring F.'s fishery by tearing up soil, described as being the soil of the now pltf., & thereby destroying the fish. To this there was a plea of not guilty. The amount of damages was referred; & the arbitrator awarded nominal damages. It was proved that the act complained of in that action was committed in a part of the same estuary, & that the soil there was claimed by the same title as the soil which was the subject of the present action, & that deft. in the present action became tenant to G. subsequently to the award. The proceedings were admitted; & pltf. had a verdict:—*Held*: they were improperly admitted, & the award not being evidence of reputation; & the proceedings not being admissible for pltf., the proceedings not being admissible for pltf., who was not a party or shown to be a privy to F., though deft. was privy to G. —WENMAN (LADY) v. MACKENZIE (1855), 5 E. & B. 117; 3 C. L. R. 1307; 25 L. J. Q. B. 11; 25 L. T. O. S.

PART III. SECT. 5, SUB-SECT. 1.—A.

Former legal proceedings—Relating to same locus in quo—Between different parties.—Pltf. tendered in certain proceedings in two possessory suits between pltf.'s ancestor & V., who each claimed to be entitled to a several fishery in the

entire of that portion of the river in half of which the several fishery was claimed by pltf. in the present cause, including the minutes of the decree whereby the ct. granted an injunction whereby the ct. granted an injunction to quiet pltf.'s ancestor & V. in such possession as they had at the time of filing of their respective bill:—*Held*: the decree was evidence by way of

reputation of the several fishery at the time of the bills being filed.—DEVONSHIRE (DUKE) v. NEILL (1877), 2 L. R. 1r. 132.—1R.

*An ancient deed—Containing un-
derstanding—No dispute as to
genuineness of document.*—As a link
in pltf.'s title to a several fishery an

Sect. 5.—Evidence of title: Sub-sect. 1, A., B. & C.; sub-sect. 2, A. & B.]

267; 1 Jur. N. S. 1015; 3 W. R. 626; 119 E. R. 517.

221. ——— Action.]—The corpn. of O. claiming the exclusive right of fishery in O. haven, their lessees brought an action against two fishermen for an invasion of that right. The evidence offered on the part of plffs. consisted of a charter of Queen Elizabeth, dated in 1569, confirming all former charters of the corpn., & giving them power to make bye-laws for the preservation of the fish in the haven; a statute of 27 Eliz. c. 21, for the preservation of O. haven, & a private Act of 31 Eliz. c. 1, confirming the former Act, in both of which mention was made of the interest of the corpn.; the record in an action brought by the corpn. in 1792 against a fisherman for dredging for oysters in their water, in which the corpn. succeeded in establishing their right to the oysters; a book kept by the chamberlain of the corpn. containing entries from 1792 downwards of various sums paid by inhabitants of O., as well as by strangers, for licences to fish in the haven for "floating fish," & oral testimony showing that the corpn. had from that period down to the present time claimed the exclusive right to the floating fish within the limits of the haven, & had on many occasions obstructed & prevented unlicensed persons from fishing therein:

Held: the jury were warranted in finding upon this evidence that the corpn. had the right claimed; & plff.'s case was not displaced by evidence on the other side that a great number of persons had constantly fished without licences, though repeatedly warned off. *MANNALL v. FISHER* (1859), 5 C. B. N. S. 856; 23 J. P. 375; 5 Jur. N. S. 141 E. R. 313.

222. ——— Bill & answer in Chancery.]—*MALCOMSON v. O'DEA*, No. 156, *ante*.

223. ———.]—Deft. in an action to try a right of fishery, after judgment had been given for plff., accidentally discovered certain documents prepared for the defence of a previous action dealing with the same subject-matter, which action was defended at the cost of a predecessor in title of plff.'s. Plff. obtained possession of the documents after copies of them had been taken by deft. Deft. having appealed:—*Held:* deft. was not precluded on the ground of privilege from giving secondary evidence of the contents of the documents.—*CALCRAFT v. GUEST*, [1898] 1 Q. B. 759; 67 L. J. Q. B. 505; 78 L. T. 283; 46 W. R. 120; 42 Sol. Jo. 313, C. A.

Annotations: *Consd.* *Ashburton v. Pape*, [1913] 2 Ch. 469. *Refd.* *Goldstone v. Williams, Deacon*, [1899] 1 Ch. 47; *West Riding of Yorkshire Rivers Board v. Tadcaster R. D. C.* (1907), 97 L. T. 436.

224. Corporation books—Entries of licences to fish.]—*MANNALL v. FISHER*, No. 221, *ante*.

ancient deed made subsequent to a Crown grant was read in evidence whereby A. & B. professed to grant the fishery to C., & containing an indorsement without date, to the effect that possession had been given by one of the grantors in the presence of the witnesses. No question having been made as to the document being genuine:—*Held:* the indorsement was evidence of the fact stated therein.—*LITTLE v. WING* (1858), 8 L. C. L. R. 279.—*IR.*

o. Attested copies of grant.]—*It. v. DONEGAL JJ.* (1859), 12 Ir. Jur. 185.—*IR.*

p. Documents of predecessor in title—Relating to locus in quo.]—*POWELL v. HETTERMAN* (1881), 8 L. R. Ir. 130.—*IR.*

PART III. SECT. 5, SUB-SECT. 1.—B.

q. Crown lease—Proof of payment of rent under lease.]—In an action of trespass in a several fishery, a grant for a lease of the fishery granted by Queen Elizabeth, with proof of payment of rent under the lease:—*Held:* sufficient evidence to presume a seisin in the

225. ———.]—*MALCOMSON v. O'DEA*, No. 156, *ante*.

226. Royal charter.]—*MANNALL v. FISHER*, No. 221, *ante*.

227. Private statute.]—*MANNALL v. FISHER*, No. 221, *ante*.

228. Tithe maps.]—*PALMER v. ANDREWS* (1902), cited *Moore's History & Law of Fisheries*, 147.

Grant.]—*See Sect. 3, sub-sect. 1, ante*.

B. Sufficiency.

See, generally, *EVIDENCE*, Vol. XXII., pp. 191 *et seq.*

229. Crown grant—Further & ineffective grant in same deed—First grant not invalidated.]—*HANBURY v. JENKINS*, No. 94, *ante*.

230. Recitals—Insufficient—Without acts of possession.]—*BRISTOW v. CORMICAN*, No. 131, *ante*.

———.]—*See, generally*, *DEEDS*, Vol. XVII., pp. 362-369, Nos. 1737-1806.

Documentary title without proof of user.]—*See Sub-sect. 2, A., post*.

Grant.]—*See Sect. 3, sub-sect. 1, ante*.

C. In Support of User.

See Sub-sect. 2, post.

SUB-SECT. 2.—USER.

A. In General.

231. Necessary to support documentary title—Crown grant.]—*COLCHESTER CORPN. v. PRESTNEY* (1857), 29 L. T. O. S. 226.

Annotation: *Refd.* *Potter v. Berry* (1857), 6 W. R. 71.

232. ———.]—*BRISTOW v. CORMICAN*, No. 131, *ante*.

233. ———.]—*NEILL v. DEVONSHIRE (DUKE)*, No. 41, *ante*.

234. ———.]—*BLOUNT v. LAYARD*, No. 66, *ante*.

235. ———.]—*SMITH v. ANDREWS*, No. 77, *ante*.

236. User by public—As evidence in derogation of private fishery.]—*NEILL v. DEVONSHIRE (DUKE)*, No. 41, *ante*.

237. ———.]—*SMITH v. ANDREWS*, No. 77, *ante*.

238. ———.]—*BLOUNT v. LAYARD*, No. 66, *ante*.

———.]—*See, generally*, *EASEMENTS*, Vol. XIX., p. 201, Nos. 1531-1536.

Common of fishery.]—*See COMMONS*, Vol. XI., pp. 20, 21, Nos. 231-242.

Crown.—*GABBETT v. CLANCY* (1845), 8 L. L. R. 299.—*IR.*

PART III. SECT. 5, SUB-SECT. 2.—A.

r. What must be proved—Assertion of right higher than general right of public.]—To establish an exclusive right of fishery in a tidal & navigable river, it is necessary to prove that plff.'s user was in assertion of a right other & higher than the general right of the public to fish.—*ABHOY CHARAN JALIA v. DWARKA NATH MAHTO* (1911), 1 L. R. 39 Calc. 53.—*IND.*

PART III.—PRIVATE FISHERIES.

B. Acts of Ownership.

239. What amounts to—Dependent on circumstances.]—In 1774 the Crown granted to L. a barony charter to lands almost continuous on both sides of a river in Inverness-shire; included were older baronies containing express grants of salmon fishing to parts of the river some above & some below certain falls; also an ancient barony grant giving the fishing on the Water of Forne, which was alleged to be the old name of the whole river from its source to the sea. From time immemorial L. had exercised his possession, up to 1862, taking all the fish in the whole river by means of close cruives, just below the falls, which stretched right across the river, & which were narrower than then allowed by law. Above the falls he asserted his right (a) by occasionally fishing there; (b) by during the spawning season having watchers; (c) by making his tenants in their leases bound to protect the fishing, & prevent all others from fishing. All which he had done for a period much longer than forty years. Since 1862, when close cruives were abolished, he had regularly fished above the falls with net & coble. Neither the Crown nor any one else had ever objected to L.'s entire possession of the whole salmon fishing in the river. The Crown now, while admitting L.'s right to the salmon fishing below the falls to be incontestible, claimed, *de jure coronæ*, all the fishing above the falls:—*Held*: the river here was a *unum quid*; one continuous and connected subject; & L.'s entire control and enjoyment of the whole profit of the fish in the whole river, for a time far beyond the period of prescription, coupled with his titles, gave him the right to the salmon fishing within the limits, & *ex adverso* his barony lands wherever situated.

Possession must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another (LORD O'HAGAN).—LORD ADVOCATE *v.* LOVAT (LORD) (1880), 5 App. Cas. 273, II. L.

Annotations:—*Reid*. Johnston *v.* O'Neill, [1911] A. C. 552; Kirby *v.* Cowderoy, [1912] A. C. 599.

240. NEILL *v.* (DUKE), No. 41, *ante*.

241. — Making or possession of weirs.]—ST. BENEDICT, HULM (ABBOT) CASE (1317), *Hale de Jure Maris* (Hargrave's Tracts), c. 5, p. 20.

Annotation:—*Reid*. Smith *v.* Andrews (1891), 65 L. T. 175.

242. — Presumption of legality of weir.]—WILLIAMS *v.* WILCOX, No. 362, *post*.

—.]—*See, further*, Part V., Sect. 6, subsect. 2, *post*.

243. — Granting or taking leases of fisheries—With spear-sedge, flags & rushes.]—Where a pauper rented "the fishery of a pond, with the spear-sedge, flags & rushes growing in or about the same, for £10 a year." The ct. understood that the soil passed with it, & that it was a tenement within 9 & 10 Will. 3, c. 11. The fact of the pauper's taking a tenement of £10 a year is sufficient to give a settlement, though the lessor has no title.—R. *v.* OLD ALRESFORD (1786), 1 Term Rep. 358; 99 E. R. 1138.

244. — — —.]—ECROYD *v.* COULTHARD, No. 203, *ante*.

245. — Using fixed engine—No documentary evidence of right to use.]—Applts. claimed to use a certain raise net on a marsh, which in the reign of Elizabeth formed part of the manor of L. who was attainted. The inquisition & survey then made purported to give an inventory of his possessions, & mentioned a raise net set up in another part of the manor from that in which the applts. used theirs, but made no specific mention of any other raise net. Subsequently part of the manor was granted to a predecessor of the applts., & was enfranchised. Proof of user since 1797 was given, but the right had been contested by people in the neighbourhood. In 1812 a deed of compromise was entered into in which the owner of the part of the manor not granted away was recited to be lord of the manor, & entitled to the soil of the marsh, & the predecessors of the applts. were recited to be entitled to the sole herbage & pasturage, & to a concurrent right of lake fishery thereon. There was also evidence of subsequent user, & proof that this raise net had been used by applts. in 1857:—*Held*: although long exclusive enjoyment of a right to a several fishery in a public navigable river is sufficient *prima facie* evidence upon which to presume that the Crown had granted a separate right before Magna Carta, yet the omission of all mention of the right in any probably true inventory, taken since that period, of all the possessions of the then alleged owner of that right, or any reasonable ground for considering that the user had not been exclusive, but in common with other persons, may be sufficient to negative such presumption.

This claim being made in respect of what was then a customary tenement of the manor, a prescriptive right to a fishery of so peculiar a kind as to be accompanied by the right of using a fixed engine would have been presented by the tenant in the name of the lord, & would in consequence probably have appeared in the inquisition & therefore this omission was proof that the right was not in existence at that time.

Even if a fishery may pass as appurtenant to land, a several fishery cannot be appurtenant to a several pasture; & therefore whatever claim the applt. might have to this fishery, it could only be as appurtenant to demesne lands, which was here negatived by the omission in the inquisition.

Qu: whether there could be such unlimited fishery as that here claimed appurtenant to demesne lands at all. *r.* FISHERIES SPECIAL COMES (1870), 23 L. T. 35 J. P. 822.

Annotation:—*Consd.* Chesterfield *v.* HARRIS.

246. — — —.]—FTT PURCELL, No. 29, *ante*

further, Part V., Sect. 1,

247. Payment & receipt of rent.]—GREENBANK *v.* SANDERSON, No. 344, *post*.

248. — Placing stakes or pens in river—Taking gravel.]—HANBURY *v.* JENLINS, No. 94, *ante*.

249. Acts elsewhere than in locus in quo—When admissible.]—NEILL *v.* DEVONSHIRE (DUKE), No. 41, *ante*.

PART III. SECT. 5, SUB-SECT. 2. —B.

a. What amounts to.]—ASHWORTH *v.* BROWNE (1869), 10 L. Ch. R.

Sect. 5.—Evidence of title: Sub-sect. 2, C. & D. Sect. 6.]

C. Long Continued Enjoyment.

250. Presumption of lost grant—By Crown before Magna Carta—User must show distinct & exclusive enjoyment.]—MALCOMSON v. O'DEA, No. 156, ante.

251. Presumption rebuttable.]
EDGAR v. ENGLISH FISHERIES SPECIAL COMRS., No. 245, ante.

252. — User for hundred years—Before action brought.]—A several fishery in the waters of the river T., the immemorial existence, & consequently the legal origin of which, by an original grant from the Crown to the prior & monks of the monastery of T., anterior to Magna Carta, was proved, was claimed by pltf., & it being proved at the trial that subsequently to Magna Carta, certain liberties & free usages, claimed by the prior & his predecessors, had been adjudged by the King's Ct. to have been forfeited; defts. contended that the fishery in question came within the terms "liberties and free usages," & so had merged on reverting to the Crown by forfeiture, & could not be regranted:—*Held*: pltf. had a sufficient title to the several fishery to enable him to maintain trespass against defts.

Evidence of actual user & enjoyment, by a pltf., of a right of several fishery in a tidal river for a hundred & ten years prior to action brought, is, of itself alone, satisfactory evidence upon which a jury if not actually called upon to presume, would be amply justified in presuming that the right had existed from time immemorial, & consequently that there must have been a valid grant of the fishery by the Crown anterior to Magna Carta; & it lies on deft., who questions the right to establish either that the fishery was, in fact, created since the time of legal memory & Magna Carta, or that, at some period subsequent thereto, no such fishery was in existence. —NORTHUMBERLAND (DUKE) v. HOUGHTON (1870), L. R. 5 Exch. 127; 39 L. J. Ex. 66; 22 L. T. 191; 18 W. R. 495.

ms: **Reid**, Saltash Corpn. v. Goodman (1881), 29 W. R. 639. **Mentd.** A-G. v. British Museum Trustees, 2 Ch. 5

253. — — — — — WILSON v. CROSSFIELD (1885), 1 T. L. R. 601.

254. — — — — — v. LONSDALE, No. 156, post.

255. — — — — — GOODMAN v. SALTASH CORPN., No. 262, post.

256. — — — — — Defeat of presumption—Evidence of private statute.]—WARWICK v. GONVILLE & CAIUS COLLEGE (1890), 6 T. L. R. 417, C. A.

— — — — — Lost modern grant.] — See,

PART III. SECT. 5, SUB-SECT. 2.—C.

a. Length of enjoyment — Twelve years.]—When a person exercises right of fishing in a tank ~~continuously~~ for twelve years, his right to fish becomes absolute & indefeasible. — LUCKHIMONY DASSEE v. KORUNA KANT MOITRO (1878), 3 C. L. R. 509.—IND.

for fishing in a several fishery. By letters patent of 14 Car. the half of all fisheries, & taking of salmon, &

all other kind of fish, in the O. G. river were granted to M. Pltf. proved that he had exclusively fished in the O. G. river, with nets for upwards of forty years, without any interruption; but it also appeared that, prior to that time, the persons claiming under the patent of Car. I., had exercised a right to fish with nets on the north bank of the river, & that their tenants had since that time uninterruptedly fished there with rods:—*Held*: as the documents by which the parties respectively deduced their title

EASEMENTS, Vol. XIX., pp. 61–67, Nos. 345–387.

257. Length of enjoyment—Fifty years.]—R. v. DOWNING, No. 310, post.

258. — — — — — Twenty years.]—HALSE v. ALDER, No. 307, post.

259. — — — — — FOSTER v. WARBLINGTON URBAN COUNCIL, No. 333, post.

— — — — — See, generally, EASEMENTS, Vol. XIX., pp. 58, 59, Nos. 329–339; pp. 66–67, Nos. 373–386; pp. 73–75, Nos. 425–448.

260. Whole user to be considered—Claim of exclusive fishery—Counter claim also founded on long user.]—GOODMAN v. SALTASH CORPN., No. 262, post.

261. Origin of enjoyment—Legality of origin—Proof of.]—WILSON v. CROSSFIELD (1885), 1 T. L. R. 601.

262. Presumption in favour of.]—A prescriptive right to a several oyster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a borough corpn. & its lessees, without any qualification except that the free inhabitants of ancient tenements in the borough had from time immemorial without interruption, & claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo* from Feb. 2, to Easter Eve in each year, & of catching & carrying away the same without stint for sale & otherwise. This usage of the inhabitants tended to the destruction of the fishery, & if continued would destroy it:—*Held*: the claim of the inhabitants was not to a *profit à prendre* in *alieno solo*; a lawful origin for the usage ought to be presumed if reasonably possible; & the presumption which ought to be drawn, as reasonable in law & probable in fact, was that the original grant to the corpn. was subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough in accordance with the usage. I think it clear that a fluctuating & uncertain body cannot claim a *profit à prendre* in *alieno solo* & indeed cannot be the grantee either of a several fishery or of any other kind of real property (LORD CAIRNS).

The owner of a *profit à prendre* may take it in person or by his servants (LORD BLACKBURN).—GOODMAN v. SALTASH CORPN. (1882), 7 App. Cas. 633; 52 L. J. Q. B. 193; 48 L. T. 239; 47 J. P. 276; 31 W. R. 293, H. L.; *reversg.* S. C. *sub nom.* SALTASH CORPN. v. GOODMAN (1881), 7 Q. B. D. 106, C. A.

Annotations:—Consd. Tilbury v. Silva (1890), 45 Ch. D. 98; Smith v. Andrews, [1891] 2 Ch. 678; Harris v. Chesterfield, [1911] A. C. 623. **Reid**, Neill v. Devonshire (1882), 8 App. Cas. 135; Blount v. Layard, [1891] 2 Ch. 681, n.; Haigh v. West, [1893] 2 Q. B. 19; Johnston v. O'Neill, [1911] A. C. 552; Mitcham Common Conservators v. Banks (1912), 76 J. P. 413; A-G. v. Horner

established the existence of a tenancy in common in the fishery, pltf. could not, by any length of user or enjoyment, obtain an exclusive right of fishery in the river, to the exclusion of his co-tenant in common, nor would a grant of such exclusive fishery be presumed.—BEAUMAN v. KINSELLA (1858), 8 I. C. L. R. 291.—IR.

b. — — — — — Fifty-nine years.]—Pltf., in support of a claim to a several fishery in the open sea, proved an adventurer's certificate of the year

(No. 2), [1913] 2 Ch. 140; *Nesbitt v. Mablethorpe U C* [1918] 2 K. B. 1. **Mentd.** *Re Free Fishermen of Faversham* (1887), 36 Ch. D. 329; *Stanley v. Norwich Corpn.* (1887), 3 T. L. R. 506; *Re Christchurch Inclosure Act* (1888), 38 Ch. D. 520; *Re Norwich Town Close Estate Charity* (1888), 40 Ch. D. 298; *Re St. Stephen, Coleman St., Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492; *Re Bootham Ward Strays, York, I. R. Comrs. v. Scott*, [1892] 2 Q. B. 152; *Wheaton v. Maple*, [1893] 3 Ch. 48; *Elliot v. Bristol Corpn.* (1895), 72 L. T. 752; *Simpson v. Godmanchester Corpn.* (1895), 65 L. J. Ch. 154; *A.-G. v. Wright*, [1897] 2 Q. B. 318; *Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs.* (1899), 81 L. T. 174; *A.-G. v. Simpson*, [1901] 2 Ch. 671; *A.-G. v. Tonkin* (1902), 18 T. L. R. 29; *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 2 Ch. 613; *Mercer v. Denne*, [1904] 2 Ch. 534; *Re Allen, Hargreaves v. Taylor*, [1905] 2 Ch. 400; *A.-G. v. Antrobus*, [1905] 2 Ch. 188; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139; *R. v. Income Tax Special Comrs., Ex p. University College of North Wales* (1908), 98 L. T. 446; *Foley's Charity Trustees v. Dudley Corpn.*, [1910] 1 K. B. 317; *Re Wedgwood, Allen v. Wedgwood*, [1915] 1 Ch. 113; *Verge v. Somerville*, [1924] A. C. 496.

263. ————.]—*TILBURY v. SILVA*, No. 286, *post*.

264. ——— **Traced to modern deed.**]—*WARWICK v. GONVILLE & CAIUS COLLEGE* (1890), 6 T. L. R. 447, C. A.

265. Assisting interpretation of ancient documents.]—*WILSON v. CROSSFIELD* (1885), 1 T. L. R. 601.

D. Documentary Evidence Supporting User.

See, generally, EVIDENCE, Vol. XXII., pp. 191 *et seq.*

266. Ancient documents—Coming from proper custody.]—*MALCOMSON v. O'DEA*, No. 156, *ante*.

267. Old licences—Of court rolls—Proof of payment of rent in modern times.]—*ROGERS v. ALLEN*, No. 91, *ante*.

268. —.]—*MANNALL v. FISHER*, No. 221, *ante*.

269. —.]—*MALCOMSON v. O'DEA*, No. 156, *ante*.

270. Entries made against interest—Receipt of rents.]—On an issue as to the right of L. to a certain fishery, entries of a deceased receiver, charging himself with the receipt of rent from a sub-receiver, due from certain persons, of whom the sub-receiver was one, for fixing a net in the fishery, are evidence in support of L.'s right.—*PERCIVAL v. NANSON* (1851), 7 Exch. 1; 21 L. J. Ex. 1; 155 E. R. 830.

See, generally, EVIDENCE, Vol. XXII., pp. 98–110, Nos. 688–815.

finding R. entitled to "a salmon fishery," & to the lands of C. Acts of erchip over the fishery by A. & grantees were proved from 1668 to 1701. No such act was proved from date to 1798, but from 1798 to there was proof of undisturbed use by the family of O'N., from whom derived. Title in the family of O'N., under A. to the lands of C. was deduced from 1741 to 1857:—*Held*: "several fishery in pltf. was rightly

c. ——— **Title deduced from reign of King John.**]—*ASHWORTH v. BROWNE* (1860), 10 L. Ch. R. 421.—*IR.*

PART III. SECT. 5, SUB-SECT. 2.—D.

d. Ancient documents.]—From the finding of an inquisition in 1540 there was clear evidence of the existence, at & prior to that date, of

a several fishery in tidal waters, which had been surrendered to the Crown. By subsequent instruments of title this several fishery was identified with that claimed by pltf., who proved documentary title thereto. The evidence satisfied the ct. that a several fishery was in fact held, & enjoyed in accordance with the documentary title:—*Held*: pltf. had established his right to the several fishery claimed.—*TIGHE v. SINNOTT*, [1897] 1 L. R. 140.—*IR.*

PART III. SECT. 6.

e. Fisheries sold annually by city corporation.]—By its charter the city of St. John was granted "all the land & waters thereto adjoining or running in, by, or through the same" with defined boundaries, including a course at low water mark: "as well the land as the water, & the land

271. Old leases.]—*MALCOMSON v.* No. 156, *ante*.

272. ——— **Of court rolls.**] *A.-G. v.* No. 199, *ante*.

273. Former legal proceedings
decree made
DEVONSHIRE (DUKE),
ante.

274. ——— by *r.*
DEVONSHIRE

275. Rate books.]—*SMITH ANDREWS*, No. 77, *ante*.

SECT. 6.—ALIENATION OF FISHERIES

276. By grant of prescription—Not by custom.]—*A.-G. FOR BRITISH COLUMBIA v. A.-G. FOR CANADA*, No. 9, *ante*.

———.]—*See, also*, Sect. 3, *ante*.

277. Necessity for deed.]—Where a subject is owner of a several fishery in a navigable river, where the tide flows & reflows, granted to him, as must be presumed, before Magna Carta, by the description of "*separalis piscaria*," that is an incorporeal & not a territorial hereditament, & a term for years in it cannot be created without deed. *Seemle*, the owner of a several fishery, in ordinary cases, & where the terms of the grant are unknown, may be presumed to be owner of the soil.—*SOMERSET (DUKE) v. FOGWELL* (1826), 5 B. & C. 875; 8 Dow. & Ry. K. B. 717; 5 L. J. O. S. K. B. 49; 108 E. R. 325.

Annotations:—**Refd.** *Bridgwater's Trustees v. Bootle Surveyors* (1866), 7 B. & S. 348; *Hindson v. Ashby*, [1896] 2 Ch. 1. **Mentd.** *Holford v. Bailey* (1849), 13 Jur. 278; *Whitstable Free Fishers & Dredgers v. Gann, Gann v. Johnson* (1861), 11 C. B. N. S. 387; *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732; *A.-G. v. Emerson*, [1891] A. C. 619; *Ecroyd v. Coulthard* (1897), 77 L. T. 357; *Beaufort v. Aird* (1904), 20 T. L. R. 602.

278. ———.]—Declaration, in *assumpsit*, alleged that pltf. agreed to grant & let, & deft. to take, a messuage at D., in the parish of M., with exclusive licence to shoot & sport over the manor of D., in the parishes of M. & L., & to fish in the waters thereof, during the term; to hold the messuage, right, liberties, & premises, for the term, at a rent; mutual promises; & that pltf. let the messuage, right, liberties, & premises to

covered with water within
"s." The fisheries between
& low water mark of the harbour
were declared by the charter to be for
the sole use of the inhabitants, but
by Act of Assembly they were directed
to be annually sold by the city. *Held*:
where the city is bounded by low
water mark it has not a title to sell the
right of fishing beyond such mark,
though within the harbour. *ST.*
JOHN CITY v. WILSON (1902), 22 C. L. T.
209; 9 N. B. Eq. Rep. 398. **CAN.**

f. ———.] By virtue of its charter
the corp. of the City of St. John
owns St. John harbour, but the right
of fishing on the west side of the
harbour is vested in the inhab.
of the west side of the city. By
Vict. c. 59, the corp. is autl
to dispose of the fishing rights on the
west side of the harbour by annual sale
of fishing lots at public auction to the

Sect. 6.—Alienation of fisheries. Sects. 7, 8 & 9:
Sub-sects. 1 2,

deft., who entered into & upon the same, & became & was possessed thereof for the term; breach, non-payment of rent:—*Held*: bad, on general demurrer, inasmuch as the agreement showed a demise of an incorporeal hereditament, which could only be by deed; & the letting as subsequently alleged, if otherwise available to support the action, should have appeared to be by deed.—*BIRD v. HIGGINSON* (1837), 6 Ad. & El. 824; 6 L. J. Ex. 282; 1 J. P. 322; 112 E. R. 316, Ex. Ch.; *affg.* (1835), 2 Ad. & El. 696.

Annotations:—*Refd.* R. v. Hockworthy (1837), 7 Ad. & El. 492; Doe d. Morgan v. Powell (1844), 7 Man. & G. 980; Thames Haven Dock Co. v. Brymer (1850), 5 Exch. 696. *Mentd.* Worley v. Harrison (1835), 3 Ad. & El. 669; Hayselden v. Staff (1836), 6 Nev. & M. K. B. 659; Upward v. Knight (1839), 7 Scott, 311; Ratton v. Davis (1841), 1 Gal. & Dav. 21; Clarke v. Allatt (1847), 4 C. B. 335; Thomas v. Fredricks (1847), 10 Q. B. 775; Callander v. Howard (1850), 10 C. B. 302; Howell v. Rodbard (1850), 4 Exch. 309; Partridge v. Gardner (1851), 6 Exch. 621; Cannon v. Rimington (1852), 12 C. B. 514; Brown v. Peto, [1900] 2 Q. B. 653.

279. —.] —*NEILL v. DEVONSHIRE (DUKE)*, No. 41, *ante*.

—*See*, Vol. XVII., p. 192-194, Nos. 26-50; EASEMENTS, Vol. XIX., p. 26-31, Nos. 115-111.

280. Effect of general words - Right in gross.—*STAFFORDSHIRE & WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY*, No. 125, *ante*.

—*See, generally*, EASEMENTS, Vol. XIX., pp. 32-35, Nos. 119-179.

281. By one co-owner—Provided rights of other co-owner undisturbed.—*MENZIES v. MACDONALD*, No. 311, *post*.

282. Rights of prescriptive corporation—Winding up.—*Re FREE FISHERMEN OF FAVERSHAM (CO. OR FRATERNITY OF)*, No. 189, *ante*.

SECT. 7.—ANCILLARY RIGHTS.

283. Right to land nets—Without consent of owners of banks.—*IPSWICH (INHABITANTS) v. BROWNE* (1581), Sav. 11, 14; 123 E. R. 984, 986, Ex. Ch.

Annotations:—*Expld.* Peter v. Kendal (1827), 6 B. & C. 703. *Refd.* Matthews v. Peache (1855), 20 J. P. 241.

284. — — **Long user.**—*GARDNER v. REECE* (1761), cited in, [1901] 2 Ch. at p. 404.

Annotation:—*Refd.* Hanbury v. Jenkins, [1901] 2 Ch. 401.

285. — — — **Presumption of grant of right.**—Where the lessees of a fishery had publicly landed their nets on the shore at A. for more than 20 years, & had, at various times, dressed & improved the landing place, both the fishery & the landing place having originally belonged to

one person, but no evidence being offered to show that he, or those who under him owned the shore at A., knew of the landing nets by the lessees of the fishery:—*Held*: it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery, by some former owner of the shore at A.—*GRAY v. BOND* (1821), 2 Brod. & Bing. 667; 5 Moore, C. P. 527; 129 E. R. 1123.

Annotations:—*Refd.* Dalton v. Angus (1881), 6 App. Cas. 740. *Mentd.* Proud v. Price (1893), 62 L. J. Q. B. 490; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140.

286. Right of way—To reach fishery—Manorial land—Subsequent enfranchisement.—The practice in a manor was for the lords to grant copyholds for three lives, & to renew at a fine upon the dropping of any of the lives; but there was no custom binding them to renew. The copyhold grants did not mention a right of fishing; but from time immemorial the copyholders had enjoyed a right of angling in a stream which formed the boundary of the manor, & of passing along the bank over the lands of other tenants of the manor for that purpose. Subject to this, the right of fishing was in the lords. In 1845 the lords enfranchised a copyhold belonging to S., which adjoined the river, & released in the most ample terms all rights of fishing & all other rights they had over the enfranchised tenement. After this various other copyholds were enfranchised, & for nearly forty years the copyholders & the enfranchised copyholders exercised the same right as before of angling and going over the land of S. for that purpose. T. was the owner of several tenements formerly copyhold of the manor which had been enfranchised since 1845. In 1885 S. set up a gate & prevented T. from passing over his land to fish. T. acquiesced in the interruption until 1889, when he commenced an action, on behalf of himself & all other the owners & occupiers of copyholds or enfranchised copyholds, to establish the right of angling & of passing over the land of S. for that purpose:—*Held*: by the enfranchisement deed of 1845 the lords gave up all their rights over the land of S. & no reservation or exception of a power to make to other tenants grants giving rights over that land could be implied, as there was no obligation on the lords to make such grants; the rights given up included the reversionary right of the lords to grant rights of fishing on the expiration of the lives for which the copyholds were held; the lords therefore had no power to give to T. by his subsequent enfranchisement deeds any rights over the land of S., & T. had no title to maintain the action; also lost grants of the rights to the enfranchised copyholders could not be presumed.

Also, the interruption of T.'s alleged right, acquiesced in by him, for four years before action brought, was a bar to that right, & such right, being in the nature of a *profit à prendre* could not be claimed by prescription on behalf of a large & indefinite class such as "owners & occupiers."

Where a privilege has been exercised as of right

highest bidder. Deft., an inhabitant of the west side of the city, obtained a lease from the city corpn. of part of a west side fishing lot situated between high & low water mark & erected a weir & fished thereon. There was no mention of fishing rights in the lease. In an action by the city for an injunction to restrain deft. from fishing on the lot demised:—*Held*: while the right of fishing on the west side of the harbour is still vested in

the inhabitants of the west side of the city, this right can be exercised only subject to the control vested in the city; & the city can dispose of these fishing rights only by sale at public auction.—*ST. JOHN CITY v. BELYEA* (1919), 47 N. B. R. 155; 51 D. L. R. 495.—**CAN.**

PART III. SECT. 7.

g. What words will

'Ex.

clusive "privilege of using station as fishing station."—By 14 Vict. c. 31, the Governor-in-Council was authorised to grant leases or licenses of occupation for fishery stations on the ungranted shores of the Province. A grant was made to plff. for the exclusive leave & license to occupy & enjoy as a fishing ground for the term of four years, a lot abutting on the outside of Portage Island; with the exclusive privilege of using the lot as a fishing station:—

for a long series of years, the ct. will make every presumption in favour of its legal origin, but the circumstances of the enjoyment must be carefully looked to; & as in the present case there were copyholders whose right of way & of fishing was not disputed, the ct. considered the case not to stand on the same footing as if the persons exercising the privilege formed only one class.

The general law of conveyancing, that, where a riparian owner, who is also owner of the soil under the river *ad medium filum*, makes a grant of his land on the banks of the river, the soil *ad medium filum* passes by the grant, applies to land of any tenure, whether freehold, copyhold, or leasehold (KAY, J.).—TILBURY v. SILVA (1890), 45 Ch. D. 98; 63 L. T. 141, C. A.

Annotations:—**Consd.** Derry v. Sanders, [1919] 1 K. B. 223. **Refd.** Ecroyd v. Coulthard, [1898] 2 Ch. 358. **Mentd.** City of London Land Tax Comrs. v. C. L. Ry., [1913] A. C. 364.

287. — Appurtenant to several fishery.—HANBURY v. JENKINS, No. 94, *ante*.

288. Along canal banks—Under statute—Authorising construction of canal.—STAFFORDSHIRE & WORCESTERSHIRE CANAL NAVIGATION v. BRADLEY, No. 125, *ante*.

Public fisheries.—See Part II., Sect. 1, sub-sect. 3, *ante*.

SECT. 8.—BOUNDARIES OF FISHERIES.

Tidal waters—Ascertainment of tidal limit.—See Nos. 37, 38, 204, *ante*, No. 423, *post*.

Non-tidal waters—Change of course of water.—See Sect. 1, sub-sect. 1, B., *ante*.

— **Accretion to bed of river.**—See Sect. 1 sub-sect. 1, B., *ante*.

— **Presumption as to ownership of soil.**—See Sect. 4, *ante*.

SECT. 9.—PROPERTY IN FISH AND LARCENY.

SUB-SECT. 1.—PROPERTY.

289. Nature of property—Privileged property.—The owner of a several fishery hath a privileged property in the fish therein, & trespass will lie for taking them.—CHILD v. GREENHILL (1639), Cro. Car. 553; March, 48; 79 E. R. 1077; *sub nom.* GREENHILL'S CASE, W. Jo. 440.

Annotation:—**Refd.** Pollexfen & Ashford v. Crispin (1671), 1 Vent. 122.

290. Ex ratione loci—Fish in enclosed pond.—R. v. STEER, No. 300, *post*.

291. — Real estate.—ANON. (undated), Keil. 118; 72 E. R. 285.

292. ——GREYES CASE (1594), Owen, 20; 74 E. R. 869.

GRAY v. TROWE (1601), Gouldsb. 129; 75 E. R. 1043.

294. Subject matter of waste.—ANON. (1608), 4 Leon. 240; 74 E. R. 846.

Held: this grant did not convey any right of fishing, but merely a right to occupy a certain portion of the shore. HIERLIHY v. LOGGIE, 3 All. CAN.

PART III. SECT. 9, SUB-SECT. 2.—A.

h. Fera natura—Must be into possession.—Fish in a river are *fera natura*, & unless reduced into

from land
of fish according

interests in two pieces of land, over which a reservoir was made, under a local Act, which provided, "that it should be lawful for the owner or owners of the lands on which any such reservoir should be made, to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein;" & that the owners of all lands through which the canal should be made, should be entitled to the right of fishery in so much of the canal as should be made over or through their lands or grounds respectively: *Held*: as plff. & deft. had only a several right of fishing in the water over his own land, they were not tenants in common of the fish, but when the water in the reservoir was drawn off, each was entitled to the fish which might be left & taken on his own soil. SNAPE v. DORRIS (1823), 1 Bing. 202; 8 Moore, C. P. 23; 1 L. J. O. S. C. P. 58; 130

296. Sufficiency of property—Actual not probable possession—Escape of fish about to be caught.

—Plff., while fishing for pilchards, had nearly encompassed the fish with a net; but deft., by rowing his boat to the opening, disturbed the fish & prevented the capture. Plff. brought trespass: & issues being joined on plff.'s possession of the fish, & on the fish being plff.'s, in manner, etc.: *Held*: he was not entitled to recover, no special custom of the fishery being proved.

Whatever interpretation may be put upon such time as "custody" & "possession," the question will be whether by custody or possession has been obtained here. I think it impossible to say that it had, until the party had actual power over the fish (LORD DENMAN, C.J.). YOUNG v. HICHENS (1844), 6 Q. B. 606; 1 Dav. & Mer. 592; 2 L. T. O. S. 120; 115 E. R. 228; *subsequent proceedings*, 4 L. T. O. S. 151.

Annotations: **Refd.** Allen v. Flood, [1898] A. C. 1; The Tubantia, [1921] P. 78.

As subjects of larceny.—See Sub-sect. 2, *post*.

Public fisheries.—See Part II., Sect. 1, sub-sect. 4, *ante*.

See, further, ANIMALS, Vol. II., p. 207, Nos. 30-34; p. 211, Nos. 72-73; p. 212, No. 83.

9 TENY.

A. At Common Law.

297. Stealing fish in private pond—A felony.—The stealing of tame peacocks is felony . . . so of fishes, in a private lake & ponds. ANON. (1527), Jenk. 204; 145 E. R. 138.

298. ——GREYES CASE (1594), Owen, 20; 74 E. R. 869.

— GRAY v. TROWE (1601), Gouldsb. 129; 75 E. R. 1043.

300. ——An indictment lies for in another's private pond, & taking away so many carps, the & chattels of prosecutor.

See R. v. MARITZ, S. C. 787.—S. AF.
k. Right of sharemen—To catch—continuance of

Sect. 9.—Property in fish and larceny: Sub-sect. 2, A. & B. Sect. 10: Sub-sect. 1, A.]

If a man has a close pond in which there are fish, he may call them *pisces suos* in an indictment, or he may not do it, at his pleasure, & either way is good; because being in a close pond, the property *ratione loci* in them cannot be lost, because they cannot swim away (*per Cur.*).—*R. v. STEER* (1704), 6 Mod. Rep. 183; 3 Salk. 189, 291; 87 E. R. 939.

301. Stealing oysters from oyster lays—Brought thither for sale—Not a felony.—Felony cannot be committed in stealing oysters off oyster-lays, in an arm of the sea, though not produced there, but brought for sale.—*R. v. WALFORD* (1803), 5 Esp. 62, N. P.

See, also, ANIMALS, Vol. II., p. 210, Nos. 54, 57, 58.

B. Under Statute.

See Larceny Act, 1861 (c. 96), ss. 21, 25, 26; Larceny Act, 1916 (c. 50), s. 1 (3); Sea Fisheries Act, 1868 (c. 45), ss. 51, 52, 55; Sea Fisheries Act, 1881 (c. 27), s. 1; Salmon & Freshwater Fisheries Act, 1923 (c. 16), s. 74 (1).

302. In respect of what fish—Shell fish—Oyster spawn—3 Jac. 1, c. 12.] The above Act which prohibits persons from “willingly taking, destroying, or spoiling any spawn, fry, or brood of any sea-fish in any wear or other engine or device whatsoever,” seems not to comprehend shell fish, & if it does, it means a taking for destruction, & not a taking of oyster spawn for the purpose of removing it to beds, for further growth & maturity to make it marketable.

On looking at the Acts of Parliament, I find the terms floating fish & shell fish, & that floating fish is used in contradistinction to shell fish, & sea fish synonymously with floating fish; therefore it is fair to presume that if shell fish had been intended to be included in this Act [3 Jac. 1, c. 12] as well as sea fish the Act would have so expressed it by using the appropriate phrase brood of sea fish & shell fish, but I do not find that shell fish is mentioned (LORD ELLENBOROUGH, C.J.).—*BRIDGER v. RICHARDSON* (1814), 2 M. & S. 568; 105 E. R. 493.

*Annotations:—***Refd.** *Maldon Corpn. v. Woolvet* (1840), 4 Per. & Dav. 26; *Crofts v. Middleton* (1856), 8 De G. M. & G. 192; *Foster v. Warblington U. C.*, [1906] 1 K. B. 618. **Mentd.** *R. v. London (Bp.)* (1889), 23 Q. B. D. 414.

303. ——— Crayfish—Larceny Act, 1861 (c. 96), s. 24.]—A trespasser who takes crayfish is liable to the punishment of one who unlawfully takes fish contrary to sect. 24 of the above Act.—*CAYGILL v. THWAITE* (1885), 49 J. P. 614; 33 W. R. 581; 1 T. L. R. 386, D. C.

*Annotation:—***Folld.** *Leavett v. Clark*, [1915] 3 K. B. 9.

304. ——— Winkles—Larceny Act, 1861 (c. 96), s. 24.]—By sect. 24 of the above Act, “whoever shall unlawfully & wilfully take . . . any fish in any water . . . in which there shall be any private right of fishery” shall on conviction be liable to a certain penalty “provided that nothing

hereinbefore contained shall extend to any person angling” between certain hours.

A corpn. had a right of several fishery in a portion of a tidal river. Applt., without any licence in that behalf from the corpn., when the tide was out collected winkles from small pools left by the receding tide in the bed of the river at a spot within the limits of the fishery:—*Held*: winkles, although incapable of being taken by angling, were “fish,” & there was evidence upon which the justices might find that the pools from which they were taken were “water” within the sect.—*LEAVETT v. CLARK*, [1915] 3 K. B. 9; 84 L. J. K. B. 2157; 113 L. T. 424; 79 J. P. 396; 31 T. L. R. 421; 13 L. G. R. 894; 25 Cox, C. C. 44, D. C.

305. ——— Dead fish caught at sea—Larceny by servant—Possession of owner.—Prisoner was employed by prosecutors as the master of a fishing-smack engaged in making voyages from G. to the North Sea & back for the purpose of catching fish for prosecutors, who sold the fish on the return of the vessel after each of its voyages. Prisoner had the full charge & control of the vessel during the voyages. Whilst returning to G. with a cargo of fish which had been caught & deposited in the usual receptacle provided for that purpose in the hold of the vessel, the prisoner put into B. harbour for the purpose of having a new trawl net mounted. Whilst in that harbour a boat came from the shore, & by prisoner’s orders some of the fish was taken out of the hold, put into the boat & taken ashore, where it was subsequently sold by prisoner, who appropriated the proceeds:—*Held*: the fish had been reduced into the possession of prosecutors before prisoner took it out of the hold, & prisoner was properly convicted of larceny.—*R. v. MALLISON* (1902), 86 L. T. 600; 66 J. P. 503; 20 Cox, C. C. 204, C. C. R.

306. Criminal intention—Larceny Act, 1861 (c. 96), s. 24.]—*HUDSON v. MACRAE*, No. 64, *ante*.

307. ——— ———.]—P., the owner of lands abutting on a private river, let the lands verbally to L. from year to year, nothing being said about the fishing, & L. rented the lands for twelve years. L. gave leave to H. to fish with a net, & H. was summoned under sect. 24 of the above Act. At the hearing the only evidence was that in 1819 P. gave verbal permission to A. to fish there, & A. had fished ever since at discretion, & exclusively. No deed or conveyance had been executed in favour of A., & H. believed that the right belonged to L., the tenant of the lands:—*Held*: A. had not proved any right of fishery, & the justices were wrong in convicting.

There was no evidence of *mens rea*: the applt. believed *bonâ fide* he was exercising his right under the lessee of the land (LUSH, J.).—*HALSE v. ALDER* (1874), 38 J. P. 407.

308. ——— Form of conviction.]—*R. v. THORPE, ETC.* (NOTTS, JJ.) & *JAVENS* (1896), 60 J. P. 309, D. C.

309. To what water applicable—Tidal navigable river—With private right of fishery—Larceny Act,

Sharemen in the fishery have no right to take possession of their share of the voyage, during its continuance, or at any time till set apart for them, & they will be liable criminally if by force or stealth they take their undivided share.—*R. v.*

NFLD.

PART III. SECT. 9, SUB-SECT. 2.—B.

1. *Fera naturæ*—Not property of fishery.]—Fish in a public

river cannot be said to be property in the possession of the person who may have the fishery right, & the infringement of that right is not theft under Indian Penal Code, s. 378.—*BHAGIRAM DOME v. ABAR DOME* (1887), 1 L. R. 15 Calc. 388.—**IND.**

(1887), 7 Nfld. L. R. 239.—

PART III.—PRIVATE FISHERIES.

1861 (c. 96), s. 24.]—Upon an information under the above sect. for attempting to take, otherwise than by angling, fish in part of a navigable tidal river, where complainant had a private right of fishery, applt. called a witness who said that during 1846 or 1847 he had fished with applt. in the place in question, & had assisted him to fish there several times during the four years succeeding, & had seen him fish there once about eight or ten years ago. Applt. was aware that the lessees of the prosecutor had the exclusive occupation of the fishery for six years previous. The justices were of opinion that applt. had not shown a *bonâ fide* claim of right so as to oust their jurisdiction, & convicted applt.:— *Held*: (1) the above sect. applied to a navigable tidal river in which there was a private right of fishery; (2) the justices were justified in finding that applt. had not shown a *bonâ fide* claim of right so as to oust their jurisdiction.— **PALEY v. BIRCH** (1867), 8 B. & S. 336; 16 L. T. 410; 31 J. P. 518.

310. Proof of right to fishery—Oral evidence—User—Previous action & verdict for prosecutor.]—In support of an indictment for stealing oysters in a tidal river, it is sufficient to prove ownership by oral evidence, as, *e.g.* that prosecutor & his father for forty-five years since 1815, had exercised the exclusive right of oyster fishing in the *locus in quo*, & that in 1846 an action had been brought to try the right, & the verdict given in favour of prosecutor.—*R. v. DOWNING* (1870), 23 L. T. 398 ; 35 J. P. 196 ; 11 Cox, C. C. 580, C. C. R.

Annotation :- **Consd.** *Foster v. Warblington U. C.*, [1906]
1 K. B. 618.

311. ——— **Fishery under lease—Original lessor dead—Probate of lessor's will.**—S. was charged with unlawfully fishing in a river contrary to Larceny Act, 1861 (c. 96), s. 24. Prosecutor produced a lease of the lands executed by the preceding owner, & proved execution by the lessee, but the witness of the lessor's signature was not called. The lease contained an express reservation of fishing, & the term was still current. Both the original lessor & lessee were dead, but rent had been received & paid under the lease for seven years:—*Held*: there was sufficient evidence of a private right of fishing without probate of the original lessor's will.—**GREENBANK v. SANDERSON** (1881), 49 J. P. 40, D. C.

312. Confiscation of angling tackle—Exemption from damages or penalty—What constitutes “angling”—Use of fixed night lines.]—Under sect. 25 of Larceny Act, 1861 (c. 96) ; “ Provided that any person angling, against the provisions of this Act, between the beginning of the last hour before sunrise & the expiration of the first hour after sunset, from whom any implement used by anglers shall be taken, or by whom the same shall be delivered up, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling ” :—*Held* : fishing by night lines, consisting of two small pegs or stakes about 6 in. to 8 in. long which were pointed & driven into the bank of the stream with lines & hooks attached & with a stone weight attached to one of the lines to keep the line floating with the stream, was not “ angling ” within this proviso.—BARNARD v. ROBERTS (1907), 96 L. T. 648 ; 71 J. P. 277 ; 23 T. L. R. 439 ; 51 Sol. Jo. 411 ; 21 Cox, C. C. 425, D. C.

also, ANIMALS, Vol. II., p. 210, Nos. 57,
p. 212, No. 83.

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ECT. 10. DISTURBANCE OF FISHERIES REMEDIES THEREFOR.

DISTURBANCE—WHAT AMOUNTS TO.

A. In General.

313. By nets or engines—Right of owner to detain—If doing damage.—The owner of a several fishery may detain nets or other engines damage fessant ; but if he cut or destroy them, trespass will lie. —**REYNELL v. CHAMPERNOON** (1631), Cro. Car. 228 ; 79 E. R. 799.

314. Fishing without right - Trespass. - *GRAYES CASE* (1594), Owen, 20; 74 E. R. 869.

315. - CHILD v. GREENHILL, No. 289, *ante*.

316. - - - - - POLYXENIN *v.* CRISPIN (1671),
1 Vent. 122 ; 86 E. R. 84 ; *sub nom.* ASHFORD &
POLYXPHEN *v.* CRISPIN, 2 Keb. 757 ; *sub nom.*
POLYXPHEN *v.* CRISPIN, 2 Keb. 765.

Annotations :—Refd. Sutton v. Moody (1896), 1 Ld. Rym. 250. **Mentd.** R. v. Landall (Bp.) (1735), 2 Stra. 1006.

317. — [.] — Trespass for taking fish *ipsius querentis in libera piscaria* is not good, though after verdict. *URTON v. DAWKINS* (1686), 3 Mod. Rep. 97 ; 87 E. R. 62 ; *sub nom.* *URTON v. DAWKINS*, Comb. 11.

Annotation : **Reid.** Smith v. Kemp, (1693), Carth. 285.

318. *Trepasa vi et armus* lies for taking fish *in libera piscaria*. SMITH v. KEMP (1693), Carth. 285; Holt, K. B. 322; 2 Salk. 637; 4 Mod. Rep. 186; Skin. 312; 90 E. R. 769.

Annotations : - **Refd.** Glipps v. Woollicot (1697), Skin, 677 ; Anon. (1774), Lofft, 364 ; Holford v. Bailey (1830), 13 Q. B. 426 ; Hindson v. Ashby, [1896] 2 Ch. 1 ; Ectoyd v. Coulthard (1897), 77 L. T. 357 ; Fitzgerald v. F. [1897] 2 Ch. 96. **Mentd.** Holmes v. Wood (1841) Barn. K. B. 249 ; Lonsdale v. F.

319. --- Although no fish taken.
PATRICK T. GREENWAY (1796), cited in I. Wms.
Saund. at p. 316, n. : 85 E. R. 498.

Annotation : **Reid.** *Holford v. Bailey* (1850), 13 Q. B. 126.

320. — — — — — **HOLFORD v. BAILEY,**
No. 86, *ante*.

Larceny.—See Sect. 9, sub-sect. 2, *ante*.

321. Flooding fishery.] Causing water to overflow another's fishery or land, though by an act on the party's own soil is a direct trespass. — *COURTNEY v. COLLIER* (1697), 1 *Ld. Raym.* 272; 12 *Mod. Rep.* 164; 91 *E. R.* 1079.

Annotations: **Mentd.** Reynolds *v.* Clerk (1725), 8 Mod. Rep. 272; Scot *v.* Shepherd (1773), 2 Wm. Bl. 892; Woodward *v.* Wulton (1807), 2 Bos. & P. S. R. 476.

322. Obstruction to passage of fish **Erection of weir - Of different nature than permitted by grant.** -- Under ancient deeds recognising a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape through the weir is debarred, though in flood times the fish may still overleap it. The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up a river, is treated as a public nuisance & the right to convert a brushwood into a stone weir is not evidenced by showing that forty years ago two-thirds of it had been so converted, without interruption, & the action for the

FISHERIES.

Sect. 10.—Disturbance of fisheries and remedies *Sub-sect. 1, A. & B.]*

injury having been brought within twenty years after the remaining third part was so converted.—*WELSH v. HORNBY* (1806), 7 East, 195; 3 Smith, K. B. 244; 103 E. R. 75.

Annotations:—Consd. Leconfield v. Lonsdale (1870), L. R. 5 C. P. 657. *Refd.* Rolfe v. Whyte (1868), L. R. 3 Q. B. 286; Barker v. Faulkner (1898), 79 L. T. 24. *Mentd.* Beaufort v. Swansea Corp'n. (1849), 3 Exch. 413; Joel v. Harvey (1857), 5 W. R. 488; Waterpark v. Fennell (1859), 7 H. L. Cas. 650.

323. ———.]—Pltf. & def't. were adjoining owners of land through which a well known trout stream flowed. Def't. erected upon his own property a weir with fenders & gratings with the avowed purpose of preventing fish going up to pltf.'s property while it allowed them to pass from that property to def't.'s. Pltf. alleged that he was thereby dammified. Def't. did not deny these allegations, but submitted that not interfering with the flow of the water he was entitled to erect & maintain such weir:—*Held*: the principle which was to be found in the authorities, that the erection in a salmon river of a weir whereby fish were prevented from reaching the upper portions of the river constituted an injury to the owners of the upper waters with respect to which they had a right of action, might possibly extend to other kinds of fish if damage were proved.—*BARKER v. FAULKNER* (1898), 79 L. T. 24.

324. ——— **Diverting flow of water.]**—Interference with the free passage of salmon up a river is a wrong against the proprietors of the upper fisheries, & if it materially obstructs the passage of fish can be restrained by interdict.

In 1882 mill owners on the D. river, which is a salmon river, increased their diversion of the water from its natural channel into artificial channels serving the uses of their mill. This was done to such an extent as to leave the natural channel in the neighbourhood of the mill at times bare of water. In 1900 the proprietors of the salmon fisheries in the upper reaches of the river objected to the mill owners' diversion of the water, & asked for an interdict:—*Held*: they were entitled to an interdict.—*PIRIE & SONS, LTD. v. KINTORE (EARL)*, [1906] A. C. 478; 75 L. J. P. C. 96, H. L.

325. ———.]—*FRASER v. FEAR*, No. 351, *post*.

326. Cutting canal in foreshore.]—*FAIRMAN v. GIPPS* (1851), cited in 5 E. & B. at p. 449; 119 E. R. 518.

Annotation:—Refd. Wenman v. Mackenzie (1855), 5 E. & B. 417.

PART III. SECT. 10, SUB-SECT. 1.—A.

323 i. Obstruction to passage of fish—Erection of weir.]—Pltfs., who claimed to be owners of one undivided half part of a water lot, & fishing privileges d therewith brought action def'ts. for erecting a weir over on pltfs.' land whereby fish which would otherwise have come to pltfs.' weir were prevented from doing so. In relation to the injury complained of resulting from the interference with the fishing rights both parties relied upon evidence of opinion of witnesses, none of whom were shown to be qualified in a greater degree than others to give expert evidence:—*Held*: as there was uncontradicted evidence showing the trespass, pltfs. were entitled to recover.—*RICE v. DITMARS* (1888), 21 N. S. R. 140.—**CAN.**

m. Erection of buildings across river.]—A proprietor of a sole & several fishery in the upper part of a river brought an action against B., the proprietor of a sole & several fishery in the lower part of the same river, for keeping & maintaining certain buildings across the river which prevented fish from coming into A.'s fishery:—*Held*: keeping & maintaining these works enabled A. to maintain his action.—*HAMILTON v. DONEGAL (MARQUIS)* (1795), 3 Ridg. Parl. Rep. 267.—**IR.**

PART III. SECT. 10, SUB-SECT. 1.—B.

330 i. Discharge of sewage—Works of local authority.]—A riparian proprietor & owner of salmon-fishings on the Tay, immediately below Perth, where the river is public, navigable, & tidal,

327. Inclosing bed of river.]—Where pltfs. have established a right to a several fishery in part of a tidal river, the ct. will grant an injunction to restrain def't. from inclosing the bed of the river, the effect of such inclosure being to destroy the fishery, without necessarily deciding or entering upon the question as to the ownership of the soil.—*BRIDGES v. HIGHTON* (1865), 11 L. T. 653, L. C.

Damage by navigators.]—*See* Part IV., Sect. 1, *post*.

Public fisheries.]—*See* Part II., Sect. 1, sub-sect. 4, *ante*.

B. Pollution.

See, generally, NUISANCE; PUBLIC HEALTH; SEWERS & DRAINS; WATER SUPPLY; WATERS & WATERCOURSES.

328. Refuse from dye work.]—[An action on the case lies] . . . of a dye house, etc., if the filth runs into his [pltf.'s] fishpond, etc.—*ALDRED'S CASE* (1610), 9 Co. Rep. 57 b; 77 E. R. 816.

Annotations:—Mentd. Bradley v. Gill (1688), 1 Lut. 69; Rich v. Basterfield (1847), 4 C. B. 783; Simpson v. Savage (1856), 1 C. B. N. S. 347; Bonomi v. Backhouse (1858), E. B. & E. 622; Webb v. Bird (1861), 10 C. B. N. S. 268; Bamford v. Turdley (1862), 3 B. & S. 66; Crowhurst v. Amersham Burial Board (1878), 4 Ex. D. 5; Dalton v. Angus (1881), 6 App. Cas. 740; Tod-Heatly v. Benham (1888), 40 Ch. D. 80; Aldin v. Latimer Clark, Muirhead, [1894] 2 Ch. 437; Chastey v. Ackland (1897), 13 T. L. R. 237; Warren v. Brown, [1900] 2 Q. B. 722; Davis v. Town Properties Investment Corp'n. (1902), 71 L. J. Ch. 900; Colls v. Home & Colonial Stores, [1904] A. C. 179; Kine v. Jolly, [1905] 1 Ch. 480.

329. Refuse from gas works.]—*R. v. MEDLEY*, No. 341, *post*.

330. Discharge of sewage—Works of local authority.]—*OLDAKER v. HUNT*, No. 345, *post*.

331. Public works ordered by Act of Parliament must be so executed as not to interfere with the private rights of individuals; & in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer, e.g., by remaining undrained, unless his rights are invaded, is one which this ct. cannot take into consideration.

The council of the borough of B. were bound by a local Act of Parliament, effectually to drain the town:—*Held*: (1) they were not justified in so carrying on their operations for this purpose as to drive away fish & prevent cattle from drinking of the water of a river at a part seven miles below the town & where it belonged to pltf.; (2) although pltf. had submitted to the injury for nearly four years, trusting to the assurance of the council

sought decree of interdict against a local authority to prevent them from polluting the river by the introduction of sewage:—*Held*: pursuer had a little to sue as owner of salmon fishings, & he was entitled to be protected by interdict if necessary to prevent a re-arrangement of the sewage system of the city by which the whole sewage, which had hitherto been discharged into the river at three different places above pursuer's property, & at a distance of from one mile to half a mile from it, was all to be discharged at one point less than half a mile above pursuer's fishings.—*MONCREIFFE v. PERTH POLICE COMRS.* (1886), 13 R. (Ct. of Sess.) 921.—**SCOT.**

n. Discharge of lime.]—A river had been poisoned with lime, & in consequence a quantity of fish therein

PART III.—PRIVATE FISHERIES.

that they were carrying out a scheme of sewage by which eventually the evil would be removed, he was not precluded on the ground of laches from now applying for an injunction, the rule in such cases being that the mere prospect of injury does not give a right to this relief.—*A.-G. v. BIRMINGHAM BOROUGH COUNCIL* (1858), 1 K. & J. 528; 22 J. P. 561; 6 W. R. 811; 70 E. R. 220.

Annotations:—*Generally*, *Mentd.* *A.-G. v. Metropolitan Board of Works* (1863), 9 L. T. 139; *A.-G. v. Kingston-on-Thames Corp.* (1865), 34 L. J. Ch. 481; *Spokes v. Banbury Board of Health* (1865), L. R. 1 Eq. 42; *Lillywhite v. Trimmer* (1867), 36 L. J. Ch. 525; *A.-G. v. Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146; *A.-G. v. Dorking Grdus.* (1882), 20 Ch. D. 595; *Islington Vestry v. Hornsey U. C.*, [1900] 1 Ch. 695; *Hove Corp. v. Brighton Intercepting & Outfall Sewers Board* (1903), 67 J. P. 335; *Price's Patent Candle Co. v. L. C. C.*, [1908] 2 Ch. 526.

332. ———.]—By direction of a local board of health the sewage of a town had been by means of drainage conveyed to a river, which sewage, not having been completely deodorised before coming in contact with the river, had so polluted the stream passing pltf.'s property as to kill the fish therein & otherwise causing a nuisance:—*Held*: pltf. was entitled to an injunction to restrain the further pollution of the water passing by his property.—*BIDDER v. CROYDON LOCAL BOARD OF HEALTH* (1862), 6 L. T. 778.

——— **Oyster fishery.**—Oyster ponds or "layings" had existed as far back as living memory went upon the foreshore of an arm of the sea. The purpose for which these ponds were used was the storage of oysters, which were brought from elsewhere & laid down in the ponds in order to be fattened for the market. Certain ponds of this kind, which were enclosed by boards or concrete, were, & for more than twenty years had been, used in the manner above mentioned by pltf., who had purchased them in 1879 from others who had for a period of between twenty & thirty years previously so used them. There was some evidence that the foreshore had formed part of the waste of a manor, the lord of which had a several fishery thereon.

Defts. were an urban district council which had been constituted in 1894, their district being carved out of that of a previously existing rural sanitary authority. A sewer had been made in the district by the rural sanitary authority, from which an inconsiderable quantity of sewage had been discharged into the sea near the oyster ponds. Defts. made certain new sewers, & connected them with the first-mentioned sewer, & the quantity of sewage discharged from that sewer was thereby greatly increased. The sewage so discharged caused a nuisance to pltf.'s oyster ponds through pollution of the same with sewage to an extent which rendered them unfit for use. In an action by pltf. against defts. in respect of the nuisance so caused:—*Held*: (1) irrespectively of the question of title to the soil or to a several

fishery, pltf., as occupier of the oyster ponds, was entitled to maintain an action for trespass to the same by wrong-doers; (2) defts., not having any right to discharge sewage into the sea so as to cause a nuisance, & having by their acts of commission caused such a discharge of sewage, were wrong-doers; & the action was maintainable.—*FOSTER v. WARBLINGTON URRAS COUNCIL*, [1906] 1 K. B. 648; 75 L. J. K. B. 511; 91 L. T. 876; 70 J. P. 233; 54 W. R. 575; 22 T. L. R. 421; 4 L. G. R. 735, C. A.

Annotations:—*As to* (2) *Folld.* *Owen v. Faversham Corp.* (1908), 73 J. P. 33. *Generally*, *Mentd.* *Jones v. Llunwest U. C.*, [1911] 1 Ch. 393.

334. ———.]—(1) At common law there is no right to discharge sewage into the sea so as to cause nuisance to another, neither does any such right exist under Public Health Act, 1848 (c. 63), or Public Health Act, 1875 (c. 55). If the sewage pollutes an oyster bed in a fishery, this amounts to an injury of the bed within sect. 53 of Sea Fisheries Act, 1868 (c. 45), & where a local fisheries committee have made a bye-law under Sea Fisheries Regulation Act, 1888 (c. 51), prohibiting the deposit or discharge of any substance detrimental to sea fish or sea fishing, such pollution is also illegal as a breach of the bye-law. (2) Even if householders have a prescriptive right to discharge their sewage into existing sewers, an injunction may be granted to restrain a nuisance by pollution arising from the sewage if, on the facts of the case, it does not appear that any interference with such rights will result from the injunction.—*HOBART v. SOUTHEND-ON-SEA CORPN.* (1906), 75 L. J. K. B. 305; 91 L. T. 337; 70 J. P. 192; 54 W. R. 451; 22 T. L. R. 307; 4 L. G. R. 757; *on appeal*, 22 T. L. R. 530, C. A.

Annotations:—*As to* (1) *Consd.* *Foster v. Warblington U. D. C.*, [1906] 1 K. B. 648. *Appld.* *Owen v. Faversham Corp.* (1908), 73 J. P. 33.

335. ———.]—In an action brought by the owner of a fishery, which he used for hatching fish, pltf. claimed an injunction & damages against defts. in respect of injury caused to the fish in his fishery by the discharge of sewage from defts.' sewage works. On the occasion complained of it was raining & the river rose. The evidence on behalf of pltf. showed that great masses of crude sewage had been discharged into the river, & that immediately afterwards his fish sickened & died in great numbers. Defts.' evidence was to the effect that, assuming that crude sewage had been discharged into the river, it had been rendered innocuous by dilution by the volume of water in the river before it reached pltf.'s fishery, which was over two miles below the sewage works:—*Held*: (1) the proper inference from the evidence was that the addition of the storm water had caused a serious disturbance of defts.' sewage system, & no alternative cause for the death of the fish having been proved, the fish died from deoxygenation of the water by sewage; (2) pltf. was entitled to damages.

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KERRY

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In consequence of the explosion the
river was injured in its character as a
fish-producing property, but no direct
evidence of injury to the soil was
given. He applied for compensation
for criminal injury:—*Held*: any
trawling of private water is a trespass
to land, & the explosion of a cartridge in
such a trespass, as will form the subject
of compensation.—*LANSDOWNE (MAR-
QUIS) v. KERRY COUNTY COUNCIL*
(1914), 48 L. T. 58.—IR.

*D. Timber dragged through stream
feeding salmon-fishery Destruction of
ova.*—In the course of removing
timber it was dragged across a stream
which fed a salmon-hatchery below.
The result was that the stream became
fouled, & the ova in the hatchery were
destroyed. In an action by the pro-
prietary of the hatchery against the
owner of the timber, it was proved that
the latter had continued his operations
after he had become aware of their
probable consequences to the ova.

Sect. 10.—Disturbance of fisheries and remedies therefor: Sub-sect. 1, B.; sub-sect. 2. Part IV. Sect. 1.]

DULVERTON RURAL DISTRICT COUNCIL v. TRACY (1921), 85 J. P. 217; 19 L. G. R. 693, H. L.

336. — Prescriptive claim to pollute.]—The L. local board, constituted under Public Health Act, 1848 (c. 63), carried the whole drainage of the town of L. into the adjacent river, a small stream which, immediately below the town, flowed for three miles through pltf.'s lands on both sides. Pltf. was also seised of a mill upon the stream. The quantity of sewage matter thrown into the stream was greatly increased, the population of the town having increased nearly one-half, & the extent of sewers from 250 yards in 1848, to 10,500 yards in 1855; & besides other evidence of that, it appeared that sheep could no longer be washed there, that the fish were all dead, & that the exhalations were noisome. Pltf. had been in correspondence with the board on the subject of remedying the nuisance until Sept. 19, 1855, which was the date of the last communication in which they held out hopes of doing so. The bill & information was filed on Jan. 15, 1856: *Held*: (1) the practice, long previous & up to 1848, of a few houses in the town to drain into the river, afforded no ground for the local board setting up a prescriptive right, & the local board, as a modern corpn., could claim no prescriptive rights: (2) the stream was a private stream, the property of pltf., & therefore he had private ground of complaint to support the bill, as well as the public nuisance on which to found the information; & the board had no rights, except with his consent, under sect. 145 of the Act; (3) there was no such laches on the part of pltf. as to prevent him from having relief on an interlocutory application. — **A.-G. v. LUTON LOCAL BOARD OF HEALTH** (1856), 27 L. T. O. S. 212; 20 J. P. 163; 2 Jur. N. S. 180.

Annotations:—As to (1) Refd. A.-G. v. Halifax Corpn. (1869), 17 W. R. 1088. As to (2) Consd. A.-G. v. Birmingham B. C. (1858), 4 K. & J. 528. Refd. A.-G. v. Kingston-upon-Thames Corpn. (1865), 11 Jur. N. S. 596.

337. — — — —.]—In answer to an action by the owner of an oyster fishery for an injunction to restrain a municipal corpn. from discharging untreated sewage into tidal waters so as to pollute pltf.'s oyster beds, defts. pleaded that they had a right both at common law & by prescription to discharge their sewage into the sea: *Held*: defts. had no right to discharge sewage into the sea so as to cause a nuisance, & an injunction ought to be granted. — **OWEN v. FAVERSHAM CORPN.** (1908), 73 J. P. 33, C. A.

— — — —.] — *See, also, EASEMENTS, Vol. XIX., pp. 157–158, Nos. 1083–1086.*

338. Discharge of sediment.] — **FITZGERALD v. FIRBANK**, No. 4, *ante*.

Salmon & Freshwater Fisheries Act, 1923 (c. 16) — Effect of.] — *See Part V., Sect. 5, sub-sect. 1, E.,*

See, also, EASEMENTS, Vol. XIX., pp. 156–158, Nos. 1074–1096.

but was willing to take any reasonable precautions which did not materially impede the removal of the timber, he being under contract with the proprietor of a plantation to remove the timber within a limited time:—*Held*:

pursuer was not entitled to damages, defender having followed the ordinary & legitimate method of carrying out the removal.—**ARMISTEAD v. BOWERMAN** (1888), 15 R. (Cl. of Sess.) 814; 25 Sc. L. R. 612.—**SCOT.**

SUB-SECT. 2.—REMEDIES.

339. Ejectment—Will not lie.] — An ejectment will not lie for a piscary.—**MOLINEUX v. MOLINEUX** (1605), Cro. Jac. 144; 79 E. R. 126.

Annotations:—Mentd. Bowman v. Milbanke (1664), 1 Sld. 191; Grange v. Tiving (1665), O. Bridg. 107; Fry's Case (1672), 1 Vent. 199; Williams v. Fry (1672), 2 Keb. 814, 867; Winsford v. Smith (1692), 1 Show. 350; Lodge v. Jennings (1727), Gilb. Ch. 255; R. v. Hoare (1817), 6 M. & S. 266.

340. — — — —.] — An ejectment will not lie *de piscaria* in a river.—**HERBERT v. LAUGHLUYN** (1637), Cro. Car. 492; 79 E. R. 1025.

341. Indictment—Discharge of gas refuse—Sufficiency of evidence to sustain.]—(1) In an indictment against a gas co. for a nuisance, in conveying the refuse of gas into a great public river, whereby the fish are destroyed, & the water is rendered unfit for drink, etc., the question for the jury is, whether the special acts of the particular co. complained of amount to a nuisance.

(2) The circumstance, that, by the diminution of fish, a considerable number of fishermen are thrown out of employ, is not of itself sufficient ground to sustain such an indictment.—**R. v. MEDLEY** (1834), 6 C. & P. 292.

Annotations:—Generally, Mentd. R. v. Stannard (1863), 12 W. R. 208; Tarry v. Ashton (1876), 1 Q. B. D. 314; Inland Revenue v. Cardiff Conservative Club (1894), 58 J. P. 120; Sherras v. De Rutzen, [1895] 1 Q. B. 918.

— — — — **For larceny of fish.]** — *See Sect. 9, sub-sect. 2, ante.*

342. Action—For trespass.] — **FAIRMAN v. GIPPS** (1851), cited in 5 E. & B. at p. 449; 119 E. R. 548.

Annotation:—Consd. Wenman v. Mackenzie (1855), 5 E. & B. 447.

343. — — — — For pollution.] — **FOSTER v. WARBLINGTON URBAN COUNCIL**, No. 333, *ante*.

— — — — **Unlawful fishing.]** — *See Nos. 86, 316–319, ante.*

344. — — — — By one co-owner — Although share of other co-owner alienated.] — Where two persons are joint owners of a lake, with a common right of sailing, fishing, floating timber, etc., such right is held to be not indivisible, & either of such persons may alien the whole or any portion of his right, even where it is merely appurtenant to the land, provided that such alienation does not deprive the co-owner of the full enjoyment of his moiety; & a co-owner may maintain an action for the regulation of his enjoyment, as he could if there had been no alienation.—**MENZIES v. MACDONALD** (1856), 2 Macq. 463; 2 Jur. N. S. 575; 4 W. R. 625, H. L.

Annotation:—Refd. Mackenzie v. Bankes (1878), 3 App. Cas. 1321.

— — — — **For injunction.]** — *See Nos. 4, 323, 327, 331, 332, 334–337, ante, Nos. 345, 354, post.*

— — — — **For damage by navigators.]** — *See Part IV., Sect. 2, post.*

345. Injunction — For pollution.] — Pltfs. were owners of land on the bank of a river, & were entitled to watering places for cattle upon that land, & also to a free fishery in the river, but had no interest in the bed of the river. The local

PART III. SECT. 10, SUB-SECT. 2.

q. Indictment.] — **KAVANAGH v. GLORNEY** (1876), 1 L. 10 C. L. 210.—**IR.**

r. Action — Fishing in injurious

PART IV.—FISHERIES IN RELATION TO NAVIGATION.

board of health for a district which included the land of plffs. commenced carrying a sewer through that land into the river, the outlet being within the limits of the free fishery:—*Held*: (1) the discharge of sewage into the river would be a user of & interference with the river within Public Health Act, 1848 (c. 63), s. 145, & plffs., having watering places on their land, were owners of land interested in the river within the meaning of that sect., & the board had therefore, no right so to discharge the sewage without the written consent of plffs.; (2) an injunction to restrain the board from making the sewer had been properly granted. —*OLDAKER v. HUNT* (1855), 6 De G. M. & G. 376; 3 Eq. Rep. 671; 25 L. T. O. S. 26; 19 J. P. 179; 1 Jur. N. S. 785; 3 W. R. 297; 43 E. R. 1279, L. J.J.

346. ——— — **Delay in seeking remedy.** — A.-G. *v.* LUTON LOCAL BOARD OF HEALTH, No. 336, *ante*.

347. ——— — **—** — A.-G. *v.* BIRMINGHAM BOROUGH COUNCIL, No. 331, *ante*.

348. ——— — **—** — *BIDDER v. CROYDON LOCAL BOARD OF HEALTH*, No. 332, *ante*.

349. ——— — **—** — *HOBART v. SOUTHEAST-ON-SEA CORPN.*, No. 334, *ante*.

350. ——— — **—** — *OWEN v. FAVERSHAM CORPN.*, No. 337, *ante*.

351. ——— — **Inclosing bed of river.** *v.* HIGHTON, No. 327, *ante*.

352. ——— — **Obstructing passage of fish.** *BARKER v. FAULKNER*, No. 323, *ante*.

353. ——— — **& damages.** *v.* FIR-BANK, No. 4, *ante*.

354. ——— — **Although statutory penalties recoverable.** — The lessee of a dwellinghouse & premises & of certain rights of fishing attached to the demised premises sued the occupiers of a mill on the stream in which the fishing rights were enjoyed in respect of certain acts which plff. alleged obstructed the free passage of salmon to & from the sea & destroyed large numbers of young fish. An objection was taken that an action for damages for the injury to the fishery & for an injunction restraining the continuance or repetition of the acts complained of would not lie in view of the penalties imposed by the Salmon Fishery Acts: *Held*: (1) the legislature had provided means for enforcing the prohibitions in the Acts, & that was the proper mode to deal with such a case as the present; (2) although an illegal act causing special & peculiar damage to the property of another person might justify an action to abate the mischief, it could not be said that any & every person having fishery rights in the river in question could maintain an action against the mill owners, but some special & definite damage clearly attributable to the illegal act must be established. *FRASER v. FEAR* (1912), 107 L. T. 123; 57 Sol. Jo. 29, C. A.

355. ——— — **—** — *DULVERTON DISTRICT COUNCIL v. TRACY*, No. 3.

See, generally, INJUNCTION.

Part IV.—Fisheries in relation to Navigation.

SECT. 1.—IN GENERAL.

356. Right of navigation — A right of way.]

(1) The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. It is therefore no excess, if a vessel which cannot reach her place of destination in a single tide remains aground until the tide serves.

(2) If property, as oysters, be placed in the channel of a public navigable river so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without doing so.

(3) A corpn., which had an immemorial right to the oyster fishery in a navigable river, to be managed by certain functionaries & cts. of the corpn. became, in 1740, by the ouster of several of its members, unable to carry on the management of the fishery. In 1763 the corpn. was incorporated by charter under the old name, & the charter ratified, confirmed & restored to it all fisheries, etc.:—*Held*: there having been no actual dissolution, the fishery had never come to the Crown &

would therefore be in the corpn. as it existed under the new charter. *Qu.*: whether if the fishery had come to the Crown, it could, after Magna Carta, have been regranted by charter.

(4) The corpn., by a written document, purporting to be an order of the ct. of the corpn. held for the conservancy of the fishery, granted a licence to certain dredgemen to dredge & take the oysters during the oyster season: *Held*: this did not operate as a demise of the fishery putting the corpn. out of possession. *COLCHESTER CORPN. v. BROOKE* (1846), 7 Q. B. 339; 15 L. J. Q. B. 59, 173; 5 L. T. O. S. 192; 10 J. P. 217; 9 Jur. 1090; 10 Jur. 610; 115 E. R. 518.

Annotations: *As to* (1) *Consd.* *R. v. Betts* (1850), 16 Q. B. 1022; *Gann v. Whitstable Free Fishers* (1865), 11 L. Cas. 192. *Refd.* *Dimes v. Pettley* (1850), 15 Q. B. 276; *v. Warman* (1857), 2 C. B. N. S. 740; 11 L. J. Q. B. 186; 115 E. R. 511; *Amberlin* (1861), 6 H. & N. 541; *Wallasey* (1870), L. R. 5 Exch. 12.

Trading Co., [1] [1901] P. 168. *Distd.* *The Men*, [1901] P. 168. *McCarthy v. Metropolitan Board of Works*, [1857], 21 8 C. P. 191. *As to* (4) *Refd.* *Potter v. Berry* (1857), 21 J. P. Jo. 756. *Generally, Refd.* *Whitstable Free Fishers v. Foreman* (1867), L. R. 2 C. P. 688. *Mentd.* *Barner v. London General Omnibus Co.* (1908), 7 L. G. R. 359.

—The owner of a right of in the upper waters of a river proceed by action against a fishing in the lower waters in

a mode injurious to plff.'s common law right.—*MASSY (LORD) v. CARRIDY* (1853), 13 L. R. Ir. 97.—*IR.* s. Compensation for

rel-pa. —*HONE TE ANOA v. KAWA DRAINAGE BOARD* (1914), 33 N. Z. L. R. 1139.—*N.Z.*

1.—In general. Sect. 2.]

357. There are two totally distinct & different things; the one is the right of property, & the other is the right of navigation. The right of navigation is simply a right of way (LORD HATHERLEY).—ORR EWING v. COLQUHOUN (1877), 2 App. Cas. 839, H. L.

Annotations :—*Consd.* Smith v. Andrews, [1891] 2 Ch. 678. *Refd.* Sutherland v. Ross (1878), 3 App. Cas. 736; Bourke v. Davis (1889), 44 Ch. D. 110. *Mentd.* Kensit v. G. E. Ry. (1883), 23 Ch. D. 506; Ormerod v. Todmorden Mill Co. (1883), 11 Q. B. D. 155; Ambler v. Bradford Corp'n. (1902), 87 L. T. 217; Gerard v. Crowe, [1921] 1 A. C. 395.

358. — Takes precedence over right of fishery.]—If an individual has a right of fishery in a navigable river, it is subject to the right of the public to use the river for all the purposes of navigation.—ANON. (1808), 1 Camp. 517, n.

Annotation :—*Consd.* Whitstable Free Fishers v. Gann (1863), 13 C. B. N. S. 853.

359. — Although fishery unavoidably damaged—Grounding of ship at low tide.]—STER CORPN. v. BROOKE, No. 356, *ante*.

360. — Under grant by Crown.]—(1) The bed of all tidal navigable rivers & of all arms of the sea is in the Crown, but is so for the benefit of the subjects. The right of navigation belongs, by law, to all the subjects of the realm, & the right to anchor is a necessary part of the right to navigate. This right could never have been interfered with by grant from the Crown. The grant therefore of an oyster bed in an arm of the sea below low water mark, must have been taken by the grantee, subject to the public right of navigation; & he cannot now, in respect of his ownership of the soil, make any demand, even if expressly granted to him, which in any way interferes with the enjoyment of this public right.

(2) A claim of an anchorage due cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil of claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage due. Evidence of mere immemorial usage will not support such a claim.

(3) A liability to make compensation for actual injury done to the oysters by anchoring is not to be confounded with a liability to toll for casting anchor in the soil itself.—GANN v. WHITSTABLE FREE FISHERS (1865), 11 H. L. Cas. 102; 20 C. B. N. S. 1; 5 New Rep. 432; 35 L. J. C. P. 29; 12 L. T. 150; 29 J. P. 243; 13 W. R. 589; 2 Mar. L. C. 179; 11 E. R. 1305, H. L. *reversg.* S. C. *sub nom.* WHITSTABLE FREE F v. GANN (1863), 13 C. B. N. S. 853, Ex. Ch.

Annotations :—*As to* (1) *Refd.* Denaby & Cadeby Main Collieries v. Anson, [1911] 1 K. B. 171. *As to* (2) *Consd.* Foreman v. Whitstable Free Fishers & Dredgers (1869), L. R. 4 H. L. 266. *Refd.* Holford v. George (1868), L. R. 3 Q. B. 639. *As to* (3) *Consd.* The Bien, [1911] P. 40. *Generally.* *Mentd.* Bridgwater Trustees v. Bootle Surveyors (1866), 7 B. & S. 318; Jolliffe v. Wallasey L. B. (1873), L. R. 9 C. P. 62; R. v. Keyn (1876), 2 Ex. D. 63; Sutton Harbour Improvement Co. v. Plymouth Town Grdns. (1890), 63 L. T. 772.

361. — Including right of anchorage.] GANN v. WHITSTABLE FREE FISHERS, No. 360, *ante*.

—.]—*Sec. generally*, SHIPPING; WATERS & WATERCOURSES.

362. Abatement of interference with navigation — Removal of weir appurtenant to fishery—

Granted before reign of Edward I.—Obstruction by change of river bed.]—A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the Crown before the commencement of the reign of Edward I. Such a grant may be inferred from evidence of its having existed before that time. If the weir, when so first granted, obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Trespass for breaking down a weir appurtenant to a fishery. Justification, that the weir was wrongfully erected across part of a public & navigable river, the S., where the King's subjects had a right to navigate, & that the rest of the river was choked up so that defts. could not navigate without breaking down the weir. Replication, that the part where the weir stood was distinct from the channel where the right of navigation existed, & was not a public navigable river. Rejoinder, that the part was a part of the S., & the King's subjects had a right to navigate there when the rest was choked up, & that the rest was choked up. Surrejoinder, traversing the right :—*Held* : in support of this traverse plff. might show user to raise presumption of such a grant as above, & was not bound, for the purpose of introducing such proof, to set out his right more specifically on the record.

Where the Crown, had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir, obstructing a part, except subject to the rights of the public; & in such a case, the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere.—WILLIAMS v. WILCOX (1838), 8 Ad. & El. 314; 3 Nev. & P. K. B. 606; 1 Will. Woll. H. 477 7 L. J. Q. B. 229; 112 E. R. 857.

Annotations :—*Refd.* Whitstable Free Fishers v. Gann (1863), 13 C. B. N. S. 853; A.-G. v. Lonsdale (1868), L. R. 7 Eq. 377; Rolle v. Whyte (1868), 8 B. & S. 116; A.-G. v. Simpson, [1901] 2 Ch. 671; Simpson v. A.-G., [1904] A. C. 176. *Mentd.* R. v. United Kingdom Electric Telegraph Co. (1862), 2 B. S. 617, n.

363. — Damage to oyster beds.] COL- v. BROOKE, No. 356, *ante*.

364. Anchorage tolls — Claim by owners of fisheries — Consideration — Necessity for.]—GANN v. WHITSTABLE FREE FISHERS, No. 360, *ante*.

365. What amounts to.]

In an action for anchorage dues claimed in respect of a vessel casting anchor on certain anchorage ground, situated within the sea below low water mark, it appeared that plffs. were the owners in fee of the soil of such anchorage ground, & of oyster beds outside the same. It appeared also that the anchorage ground was protected by breakwaters, & afforded a comparatively safe anchorage for ships, & that both it & the oyster fishery had been parcel of a manor within which there had anciently been a port or place for landing goods from ships, but there was no direct evidence that such anchorage ground was within or connected with such port. There was, however, evidence that plffs. maintained buoys & beacons to mark the boundaries of the oyster fishery, & to prevent vessels anchoring on the oyster beds; & that these buoys & beacons marked the limits of the anchorage ground, & indicated a channel by which vessels of a light draught of water could enter the anchorage ground; & there was evidence that such buoys & beacons had been so main-

PART IV.—FISHERIES IN RELATION TO NAVIGATION.

tained as far back as living memory extends. It being proved that the payment of the anchorage dues had been received from time immemorial by plffs. & those under whom they claimed in respect of all vessels casting anchor within the limits of the anchorage ground:—*Held*: there was ample evidence to justify the presumption, both that the *locus in quo* was by prescription within an ancient port, & before the time of memory the lord of the manor, being also owner of the fishery & soil under the sea, had consented to the formation of the port, on the terms that he should have toll on merchandise landed, & anchorage from vessels anchoring or grounding in the haven; he at the same time agreeing to keep up the buoys, chiefly, in all probability, for the object of protecting the oysters, but incidentally of guiding vessels to the safe anchorage; & as this was so, there was ample consideration to support the customary payment, & the ct., in order to support an immemorial payment, ought to make this presumption.—*WHITSTABLE FREE FISHERS v. FOREMAN* (1868), L. R. 3 C. P. 578; 37 L. J. C. P. 305; 18 L. T. 734; 32 J. P. 596; 16 W. R. 1019; 3 Mar. L. C. 110, Ex. Ch.; *affd. sub nom. FOREMAN v. WHITSTABLE FREE FISHERS* (1869), L. R. 4 H. L. 266, H. L.

Annotations:—*Reid*. *Truro Corp'n. v. Rowe* (1902), 71 L. J. K. B. 974; *Denaby & Cadeby Main Collieries v. Anson*, [1911] 1 K. B. 171. *Mentd.* *Brecon Markets Co. v. Neath & Brecon Ry.* (1872), L. R. 7 C. P. 555; *R. v. Keyn* (1876), 13 Cox, C. C. 403; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 110.

SECT. 2.—ACTION FOR DAMAGE CAUSED BY NAVIGATORS.

366. Who is liable—Owner of ship—Damage reduced by master of ship.]—A ship in charge of a compulsory pilot was at high water brought into & anchored by the pilot in a river in which there were oyster beds, the existence of which was known to the pilot. The place where she was anchored was not the usual & customary place for vessels of her size & draught to anchor in. At low water she grounded, & thereby did damage to an oyster bed. On notice of the existence of the oyster bed being given to the master, he took all reasonable means to remove his ship as speedily as possible:—*Held*: the act of the pilot in anchoring the ship where he did was negligence which made him liable, but that the ship was not liable because the master's duty on receiving notice of the existence of the oyster bed was to take all reasonable measures, not extraordinary measures, to remove his ship, & this he had done.—*THE*

OCTAVIA STELLA (1887), 57 L. T. 632; 6 Asp. M. L. C. 182.

Annotations:—*The Swift*, [1901] P. 168. *Consd.* *The Bien*, [1911]

367. ——— Ship grounded through negligent navigation.]—*THE OCTAVIA STELLA*, No. 366 *ante*.

368. ———.]—Plffs., owners of oyster beds at the mouth of a navigable river brought an action *in rem* against defts. as owners of a vessel, for so negligently navigating her as to ground on the property of plffs. & thereby do damage to their oysters & oyster beds:—*Held*: (1) the damage was "done by a ship" within Admiralty Court Act, 1861 (c. 10), s. 7, & therefore the action would lie; (2) as the damage was not done by grounding in the ordinary course of navigation, or without notice of the existence of the oyster beds, defts. were liable for the negligence of those in charge of their vessel; & (3) as plffs. had property in the soil, & by Sea Fisheries Act, 1868 (c. 45), s. 51, in the oysters, they were entitled to enforce their claim for damage not only in respect of the disturbance of the beds, but also in respect of the destruction of the oysters. *THE SWIFT*, [1901] P. 168; 70 L. J. P. 17; 85 L. T. 316; 17 T. L. R. 400; 9 Asp. M. L. C. 244.

369. ——— Acting under orders of harbour master.]—A vessel, wrecked in a navigable river, was raised by her owner, one of defts., & was placed on an oyster fishery ashore, doing damage to the oysters. The harbour master, servant of other defts., the conservators of the river, was in charge of the operations, deft. owner obeying his orders, & the harbour master was negligent in giving such orders, as he ought to have known of the oyster fishery. Notice that the wrecked vessel was on the fishery was given to deft. owner, who was in possession of the vessel, & to the harbour master; but the vessel remained there for a considerable time under repair, doing further damage:—*Held*: the conservators were liable for the whole of the damage, as the harbour master was negligent in placing the wrecked vessel on the oyster beds, & it was his duty to have had her moved from there; but the owner was not liable, as he placed her there by the orders of the harbour master, who had authority to give such orders, & he had no right without further orders from the harbour master, whose responsibility still continued, either to remove the wrecked vessel from there or to place elsewhere. *THE BIANCA*, [1901] P. 168; 70 L. J. P. 17; 85 L. T. 316; 17 T. L. R. 400; 9 Asp. M. L. C. 244.

370. ——— Pilot Negligence.—*THE OCTAVIA STELLA*, No. 366, *a*

PART IV. SECT. 2.

t. General rule.]—Due care & skill must be used in navigating, so as not wilfully to destroy fishing nets, whether lawfully set or not, of the position of which those in charge of the boat had notice.—*SMITH v. NORTHERN CONSTRUCTION Co.* (1914), 30 O. L. R. 494; 19 D. L. R. 380; 5 O. W. N. 789.—*CAN.*

370 i. Who is liable—Pilot—Negligence.]—D. had a licence to fish with 40 fathoms of salmon nets off his property. While engaged in so fishing, but with 80 fathoms of nets, the nets were run into & injured by a raft owned by S. Before the accident M., the pilot of the raft, foreseeing that there was danger of striking the nets, cast anchor for the purpose of avoiding it. The anchor rope, which was new & for that purpose, broke, &

the collision occurred. There was evidence that M., when asked how it happened, said: "My warp broke; my warp was poor":—*Held*: sufficient evidence of negligence to support a verdict in D.'s favour.—*SNOWBALL v. DONOVAN* (1895), 33 N. B. R. 182.—*CAN.*

370 ii. ———.]—A net set by plff. in a public tidal navigable river, for the purpose of catching fish, was carried away by the negligent navigation of defts.' tow-boat, or a tow which she had in charge, by going unnecessarily near the side of the river where the net was set. *Held*: even assuming that the net extended further out from the river than the law allowed, deft. had nevertheless, no right to run into & destroy it either through wantonness

or neglect. *THE OCTAVIA STELLA*, No. 366, *a*

370 iii. ———.]—A net set by plff. in a public tidal navigable river, for the purpose of catching fish, was carried away by the negligent navigation of defts.' tow-boat, or a tow which she had in charge, by going unnecessarily near the side of the river where the net was set. *Held*: even assuming that the net extended further out from the river than the law allowed, deft. had nevertheless, no right to run into & destroy it either through wantonness or neglect. *THE OCTAVIA STELLA*, No. 366, *a*

& proper look-out

Sect. 2.—Action for damage caused by navigators.
3. *Part V. Sect. 1: Sub-sect. 1.]*

371. — Harbour authority— Moorings belonging to harbour-master—Injunction refused.]—MEDINA RIVER OYSTER FISHERY CO., LTD. & ULLMANN v. NEWPORT, ISLE OF WIGHT CORPN. (1897), 61 J. P. Jo. 467, C. A.

372. River Conservators—Negligence by harbour-master.]—THE BIEN, No. 369, *ante*.

373. Jurisdiction of court—County court—County Courts Act, 1888 (c. 43), ss. 56, 60.]—In an action in a county ct. for damage done to pltf.'s oyster bed by deft.'s barge, pltf. gave evidence of fourteen years' possession of the oyster bed. Deft., prior to the hearing, gave notice to pltf. to produce his documents of title, & at the hearing cross-examined him as to his title, but tendered no evidence in contradiction of it. The value of the oyster bed exceeded £50 by the year:—*Held*: (1) no question of title to hereditaments, within sect. 56 of the above Act arose, & (2) the word "easement" in sect. 60 of above Act applied only to an easement over a servient tenement in respect of a dominant tenement, & did not apply to the user of a navigable water by the public; & the county ct. judge, therefore, had jurisdiction to entertain the action. **HAWKINS v. RUTTER**, [1892] 1 Q. B. 668; 61 L. J. Q. B. 146; 40 W. R. 238; 36 Sol. Jo. 152, D. C.

Annotation:—As to (2) Reidd. Howorth v. Sutcliffe, [1895] 2 Q. B. 358.

374. — Admiralty—Action in rem—Ad-

miralty Court Act, 1861 (c. 10), s. 7.]—THE SWIFT, No. 368, *ante*.

375. — Rights of Crown—Removal to revenue side of High Court—Ownership of foreshore.]—A statement of claim alleged that pltf. was in possession of an oyster fishery & oyster beds in the estuary of a river & was the owner of large quantities of oysters that he had placed there, & that defts., being the harbour comrs. of the estuary, wrongfully caused certain vessels to anchor upon the oyster beds, whereby the oysters were damaged. The A.-G. claimed to have the action removed to the revenue side of the K. B. Div. upon the suggestion that the rights of the Crown as the owner of the foreshore might be thereby affected:—*Held*: although pltf. did not claim to be in possession under any title, & defts. did not justify their acts under the authority of the Crown, the Crown was entitled to have the action removed. — **ULLMANN v. COWES HARBOUR COMRS.**, [1909] 2 K. B. 1; 78 L. J. K. B. 877; *sub nom.* A.-G. v. NEWPORT CORPN., *Re ULLMANN v. COWES HARBOUR COMRS.*, 100 L. T. 436.

376. In respect of what damage—Disturbance of fishery—Destruction of fish.]—THE SWIFT, No. 368, *ante*.

SECT. 3.—PREVENTION OF COLLISION. e SHIPPING.

Part V. Statutory Enactments relating to Salmon and Freshwater Fisheries.

SECT. 1.—FISHERY DISTRICTS AND FISHERY BOARDS.

SUB-SECT. 1.—IN GENERAL.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 37-43, 92 (1), sched. II.

377. Fishery district—Formation or extension—By Secretary of State.]—Under Salmon Fishery Act, 1865 (c. 121), ss. 3 & 5, when the justices of any county in quarter sessions have applied to the Secretary of State to form into a fishery district any river lying wholly or partly in their county, the Secretary of State has jurisdiction by his certificate to enlarge the limits of the district to any extent, in same & the neighbouring counties, that he in his discretion may think fit.—**R. v. GREY** (1866), L. R. 1 Q. B. 469; 7 B. & S. 434; 35 L. J. M. C. 198; 14 L. T. 477; 30 J. P. 487; 12 Jur. N. S. 685; 14 W. R. 671.

378. — Definition of limits—By Secretary of State.]—**R. v. GREY**, No. 377, *ante*.

379. — Artificial reservoir not included—Freshwater Fisheries Act, 1878 (c. 39), ss. 6, 7.]—Sect. 6 of above Act, which extends the provisions of Salmon Fishery Acts relating to fishery districts to "all waters within the limits of this Act frequented by trout or char," does not give fishery boards jurisdiction over waters of a different character from those referred to in Salmon Fishery Acts, & has, therefore, no application to an artificial reservoir although it is frequented by trout or char.—**STEAD v. NICHOLAS**, [1901] 2 K. B. 163; 70 L. J. K. B. 653; 85 L. T. 23; 65 J. P. 484; 49 W. R. 522; 17 T. L. R. 454; 45 Sol. Jo. 467; 20 Cox, C. C. 27, D. C.

Annotations:—Mentd. Cook v. Clarebrough (1903), 9 L. T. 550, n.; *Moses v. Iggo*, [1906] 1 K. B. 516.

380. — What is a tributary—Tributary of tributary.]—By certificate of the Secretary of State, the Severn fishery district was defined to be "so much of the river Severn & of the rivers V. & T. & of all other tributaries of the river Severn

fishermen setting their lines or the buoys they had set:—*Held*: defenders had proved that the loss sustained did not arise from their fault, & therefore absolved them.—**LESLIES v. WALKER** (1886), 14 R. (Ct. of Sess.) 24 Sc. L. R. 213.—**SCOT**.

370 iv. — — — —.]—The crew

of a fishing-boat shot their long lines some miles from shore in clear daylight near a buoy round which two trawlers were fishing within a radius of about a mile. The crews of the trawlers could easily see that the lines were being shot, but without taking any precautions to avoid injury to

the long lines, came round the buoy, trawled over them, & injured them:—*Held*: as the trawlers had failed to take precautions to avoid injuring the long lines, they were liable in damages.—**MASSON v. NICHOLSON** (1892), 20 R. (Ct. of Sess.) 176; 30 Sc. L. R. 165.—**SCOT**.

as is situate within the counties of Gloucester, etc." The rivers V. & T. flow directly into the Severn. Licences are required for fishing in the Severn fishery district. On information against resps. for fishing without a licence in a brook which was a tributary of a tributary of the river T.:—*Held*: the justices were right in dismissing the information, because the certificate only included in the district direct tributaries of the Severn, which this brook was not.—*MERRICKS v. CADWALLADER* (1881), 51 L. J. M. C. 20; 46 L. T. 29; 46 J. P. 216, D. C.

Annotations:—*Expld.* Hall v. Reid (1882), 10 Q. B. D. 131, n. *Distd.* Evans v. Owens, [1895] 1 Q. B. 237.

381. ————.]—I see no necessity for putting the limitation suggested upon the word "tributary." Why should not the ct. read the word in the Secretary of State's certificate in its natural sense? A "tributary" is that which contributes to. No one can doubt for a moment that the Wye is a tributary of the Trent in that sense. If it were not that the waters of the Derwent were brought in aid, the Wye would be the sole tributary of the Trent; it would be the Trent, & the difficulty would be got over in that way (FIELD, J.).—*HALL v. REID* (1882), 10 Q. B. D. 131, n.; 52 L. J. M. C. 32, n.; 48 L. T. 221, n., D. C.

Annotations:—*Distd.* Harbottle v. Terry (1882), 10 Q. B. D. 131. *Folld.* Evans v. Owen & Jones (1891), 64 L. J. M. C. 59.

382. ————.]—A Secretary of State's certificate, made under Salmon Fishery Acts, 1861 (c. 109), 1876 (c. 19), defined the limits of the Severn fishery district as including "so much of the river Severn & of all the tributaries of the river" as was situate within certain specified countries:—*Held*: a brook running into a river, which ran directly into the Severn, was a "tributary" of the Severn within the certificate.—*EVANS v. OWENS*, [1895] 1 Q. B. 237; 64 L. J. M. C. 59; 72 L. T. 54; 43 W. R. 237; 39 Sol. Jo. 152; 15 R. 228, D. C.

383. ———— **Reservoir formed from tributary—For water supply.**—By Salmon Fishery Act, 1865 (c. 121), the limits of a river shall be defined, & a fishery district shall be formed, for the purpose of the Salmon Fishery Acts, by a Secretary of State's certificate describing the limits of the river & district, & by Salmon Fishery Act, 1865 (c. 121), s. 3, "river" shall include "such portion of any stream with its tributaries" as may be declared in the certificate. Prior to 1815 the Whittle Burn in the county of N. was a tributary of the Tyne. In 1815 a water co., under powers given by local Acts, constructed works for the supply of water to a neighbouring town, by placing a dam across the stream of the Whittle Burn, & forming a series of reservoirs; the water being taken by underground pipes from the stream into the highest reservoir, & from thence to the others. All water not required for the reservoirs was allowed to pass down a watercourse running outside the reservoirs into the ancient watercourse of the burn, down which it flowed into the Tyne. Sometimes all the water coming down the Whittle Burn was taken into, & impounded in, the reservoirs, & none flowed into the Tyne. At other times all the water flowed into the Tyne without having entered the reservoirs. There were outlets with sluices from the reservoirs by which surplus water flowed into the Tyne down watercourses also running into the ancient watercourse of the burn. In 1866, the fishery district

of the river Tyne was formed, & the Secretary of State's certificate defined the limits as "so much of the river Tyne with its tributaries" as was situate (*inter alia*) in the county of N.:—*Held*: the reservoirs were not tributaries of the Tyne within the meaning of the certificate.—*HARBOTTLE v. TERRY* (1882), 10 Q. B. D. 131; 52 L. J. M. C. 31; 48 L. T. 219; 47 J. P. 136; 31 W. R. 289, D. C.

Annotations:—*Folld.* George v. Carpenter, [1893] 1 Q. B. 505. *Distd.* Evans v. Owen & Jones (1891), 64 L. J. M. C. 59. *Refd.* Cook v. Clarendon (1903), 91 L. T. 550, n.; Moses v. Iggo, [1906] 1 K. B. 516.

384. ————.]—By Salmon Fishery Act, 1865 (c. 121), the limits of a river to be defined, & a fishery district is to be formed, for the purposes of the Salmon Fishery Acts, by a Secretary of State's certificate describing the limits of the river & district, & by s. 3 "river" is to include "such portion of any stream with its tributaries" as may be declared in the certificate. In 1866 the fishery district of the river Severn was formed, & the Secretary of State's certificate defined the limits as being (*inter alia*) "so much of the river Severn & of the river Vyrnwy & of all other tributaries of the river Severn as is situate within the county of Montgomery"; in 1867 a second certificate further defined the limits as including (*inter alia*) "so much of the tributaries of the river Vyrnwy" as was in Montgomeryshire, & in 1882 a third certificate included in the district "all tributaries of the river Severn" in that county. In 1880 the corpn. of Liverpool obtained an Act of Parliament, & in the exercise of the powers given by such Act constructed a reservoir by means of an embankment across the valley of the Vyrnwy for the purpose of supplying Liverpool with water; the Act authorised them to collect, divert, impound, & use all the waters of the Vyrnwy & all its tributary streams at & above the point at which the embankment of the reservoir crossed the river; but the corpn. were, before using the water for their own purposes, to cause to flow & be discharged from the reservoir into the river Vyrnwy within forty chains of the foot of the embankment a regular, equal, constant, & daily supply of water, called the daily compensation water; additional monthly compensation water was also provided for. After the completion of the reservoir, the requirements of the Act as to the compensation water were duly complied with:—*Held*: the reservoir was not a tributary of the river Severn within the meaning of the certificates, & was therefore not within the jurisdiction of the board of conservators of the Severn fishery district.—*GEORGE v. CARPENTER*, [1893] 1 Q. B. 505; 68 L. T. 714; 57 J. P. 311; 41 W. R. 366; 37 Sol. Jo. 387; 5 R. 266.

Annotation:—*Expld.* Stead v. Nicholas (1901), 70 L. J. K. B.

385. ———— **Pond formed in stream—No commercial purpose.**—Resp. was fishing without a licence from the fishery board of the district in one of three ponds made by damming up at intervals a brook which flowed into one of the rivers named in the certificate of the Secretary of State defining the fishery district. These ponds had not been made under any Act of Parliament or for commercial purposes:—*Held*: the pond was a tributary within Salmon Fishery Act, 1865 (c. 121), & resp. could be convicted of fishing without a licence.—*COOK v. CLARENBROUGH* (1903), 75 L. J. K. B. 332, n.; 91 L. T. 550, n.; 70 J. P. 252, D. C.

Annotation:—*Folld.* r. B. 516.

Sect. 1.—Fishery districts and fishery boards: Sub-sects. 1 & 2. Sects. 2

386. ——— Mill pond.]—From a stream, which was a tributary of a salmon river, a mill race was conducted to certain mills. For the purpose of increasing the water power to the mills a triangular mill pond was constructed opening out of the mill race, & the water flowed backwards & forwards from the pond to the mill race, the water in the pond & race being always at the same level. All the water ultimately, after turning the mills, returned to the stream:—*Held*: the mill pond was a tributary of the stream, & persons fishing in it required a licence from the fishery board of the district.—*MOSES v. IGGO*, [1906] 1 K. B. 516; 75 L. J. K. B. 331; 94 L. T. 548; 70 J. P. 251; 50 Sol. Jo. 343; 21 Cox, C. C. 136, D. C.

387. Fishery board—Liability to income tax.]—A fishery board acting under the provisions of the Salmon & Freshwater Fisheries Acts, 1861 to 1892, does not carry on a business analogous to a trade, & any balance of the moneys received by it for fishing licences or for penalties recovered from offenders over & above the expenses of maintaining the fishery does not constitute a profit which is assessable to income tax.—*SEVERN FISHERY BOARD v. O'MAY*, [1919] 2 K. B. 484; 89 L. J. K. B. 9; 121 L. T. 371; 7 Tax Cas. 191.

SUB-SECT. 2. —CONSTITUTION, POWERS AND PROCEEDINGS OF FISHERY BOARDS.

Application of Salmon & Freshwater Fisheries Act, 1923 (c. 16).]—*See* Salmon & Freshwater Fisheries Act, 1923 (c. 16), s. 41.

Constitution & appointment of fishery boards.]—*See* Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 41-51, 92 (1), sched. III.

Proceedings & powers of fishery boards.]—*See* Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 52-58.

SECT. 2. —BYE-LAWS.

See, now, Salmon & Freshwater Fisheries Act 1923 (c. 16), ss. 59-60.

388. Bye-law as to nets—Validity of—Prohibition against use of all nets—Except one specified

kind.]—By Salmon Fishery Act, 1873 (c. 71), s. 39 (11), it was provided that a board of conservators might make bye-laws for the better protection, preservation, & improvement of the salmon fisheries within their district, to regulate during the annual & weekly close seasons the use within any river of nets for fish other than salmon, when such use at such times was prejudicial to the salmon fisheries. A board of conservators made a bye-law that it should not be lawful for any person to use any net whatever inside the bar in any public water of their fishery district, except a trawl net, between Dec. 1 & Apr. 30, both inclusive. Upon an information under the above bye-law against fishermen for using a draft net inside the bar in a public water of the fishery district, on Apr. 13 the magistrates found as a fact that trawl nets could not be advantageously used by fishermen in that part of the river, & that certain other kinds of nets could be used without prejudice to the salmon:—*Held*: the bye-law was *ultra vires* & invalid, & the conservators had no power under Salmon Fishery Act, 1873 (c. 71), s. 39 (11), to make a bye-law which was not a mere regulation, but an absolute prohibition for a definite time, of the use of nets which were not prejudicial to the salmon fishery.—*PIDLER v. BERRY* (1888), 59 L. T. 230; 53 J. P. 6; 4 T. L. R. 627, D. C.

389. ——— Certain nets non-injurious to salmon.]—A bye-law made by a board of conservators prohibited all nets used for fish within certain limits. Justices found as a fact that some nets there used were not prejudicial to salmon, & held the bye-law as in excess of the powers given by Salmon Fishery Act, 1873 (c. 71), s. 39:—*Held*: the justices were right, & they were the proper judges of the fact whether nets prejudiced the salmon fisheries.—*WOOD v. VENTON* (1890), 51 J. P. 662, D. C.

390. ——— Prohibition against use of particular net—Power to determine "description" of net.]—By Salmon Fishery Act, 1873 (c. 71), s. 39, a board of conservators may make bye-laws to determine (*inter alia*) "the length, size, & description of nets . . . for taking salmon":—*Held*: a bye-law made under this sect. which prohibited the use of particular kinds of nets was not *ultra vires*, since the word "description" did not limit the board of conservators to making regulations as to the characteristics of the particular kind of net.—*CLAYTON v. PEIRSE*, [1904] 1 K. B. 424; 73 L. J. K. B. 268; 90 L. T. 119; 68 J. P. 233; 52 W. R. 495; 20 Cox, C. C. 596.

391. Bye-law as to close season—Affecting "all

PART V. SECT. 1, SUB-SECT. 2.

a. District board of fisheries—Reconstitution of.]—A district board had been constituted under Salmon Fisheries (Scotland) Act, 1862, for the preservation of the fisheries in the district, but had subsequently lapsed upon the expiry of the three years' term of office of those who were first elected, without a new board having been elected. The ct. in the absence of any statutory direction upon the subject granted the prayer of a petition by two of the proprietors qualified under the Act, asking a remit to the sheriff to reconstitute the board according to the forms enacted by the sect. in the case of a first election.—

(Ct. of Sess.) 819.—**SCOT.**

b. ——— Title of board to sue for interdict.]—Under Salmon Fisheries

Acts, 1862 & 1868, fishery boards have power to sue for penalties for offences under the Acts, & to apply summarily to the sheriff for the enforcement of rules & regulations made by them. In a note of suspension & interdict brought by a fishery board at common law to prevent persons fishing in a manner alleged to be illegal:—*Held*: complainers, being merely a statutory board with statutory remedies, had no title to sue.—*TAY DISTRICT FISHERY BOARD v. ROBERTSON* (1887), 15 R. (Ct. of Sess.) 40; 25 Sc. L. R. 51.—**SCOT.**

fishery.]—An assessment was [by a district fishery board on the proprietor of an estate who had the right to the salmon fishing in the river *ex adverso* of his estate:—*Held*: the district board were entitled

to assess defender in respect of this entry.—*DON DISTRICT BOARD v. BURNETT*, [1918] S. C. 37; 55 Sc. L. R. 90.—**SCOT.**

PART V. SECT. 2.

d. Bye-law as to preserving good order.]—The power to make regulations for "preserving good order among persons engaged in fishing" which is conferred upon the Governor-in-Council by Fisheries Act, 1908, s. 5 (f), will not cover a regulation forbidding the owner or crew of any licensed fishing boat to "carry on board any firearms" unless "authorised to do so in writing by the collector of customs.—*JORGENSEN v. RIDINGS*, [1917] N. Z. L. R. 980.—**N.Z.**

e. Bye-law forbidding taking of trout—During close season—Validity of.]—A regulation made under Fisheries

kinds of fish known as river fish"—Eels included therein—Thames Conservancy Act, 1864 (c. 113), s. 65.]—Thames Conservancy Act, 1864 (c. 113), s. 65, empowers the conservators to make bye-laws for, amongst other things, "determining the times during which the taking of any particular or specified kinds of fish shall not be practised." One of the bye-laws made in pursuance of that authority was as follows:—"The following respective periods shall be deemed to be the fence-season in the upper river, i.e. (a) For salmon, salmon-trout, & trout, the period between Sept. 10 in each year & Mar. 31 following, both inclusive; (b) For pike, jack, perch, roach, rudd, barbel, bream, chubb, carp, tench, grayling, gudgeon, pope, dace, crayfish, bleak, minnow, & every kind of fish known as river fish, except salmon, salmon-trout, & trout, the period between Feb. 14 in each year & May 31 following, both inclusive":—*Held*: "eels" are included in the general words, "every kind of fish known as river fish."—WOODHOUSE v. ETHERIDGE (1871), L. R. 6 C. P. 570; 24 L. T. 709; 36 J. P. 23.

392. Prosecution for breach of bye-law—Refusal of justices to convict—Bye-law held to be unreasonable—No grounds for such opinion stated.—Where justices refused to convict for a breach of a bye-law prohibiting fishing at certain distances above & below a weir on the ground that such bye-law was unjust & unreasonable, but did not set out the finding of fact upon which they arrived at this conclusion in the case stated by them for the opinion of the ct.:—*Held*: as *prima facie* the bye-law was valid, & there was nothing to show what was finding of fact by the justices on which they decided the bye-law to be unreasonable, the case must be sent back for the justices to convict.—ONIONS v. CLARKE (1917), 86 L. J. K. B. 740; 116 L. T. 335; 81 J. P. 77, D. C.

SECT. 3.—INSPECTORS AND BAILIFFS.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 66–72.

393. Powers — To seize nets — In private fisheries.—Water bailiff of the river Thames cannot justify seizing nets in a private fishery.—BULBROOK v. GOODERE (1765), 3 Burr. 1768; 1 Wm. Bl. 569; 97 E. R. 1089.

394. — To institute proceedings — Without authority from fishery board.—Applt. was summoned for fishing without a licence, in a fishery

district subject to a board of conservators, upon the information & complaint of resp., a duly appointed water bailiff in the employment of the board. It was not proved that resp. was authorised by the board to institute the proceedings:—*Held*: the penalty for the offence could only be recovered by the board of conservators, & therefore resp. was not entitled to institute the proceedings, & applt. was not liable to be convicted.—ANDERSON v. HAMLIN (1890), 25 Q. B. D. 221; 59 L. J. M. C. 151; 63 L. T. 108; 51 J. P. 757; 17 Cox, C. C. 129, D. C.

Annotations:—N.F. Pollock v. Moses (1891), 63 L. J. M. C. 40 W. R. 383. *Mentd.* Foster v. Fyfe, [1896] 2 Q. B. 104.

395. — Fisheries Act, 1891 (c. 37), s. 13.—Above sect. provides that the powers conferred on any authorities or officers by former Acts relating to sea fisheries, salmon, & freshwater fisheries, "shall not be construed as limiting or taking away the power of any other person to take legal proceedings for the enforcement of any such Act or of any bye-law made thereunder":—

Held: under this sect. resp., a water bailiff, was entitled to take proceedings against applt. for illegal fishing without being specially authorised to do so by the fishery board, who employed him, notwithstanding the decision in *Anderson v. Hamlin*, No. 394, *ante*, which was superseded by this enactment.—POLLOCK v. MOSES (1891), 63 L. J. M. C. 116; 70 L. T. 378; 58 J. P. 527; 17 Cox, C. C. 737; 10 R. 169, D. C.

396. — To enter on lands — When authorised by board — Penalty for resisting entry.—A water bailiff, who has an order signed by the chairman of the conservators, authorising him to enter upon all lands adjoining any salmon river within the fishery district, has a "special order" within 36 & 37 Vict. c. 71, s. 37. Any owner of lands who resists such bailiff in entering his lands, incurs the same penalty as resisting a constable under Prevention of Crime Act (c. 112), s. 12; 48 & 49 Vict. c. 75, s. 2.—HESELTINE v. MYERS (1891), 58 J. P. 689, D. C.

397. — To search — Nets, baskets, bags, etc. — Pocket included in term "bag."—By Salmon Fishery Act, 1873 (c. 71), s. 36, "Any water bailiff appointed under Salmon Fishery Acts, 1861 to 1873, acting within the limits of his district, may . . . search & examine all nets, baskets, bags, & other instruments used in fishing or in carrying fish by persons whom there is reasonable cause to suspect of having possession of illegally caught," & any person refusing to allow such search is to be liable to a penalty. On the hearing of an information against resp. for a

Act, 1908, providing that no acclimatisation society shall during the close season take trout for the purpose of pisciculture from the waters of any river or stream within the boundaries of any other acclimatisation district without the consent of the acclimatisation society from within whose rivers it is proposed to take trout being first obtained in writing is *intra vires* & valid.—SOUTHLAND ACCLIMATIZATION SOCIETY v. OTAGO ACCLIMATIZATION SOCIETY, [1918] N. Z. L. R. 524.—N. Z.

f. Bye-law as to close seasons.—The bye-law of the Comrs. under Salmon Fisheries (Scotland) Acts, 1862 & 1868, made "with respect to the due observance of the weekly close time" & enacting that a clear opening shall be made " & kept free from obstruction" in the pouches of

every stake-net, had not been contravened by the owner of a stake-net placed *in situ* for fishing in a tidal river, who had closed the pouches of his net during the last 3½ hours of the weekly close time, in respect that, during the whole of these 3½ hours the net had been on dry land owing to the ebb of the tide.—(EARL) v. BIRRELL, [1914] S. C. (J.) 92; 51 Sc. L. R. 369; 1 S. L. T. 217.—SCOT.

PART V. SECT. 3.

g. Powers — To search.—Water-bailiffs are not entitled to search a person whom they suspect to be guilty of illegal fishing unless they have previously apprehended him upon what they believe to be good grounds, or unless they have a warrant to search him.—JACKSON v. STEVENSON (1897), 24 R. (Ct. of Sess.) 38, J.—SCOT.

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(1868), 7 N. S. R. 5

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9 S. C. R. 206.—CAN.
L. — a B-duty

Sect. 3.—Inspectors and bailiffs. Sects. 4 5:
Sub-sect. 1, A., B. & C.]

refusal to allow his pocket to be searched under above sect. the justices found that the pockets of men's coats were frequently used for the purpose of carrying fish:—*Held*: having regard to that finding, resp.'s pocket was a "bag or other instrument" within the meaning of Salmon Fishery Act, 1873 (c. 71), s. 36.—*TAYLOR v. PRITCHARD*, [1910] 2 K. B. 320; 79 L. J. K. B. 749; 103 L. T. 224; 74 J. P. 372; 26 T. L. R. 496.

— **Under Thames Conservancy Act, 1857 (c. cxlvii).]**—*See* Sect. 10, sub-sect. 2, *post*.

398. Obligations—To produce instrument of appointment—Before exercising powers.]—A water bailiff appointed under Salmon Fishery Acts, 1865 (c. 121) & 1873 (c. 71), is bound before attempting to exercise his power of searching boats, etc., used in fishing to produce the instrument of his appointment.—*BARNACOTT v. PASSMORE* (1887), 19 Q. B. D. 75; 51 J. P. 821; 35 W. R. 812; *sub nom.* *PARNACOTT v. PASSMORE*, 56 L. J. M. C. 99, D. C.

Annotation:—*Distd.* *Cowler v. Jones* (1890), 51 J. P. 660.

399. ———— What is sufficient production—Production when too dark to be read.]—C., a water bailiff, went to search the boat of J., & told him that he, C., had his warrant of appointment in his hand, & offered it to be read, but, it being dark, J. said he could not read it:—*Held*: the justices were wrong in refusing to convict J. for resisting C. on the ground that C. had not produced his appointment pursuant to Salmon Fishery Act, 1873 (c. 71), s. 36.—*COWLER v. JONES* (1890), 51 J. P. 660, D. C.

SECT. 4.—LICENCES.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 10), ss. 61–65, 92 (1).

400. No intention to catch prohibited fish—Use of tackle for prohibited fish—Fixed engines.]—*LYNE v. LEONARD*, *LYNE v. FENNEL*, No. 414, *post*.

401. ———— ———.]—*MAW v. HOLLOWAY*, No. 153, *post*.

402. ———— Night lines for eels.]—H. set in a river in a fishery district night lines to catch eels. No trout were caught, but the lines were reasonably calculated to catch trout:—*Held*: H. was bound to take out a licence to use the lines.—*HILL v. GEORGE* (1880), 44 J. P. 424, D. C.

403. ———— Nets.]—S., a fisherman, was using a net of small mesh in a salmon fishery district, without a licence. He shot the net several times in places where salmon are usually caught, & the net was calculated to catch salmon,

but he was fishing for sea fish, & when he caught salmon he threw them out of the net, retaining only the sea fish:—*Held*: the justices were right in convicting S., for as the net was calculated to catch salmon, & was so used, it was immaterial whether salmon were caught or intended to be caught or not.—*SHORT v. BASTARD* (1881), 46 J. P. 580, D. C.

Annotation:—*Refd.* *Moses v. Raywood* (1911), 105 L. T. 76.

— — — — —.]—*See, also*, No. 429, *post*.

404. ———— Rod & line.]—By Salmon Fishery Act, 1865 (c. 121), s. 35, any person fishing with a rod & line for salmon, or trout, without a proper licence shall be liable to a penalty. Resp. was fishing for bait with a rod & line, without a licence, with no intention of catching prohibited fish:—*Held*: he was not guilty of an offence under Salmon Fishery Act, 1865 (c. 121), s. 35.—*MARSHALL v. RICHARDSON* (1889), 58 L. J. M. C. 45; 60 L. T. 605; 53 J. P. 596; 16 Cox, C. C. 614, D. C.

405. Use of net—Grant of licence for—To whom licence applies—Persons assisting licensee.]—Under 28 & 29 Vict. c. 121, a licence may be granted to a person for the use of a net for catching salmon, & a penalty is imposed upon any person for using a net without such licence. A. & B. had such a licence for the use of a net, & on a certain day they & the two resps. were together using two coracle nets, each of which required the assistance of two persons. A. & B. were using one net, & the two resps., who had no licence, were using another. The justices found that no fraud was intended, & as one of the licences would have conferred the right to the assistance of one of resps., & the licence therefore would have protected all four of the parties, they dismissed the information:—*Held*: they were right.—*LEWIS v. ARTHUR* (1871), 21 L. T. 66; 35 J. P. 487.

406. ———— What constitutes use—Intention—Although net not actually in water.]—*MOSES v. RAYWOOD*, No. 421, *post*.

— — — — —.]—*See, generally*, Sect. 5, sub-sect. 1, D., *post*.

407. Licence for rod & line—Extent of licence—Use of night lines included.]—In a fishery district the scale of licences included, for trout rod & line, 1s.; for the use of night lines, 5s. L. took out a rod & line licence, & also, without further licence, used a night line. On being charged for fishing without a licence for night line, the justices held the rod & line licence to include the use of a night line:—*Held*: the justices were wrong.—*WILLIAMS v. LONG* (1893), 57 J. P. 217; 37 Sol. Jo. 253, D. C.

408. ———— Use of three rods & lines—At same time.]—Resp., who held a licence authorising him to fish for trout & char with a rod & line within the limits of a fishery district, fished with three rods & three lines at one & the same time.

officer under Fisheries Act (R. S. C., c. 95, s. 12) had improperly seized a quantity of fish as being illegally caught with seines. In an action against the officer:—*Held*: as he was acting as a fishery officer in seizing the fish, & not as a justice of the peace, *ex officio*, under Fisheries Act, he was not entitled to notice of action.—*O'BRIEN v. MILLER* (1890), 29 N. B. R. 114.—**CAN.**

m. Offence not witnessed by inspector—Necessity to prosecute

common informer.]—A fishery inspector was complainant in a case of an offence against fishery laws committed outside his district, & not in his presence:—*Held*: he could prosecute as a common informer, it not being necessary that a common informer should be an eye-witness of the event.—*M'CORMACK v. CARROLL* (1910), 45 L. T. 7.—**IR.**

PART V. SECT. 4.
n. Non-production of licence.]

Applt. was convicted under fisheries regulations, which provided that every person fishing should, on demand, produce his licence, the contents of his creel & his bait. Applt. had a licence to fish. After fishing & when twenty miles from the spot where he had been fishing, a ranger accosted him & demanded his licence. As he was in a hurry & the licence was at the bottom of his car, under his fish & gear, he said he would post it. The ranger consented, but as applt. did

The scale of licence duties fixed by the conservators & approved by the Board of Trade was (*inter alia*) as follows: "For each & every rod & line, one shilling." Justices dismissed an information charging resp., under Freshwater Fisheries Act, 1878 (c. 39), s. 7, with unlawfully fishing for trout without having a licence in force authorising him so to do:—*Held*: resp. had committed the offence with which he was charged, & have been convicted.—COMBRIDGE v. HARRISON (1895), 64 L. J. M. C. 175; 72 L. T. 592; 59 J. P. 198; 11 T. L. R. 305; 39 Sol. Jo. 365; 15 R. 327.

409. To what fish applicable — Dead fish — Washed up by tide.—C. was charged with unlawfully taking a salmon by means other than a licenced instrument contrary to Salmon Fishery Act, 1873 (c. 71), s. 22. A salmon of 27 lbs. was one day left on the tide retiring, & C. picked it up, & took it home. There was no evidence whether the fish was dead or alive when picked up, but before being picked up it had been attacked by gulls:—*Held*: the justices were right in holding that the sect. applied only to taking living fish.—GAZARD v. COOKE (1890), 55 J. P. 102, D. C.

Annotation:—*Refd.* Stead v. Tillotson (1900), 41 Sol. Jo. 212.

410. — Dying fish — In poisoned stream — Taker not necessarily poisoner of stream.—To take dying trout by hand from a poisoned stream is an offence within Salmon Fisheries Act, 1873 (c. 71), s. 22, as extended to trout or char by Freshwater Fisheries Act, 1878 (c. 39), s. 7; & the offence is complete notwithstanding the absence of evidence to connect the person so taking them with the poisoning of the stream.—STEAD v. TILLOTSON (1900), 69 L. J. Q. B. 240; 61 J. P. 343; 48 W. R. 431; 16 T. L. R. 170; 44 Sol. Jo. 212.

To what waters applicable.—See Part V., Sect. 1, sub-sect. 1, *ante*.

SECT. 5.—PROHIBITIONS AS TO TAKING AND DESTROYING FISH.

SUB-SECT. 1.—PROHIBITIONS AS TO MODES OF TAKING AND DESTROYING.

A. Use of Lights, Spears, etc.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), s. 1.

not post it an information was laid against him:—*Held*: when his licence was demanded applt. was "not fishing" according to the regulations.—REYNOLDS v. COTLEDICK, [1923] N. Z. L. R. 1103.—N.Z.

PART V. SECT. 5, SUB-SECT. 1.—A.

a. Fishing by means of brush weirs & traps.—Defts. were prosecuted for fishing by means of brush weirs & traps. The weirs were formed by brush leaders from the shore with a pound at the extreme end. At low water the weirs were dry, & at neap-tide there would be some four feet of water therein. The traps were constructed by means of a leader from the shore & a pound at the end formed by netting stretched on poles or stakes set upright in the bed or bottom of the water. Boats were sometimes, but not always, used to take the fish from the weirs & traps:—*Held*: fishing by such means was not "deep sea fishing" within R. S. C., c. 95, & the regulations made thereunder by the

Governor-General-in-Council. R. ELDRIDGE (1895), 5 Exch. C. CAN.

PART V. SECT. 5, SUB-SECT. 1.—C.

p. Drift nets.—In a tidal channel adjoining Lough Foyle drift nets 15 feet deep & 600 yards long are used for the capture of salmon by night. Cork floats are attached to the top of the net & lead weights to the bottom to keep it vertical in the water. The net is gradually paid out from the stern of a boat & when fully stretched, one end of it is attached by a rope to the boat to prevent the net from being lost, & the other end is left free in the water. The boat is not moored or anchored & the net is not pulled but moves with the tide. The salmon are caught by striking the net & becoming enmeshed in it. The net is left in the water so long as it remains in good fishing form, usually from fifteen minutes to half an hour, & it is then boarded with the fish. Drift nets in Ireland are licensed, & in many

B. Use of Roe.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), s. 2.

C. Fixed Engines.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 11, 92 (1).

411. Wire grating.—R. v. HOWARD (1857), 30 L. T. O. S. 119.

412. Salmon cage—Attached to dam. MOUTON v. WILBY, No. 472.

413. Putchers—Ancient right—In operation at passing of Salmon Fisheries Act, 1861 (c. 109) — User for over forty years. HOLFORD v. GEORGE, No.

414. Putts — No intention to catch prohibited fish.—Where putts or baskets were used in a navigable tidal river for catching flat fish, & by means of a wire guard salmon were said to be prevented from being caught thereby: *Held*: the putts required a licence from the board of conservators of the district, for they came within the definition of fixed engines, whereby salmon are caught, though not intended to be used for salmon.—LYNE v. LEONARD, LYNE v. FENNEL (1868), L. R. 3 Q. B. 156; 9 B. & S. 65; 37 L. J. M. C. 55; 18 L. T. 55; 32 J. P. 422; 16 W. R. 562.

Annotations:—*Distd.* Watts v. Lucas (1871), L. R. 6 Q. B. 226. *Appld.* Short v. Bastard (1881), 46 J. P. 580. *Consd.* Marshall v. Richardson (1889), 58 L. J. M. C. 45. *Appld.* Maw v. Holloway, [1911] 3 K. B. 591. *Refd.* Moses v. Raywood (1911), 105 L. T. 76.

415. Wooden platform — Leading to eel trap — Fixed to apron of weir. MAW v. HOLLOWAY, No. 453, *post*.

Fixed nets. See Sect. 5, sub-sect. 1, D. (b).

416. Destruction of engines — By whom carried out—By any person.—Salmon Fishery Act, 1861 (c. 109), s. 11, gives a right to any person to seize & destroy fixed engines for catching salmon in inland or tidal waters, & such power is not confined to conservators or overseers for the preservation of salmon, appointed under the Act. WILLIAMS v. BLACKWALL (1863), 2 H. & C. 33; 2 New Rep. 39; 32 L. J. Ex. 171; 8 L. T. 252; 27 J. P. 501; 9 Jur. N. S. 579; 11 W. R. 621; 159 E. R. 15.

districts bye-laws regulating their have been made, under Fische (Ireland) Acts: *Held*: the drift nets were not fixed engines. TRUST SOCIETY v. HAROLD, [1912] A. C. 287. IR.

q. J. FRENCH v. DAVIS L. R. 57. NFLD.

O'DONNELL v. MALNID L. R. 58. NFLD.

FEL (DURK) v. 24 R. (Cl. of Scow)

19. SCOT.

t. Used by On *times of employer.* In a to catch for using a fixed to catch salmon in the Solway Firth contrary to 21 & 22 Vict. c. 109, s. 11, & Salmon Fisheries (Scotland) Act, 1862, s. 33, it was found by the sheriff that accused were fishermen in the employment of the tenant of the salmon fishings in question, & that they used the alleged fixed engine complained of in accordance with their master's instructions:—*Held*: no

FISHERIES.

Sect. 5.—Prohibitions as to taking and destroying fish: Sub-sect. 1, C. & D. (a) & (b).]

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), s. 11 (2).

Not intended to catch prohibited fish.]—See No. 414, ante, No. 453 post.

D. Nets.

(a) In Gen

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 6, 7, 11, 92 (1).

417. Definition of "mesh."]—The ordinary definition of "mesh" is the space from thread to thread (WIGHTMAN, J.).—THOMAS v. EVANS (1858), 1 E. B. & E. 171; 27 L. J. M. C. 172; 31 L. T. O. S. 98; 22 J. P. 308; 4 Jur. N. S. 710; 6 W. R. 497; 120 E. R. 472.

418. Trammel net - - Enclosing net of regulation mesh - Illegal.]—D. fished in a salmon river with a trammel net, which consisted of a legal meshed net, enclosed between two larger meshed nets, called walls or haramies, & the centre net hanging loosely & being fuller; when a fish struck against the three-fold net it drove the centre net through the large meshed net behind, thereby making a bag or purse, in which it was entangled & so caught: *Held*: there was evidence to justify the justices in convicting D. under Salmon Fishery Act, 1861 (c. 109), s. 10, of using two or more nets so as practically to diminish their mesh.—DODD v. ARMOR (1867), 31 J. P. 773.

419. Net of illegally small mesh - Whether mere possession an offence - Intention of catching salmon.] A fishing net with an illegally small mesh is not a "like instrument" to a snare within the meaning of Salmon Fishery Act, 1861 (c. 109), s. 8, as extended by Salmon Fishery Act, 1873 (c. 71), s. 18; & therefore, the mere possession of such a net, although with the intention of catching salmon by means thereof, is not an offence within those Acts.—JONES & PARRY v. DAVIES, [1898] 1 Q. B. 405; 67 L. J. Q. B. 291; 78 L. T. 44; 62 J. P. 182; 11 T. L. R. 180; 18 Cox, C. C. 706, D. C.

420. ——— Not intended to catch prohibited fish - Capable of doing so.] DAVIES v. EVANS, No. 448.

421. "Using" net - What amounts to - Net ready for but not actually in use.]—Resp., who was in a boat with another man in a river in a fishery district where salmon were usually caught, got out of the boat & walked near the edge of the river looking for salmon. A click net, in size & shape

resembling a landing net, was in the boat for the purpose of being put into the water when a salmon was seen near the surface. Resp. had no licence to use the net, & when interrupted by a water bailiff the net was dry, not having been put into the water. Upon an information charging resp. with having used the net for catching salmon without having a licence, contrary to Salmon Fishery Act, 1865 (c. 121), s. 36, the justices held that there was no evidence that the net was "used" for catching salmon & dismissed the information:—*Held*: as resp. had begun to search for salmon & had the net with him ready for use, he was "using" the net for catching salmon within the meaning of the sect., though he had not actually put the net into the water.—MOSES v. RAYWOOD, [1911] 2 K. B. 271; 80 L. J. K. B. 823; 105 L. T. 76; 75 J. P. 263; 22 Cox, C. C. 516, D. C.

Not intended to catch prohibited fish.]—See No. 403, ante.

(b) Fixed Nets.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 6, 7, 11, 92 (1).

422. Stake nets.]—Salmon fishing with stake nets:—*Held*: to be illegal.—DALGLEISH v. ATHOL (DUKE) (1816), 5 Dow 282; 3 E. R. 1330.

Annotations:—*Refd.* Kintore v. Forbes (1828), 4 Bli. N. S. 485; Horne v. Mackenzie (1839), 6 Cl. & Fin. 628.

423. ——— Only if used in fresh water.]—At the trial of an issue as to whether certain stake nets & other engines were placed in situations prohibited by the statutes regulating the salmon fisheries, the judge in the course of his direction to the jury, after defining estuaries as spaces between the strictly proper river & the strictly proper sea, the waters of which were partly salt & partly fresh, proceeded thus: "The mere name is of little importance. The thing to be looked to is the fact of the absence or of the prevalence of the fresh water, though strongly impregnated by salt. Now, where this fresh water prevails, though in the estuary, these structures are illegal." The Ct. of Session disallowed a bill of exceptions to the direction. The House of Lords reversed this judgment, & remitted the cause with directions to allow the bill of exceptions, & grant a new trial.—HORNE v. MACKENZIE (1839), 6 Cl. & Fin. 628; Macl. & Rob. 977; 7 E. R. 831, H. L.

Annotation:—*Refd.* Reece v. Miller (1882), 8 Q. B. D. 626.

424. ——— Although not permanently fixed.]—By 1 Geo. 1, statute 2, c. 18, s. 14, it is enacted that if any person shall make, erect, or set any bank, dam, or hedge net or nets, across certain rivers whereby the salmon therein may be hindered

were not "owners" of the fixed in the sense of 21 & 25 Vict. c. 109, s. 11, & were not therefore liable for penalties under that section.—PHYS v. KENYON (1905), 7 F. (Cl. of Sess.) 47, J. —SCOT.

PART V. SECT. 5, SUB-SECT. 1.—D. (a).

a. Bag net.]—The provision at the end of 26 & 27 Vict. c. 114, s. 3, for the case of a person having the exclusive right of fishing, does not apply to or render legal a bag net placed in the estuary of a river.—ANTRIM'S (EARL) CASE, MACNAGHTEN'S CASE (1866), 15 L. T. 54.—IR.

b. ———.]—A *prima facie* title to

with nets, under 26 & 27 Vict. c. 114, s. 4, must be shown to the of fisheries before they can be l to hold an inquiry as to adt right to fish with bag nets: title shall have been so shown, the ct. will not grant a to compel the inst to hold such an inquiry.—R. v. (1876), 1 R. 10 C. L. 213. IR.

c. Paidle-nets.]—Circumstances in which held, in an action of interdict at the instance of the proprietors of salmon fishings in the River A., that the use of paidle-nets, not exceeding five feet in height & having no cover over the nets, erected in the Solway by fishermen engaged in the white fishing

was illegal, in respect that the nets were so placed & so constructed as to be fitted to catch salmon to a material extent; & interdict against the use of such nets, except during the close time for salmon granted.—MANSFIELD (EARL) v. PARKER, [1914] S. C. 997; 51 Sc. L. R. 784; 2 S. L. T. 171.—SCOT.

PART V. SECT. 5, SUB-SECT. 1.—D. (b).

4221. Stake nets.]—LITTLE & POWELL v. GRIERSON (1824), 3 Sh. (Cl. of Sess.) 370.—SCOT.

d. River less than three-quarter miles wide—Production of certificate of fisheries inspector—That net duly

from passing up the river to spawn, he shall forfeit the sum of £5, besides the fish taken & the nets used in committing the offence; half to go to the informer, & half to the poor of the parish where the offence is committed:—*Held*: under this Act a person may be convicted for setting a net with intent to prevent salmon going up the river to spawn, although he may not have fixed the net permanently by stakes or otherwise to the ground.—*R. v. SHARPLES, R. v. POMFRET* (1856), 26 L. T. O. S. 198; 20 J. P. 548; 4 W. R. 207.

425. — Ancient right — In operation at passing of Salmon Fishery Act, 1861 (c. 109) User for over forty years.]—Sect. 11 of the above Act, which contains the provision against persons using fixed engines for catching salmon in inland or tidal waters, makes an exception in favour of “any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act,” by any person, by virtue of any grant or charter or immemorial usage. Deft., who was prosecuted under this sect., proved that his father & family & “others of the public” had, for more than forty years, fished there with stake-nets:—*Held*: this was not evidence of “ancient right or mode of fishing,” so as to be within the exceptions in the sect.—*BEVINS v. BIRD* (1865), 6 New Rep. 111; 12 L. T. 306; 29 J. P. 500.

426. — By Salmon Fishery Act, 1861 (c. 109), s. 11, no fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters . . . but the sect. shall not affect any ancient right or mode of fishing lawfully exercised, at the time of the passing of the Act, by any person, by virtue of any grant, or charter, or immemorial usage. By the interpretation clause “fixed engine” includes “putchers”; & by Salmon Fishery Act, 1865 (c. 121), s. 39, “fixed engine” in the former Act includes “any net fixed to the soil, or made stationary in any other way.” The owner of a several fishery in the navigable & tidal river Severn claimed a right to use putchers & stop-nets, which it was admitted were fixed engines within Salmon Fishery Act, 1865 (c. 121), s. 39, for the purpose of catching salmon. The putchers & stop-nets had been in use for forty-five years up to 1862; there was no evidence of previous user, nor was there any evidence to the contrary. The comrs. having found the putchers & stop-nets illegal:—*Held*: (1) the user for forty-five years did not raise a conclusive presumption of law that the putchers & stop-nets had been used from time immemorial & were not of recent origin; (2) 2 Hen. 6, c. 19, prohibits not only the use of nets which are permanently fixed day & night, but also those which are fixed for intervals of time only, if they obstruct the navigation of a river & the passage of fish.—*HOLFORD v. GEORGE* (1868), L. R. 3 Q. B. 639; 9 B. & S. 815; 37 L. J. Q. B. 185; 18 L. T. 817; 32 J. P. 468; 16 W. R. 1204.

427. — User for over sixty years.]—(1) A net was secured at one end to a pole temporarily fixed to the soil on the margin of the channels of a tidal river, one half of the net being stretched across the channel at low water from a boat anchored to a buoy. The fisherman in the boat waited his opportunity, then let out the rest of the net, & rowed round to the pole, thus

sweeping the river:—*Held*: to be a fixed engine within Salmon Fishery Act, 1861 (c. 109), s. 11, & Salmon Fishery Act, 1865 (c. 121), s. 39.

(2) A claim to fish in that way by immemorial usage:—*Held*: to be bad.—*OLDING v. WILD* (1866), 14 L. T. 402; 30 J. P. 295.

428. — Alteration in use of nets.]—A., being a lord of the manor of H., claimed to be entitled, within Salmon Fishery Acts, 1861 (c. 109), & 1865 (c. 121), to use reasonable fixed engines in the river R. in reasonable places within the manor of H. In support of the claim he produced certain old documents showing that there had been a fishery from the earliest times in that part of the river R. He also gave evidence to show that for many years previous to the year 1844 fixed engines had been used in various hollows formed in the sands of the river. That at that time a wall was built to improve the navigation under an Act of Parliament, by which the rights of all lords of manors were expressly saved, & that through the building of the wall the bed of the river was changed, & convenient hollows for placing the engines were formed close to the wall. That previous to the year 1844, the engines were never placed nearer than two hundred yards to the place where the wall now stands, but it did not appear whether there were then any hollows worth fishing within that distance. That since that time the fixed engines had been placed in the hollows close to the wall, & had never been placed on the sites where they had been used previously to 1844. In a case stated by the comrs. for the opinion of the ct. whether they were bound as matter of law to find that claimant was entitled to use the fixed engines as claimed:—*Held*: it was a mixed question of fact & law whether the using the engines in places since 1844 different from those in which they had been used previously amounted to an enhancement of the engines, & the comrs. were not, therefore, bound as matter of law to find that claimant was so entitled.—*RAWSTORNE v. BACKHOPE* (1867), L. R. 3 C. P. 67; 37 L. J. C. P. 26; 17 L. T. 411; 32 J. P. 151; 16 W. R. 219.

429. — No intention of catching prohibited fish.]—The mere using of a net, fixed to the soil in tidal waters within the limits of a salmon fishery district, but which net is not peculiarly an instrument for catching salmon, & it is not fixed for that purpose, is not an offence of Salmon Fishery Act, 1861 (c. 109), s. 11.—*WATTS v. LUCAS* (1871), L. R. 6 Q. B. 226; 40 L. J. M. C. 73; 21 L. T. 128; 35 J. P. 579; 19 W. R. 170.

430. — Evidence of ownership — Possession *prima facie* evidence.]—F. & another were charged with using a fixed engine for catching salmon contrary to Salmon Fishery Act, 1861 (c. 109), s. 11, & Salmon Fishery Act, 1865 (c. 121), s. 39. Defts. were seen in salmon waters to tie one end of their trammel net to the bank, & the other end to the boat, & there leave it for fifteen minutes. The justices held it was a fixed net, but dismissed the information for want of evidence as to ownership:—*Held*: possession was good *prima facie* evidence of ownership, & the justices were wrong in not convicting.—*VANCE v. FROST* (1894), 58 J. P. 398; 10 T. L. R. 186, D. C.

431. Net fixed at one end only — Not a fixed

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engine.]—A net of legal size had a stang or oaken pole attached to one end, weighed with lead so as to keep the net upright, the stang itself resting in the gravel. A boat went to the opposite side with the other end of the net, & rested for four hours, after which the stang end of the net was pulled in to the place where the boat landed with the other end:—*Semble*: this was not a fixed engine within Salmon Fishery Act, 1861 (c. 109), s. 11. *BIRCH v. TURNER* (1861), 29 J. P. 37.

432. ———.]—Salmon Fishery Act, 1861 (c. 109), s. 11, enacts, "No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters;" & for the purposes of this sect. a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine." Three nets, six yards in length & one yard sixteen inches in depth, were set twelve yards apart, & extended to near the middle of a river; they were fixed at one end to a large stone on the bank, & at the other end of the net were kept up by corks with lead to keep them down; the net gave way as soon as the salmon touched it; & the fish being entangled in it died: *Held*: not a fixed engine within that sect. *THOMAS v. JONES* (1861), 5 B. & S. 916; 5 New Rep. 121; 31 L. J. M. C. 45; 11 L. T. 450; 29 J. P. 55; 11 Jur. N. S. 13; 13 W. R. 151; 122 E. R. 1071.

Consd. *Watts v. Lucas* (1871), L. R. 6 Q. B. 220. *Reid.* *Olding v. Wild* (1866), 11 L. T. 402.

— .] *See, also*, No. 427, *ante*.

433. Stop net—Attached to fixed boat.]—G., being the owner of a several fishery in a tidal navigable river, used a stop net for catching salmon. A boat was fixed or steadied by large poles tipped with iron, which the fisherman carried in his boat & worked into the bed of the river in contrary directions to which the boat was tied. The fisherman then had two poles extending beyond & resting on the gunwale of the boat, to which a net was attached, & he kept his hand on the upper end of the poles, so that when he felt a fish had gone into the net, he could, at a moment's notice, jerk up the mouth of the net & enclose the fish. The weight of the poles & net rested mainly on the gunwale of the boat, & were nearly balanced, so that the fisherman's hand did not support or work the net, which was thirty feet wide, & the poles of the net were not fastened to the boat:—*Held*: this net was a fixed engine within the definition of Salmon Fishery Act, 1865 (c. 121), s. 39, which includes any net fixed to the soil or made stationary in any other way.—*GORE v. ENGLISH FISHERIES COMRS.* (1871), L. R. 6 Q. B. 561; 40 L. J. Q. B. 252; 21 L. T. 702; 35 J. P. 405; 10 W. R. 1083.

434. Toot & haul nets.]—(1) The toot & haul net used in the estuary of the Tay is fastened by a rope at one end to the shore. The net is then placed on a boat or coble; the boat with its net is pulled out by means of an overhaul rope to an anchor in the stream; the boatman on reaching the anchor attaches the net at about twenty

yards from its end to a floating rope fastened to the anchor; the end of the net is then turned inward towards the shore forming a bend or hook, & the men on shore haul the net taut. Another rope attached to the boat keeps the net upright. The net is retained in this upright position until a fish strikes it, when the outer end is freed & hauled in by fishermen on shore so as to encircle the fish:—*Held*: this mode of fishing for salmon was an illegal method within the meaning of the Salmon Fishery Acts.

(2) The drift or hang nets used in the River Tay are from eighty to two hundred & twenty yards long & twelve to nineteen feet in depth, & are shot into the river about an hour before the turn of the tide both at high & low water, when the current is least. They are run out of a boat over the stern, in a straight line across the river, & followed with the current by a man in a boat, who, when he sees or feels the net struck by a fish, rows to the spot, & captures the fish entangled in the net, or, if the fish is getting away, he secures it with a gaff. The net is not fixed to any post on the shore:—*Held*: fishing in the tidal portions of the River Tay with drift or hang nets was an illegal method of fishing for salmon within Salmon Fishery Acts.—*WEDDERBURN v. ATHOLL (DUKE), ATHOLL (DUKE) v. GLOVER INCORPORATION OF PERTH*, [1900] A. C. 403; 16 T. L. R. 113, H. L.

Generally. *Reid.* *Irish Soc. v. Harold*, [1912] A. C. 287.

435. Hang nets.]—*WEDDERBURN v. ATHOLL (DUKE), ATHOLL (DUKE) v. GLOVER INCORPORATION OF PERTH*, No. 434, *ante*.

E. Trade Effluents, Dynamite, and Noxious

See, now, Salmon & Freshwater Fisheries Act 1923 (c. 16), ss. 8, 10, 55, 59; Malicious Damage Act, 1861 (c. 97), s. 32.

436. What necessary to constitute offence—Malicious intent.]—Although Malicious Damage Act, 1861 (c. 97), s. 32, as amended by Salmon Fishery Act, 1873 (c. 71), s. 13, cannot be construed grammatically, the intention of the Legislature is plain, & the sect. as amended must be construed as making it a misdemeanour punishable with penal servitude for any term not exceeding seven years unlawfully & maliciously to put any lime or other noxious material in any salmon river with intent thereby to destroy the fish.—*R. v. VASEY*, [1905] 2 K. B. 748; 75 L. J. K. B. 19; 93 L. T. 671; 69 J. P. 455; 51 W. R. 218; 22 T. L. R. 1; 50 Sol. Jo. 14; 21 Cox, C. C. 49, C. C. R.

Annotation:—*Mentd.* *R. v. Ettridge*, [1909] 2 K. B. 24.

437. ——— Negligent causation—Leakage of creosote—From defective railway waggon.]—By Salmon Fishery Act, 1861 (c. 109), s. 5, "Every person who causes or knowingly permits to flow, or puts or knowingly permits to be put, into any waters containing salmon, or into any tributaries thereof, any liquid or solid matter to such an extent as to cause the waters to poison or kill fish, shall incur" certain penalties. Whilst a tank waggon, belonging to a private owner, which

PART V. SECT. 5, SUB-SECT. 1.—E.

1. What necessary to constitute offence.]—Evidence that a person was on the river in a canoe be

ten & eleven o'clock at night with the appliances commonly used in ill—salmon fishing, is, in the absence of any explanation of the situation where the charge is not denied on

oath, sufficient to justify a conviction for illegal fishing under Fisheries Act.—*R. v. FRASER* (1903), 36 N. B. R. 109.—**CAN.**

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contained creosote, was travelling on resps.' railway, the creosote, owing to a defective tap, leaked from the waggon through the permanent way into a stream which was a tributary of a salmon river, & killed fish. The waggon showed no defect on examination before the train started & there was no neglect or default on the part of resps.:—*Held*: resps. had not "caused" the creosote to flow into the stream within Salmon Fishery Act, 1861 (c. 109), s. 5.—*MOSES v. MIDLAND RY.* (1915), 84 L. J. K. B. 2181; 113 L. T. 451; 79 J. P. 367; 31 T. L. R. 440; 14 L. G. R. 91.

438. Malicious discharge of noxious matter—Misdemeanour—Punishable with penal servitude.—*R. v. VASEY*, No. 436, *ante*.

Pollution generally, see Part III., Sect. 10, subsect. 1, B., *ante*.

SUB-SECT. 2.—PROHIBITIONS AS TO PARTICULAR KIND OF FISH.

See, *now*, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 3–5, 92.

439. Immature fish—Young salmon—Ignorance of nature of fish—No offence.—By Salmon Fishery Act, 1861 (c. 109), s. 15, it is enacted, that any person "having in his possession the young of salmon" shall incur certain penalties therein named:—*Held*: a person, who has taken, & is in possession of, young of salmon, not knowing them to be such, cannot be convicted under Salmon Fishery Act, 1861 (c. 109), s. 15.—*HOPTON v. THIRWALL* (1863), 3 New Rep. 70; 9 L. T. 327; 27 J. P. 743; 12 W. R. 72.

440. — — — Offender illegally searched by constable.—A constable who had no right to search the person of J. did so, & found twenty-five young salmon in his pocket & summoned J. under Salmon Fishery Acts for illegally having these in his possession:—*Held*: though the search was illegal, the justices properly convicted J. of the offence.—*JONES v. OWENS* (1870), 31 J. P. 759.

SUB-SECT. 3.—PROHIBITIONS AS TO PARTICULAR TIMES—CLOSE SEASONS.

See, *now*, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 26–31, 35, 36.

441. Annual close season—Failure to open hatches of mill-dam—Although milling power

injuriously affected.—Applt. was the occupier of a fishing mill dam with a fish lock through it. At the head of the lock was a sliding door or hatch which moved in grooves, & when it was down no salmon could pass. Within three feet of this door, down stream, was a frame in which the upstream cheeks of the fish lock were placed before Salmon Fishery Act, 1861 (c. 109), when the lock was used for taking salmon. Since that Act applt. took out the cheeks, but left down the hatch, by which the water was prevented from passing through the lock or box within the fishing mill dam. The hatch was necessary for the fishery as much as for the mill, but the milling power of applt.'s mill would be injuriously though not ruinously affected by lifting up or removing the hatch:—*Held*: the fishing dam was a fishery within Salmon Fishery Act, 1861 (c. 109), & applt. might be convicted under Salmon Fishery Act, 1861 (c. 109), s. 20, for not removing the hatch during the close season, although such removal would interfere with the milling power of his mill.—*HODGSON v. LITTLE* (1861), 16 C. B. N. S. 198; 33 L. J. M. C. 229; 11 L. T. 136; 10 Jur. N. S. 953; 12 W. R. 1103; 143 E. R. 1101; *previous* (1863), 14 C. B. N. S. 111.

Mentd. *Rossiter v. Pike* (1878), 1 Q. B. D.

24.

442. — — — Evidence of "catching" fish.—Resp. was found fishing with rod & line in a several fishery during close time, & he denied, on being asked the question, that he had caught any fish; but, on being told that he must be searched, he admitted that he had got four fish, which he then produced out of his pockets. It appeared also that he was fishing with the leave of the occupier of the land adjoining the river where he was found. On an information against him under Freshwater Fisheries Act, 1878 (c. 39), s. 11 (3), for unlawfully "catching fish" the justices dismissed the complaint, being of opinion that there was no sufficient evidence of the "catching" & that resp. was a person angling in a several fishery "with the leave of the owner" within the exempting clause Freshwater Fisheries Act, 1878 (c. 39), s. 11 (3) (b):—*Held*: (1) the facts above stated were good & sufficient evidence on which the justices should have convicted resp. of "catching" the fish in question; & (2) if the justices on hearing further evidence on that point, should find that the occupier who gave the leave was not the owner of the land, then resp. did not come within the exemption provided by the clause.—*SWANWICK v. VARNEY* (1881), 15 L. T. 716; 46 J. P. 613; 30 W. R. 79, D. C.

443. — Fishing by leave of occupier—Not

PART V. SECT. 5, SUB-SECT. 2.

g. Immature fish.—*HEDDERG v. WOODHALL* (1913), 15 C. L. R. 531.—*AUS.*

h. Burn trout.—It is an offence against Solway Fishery Act, 1804, s. 9, for an unauthorised person to fish for burn trout in any part of any river or water flowing into or communicating with the Solway Firth, even though the part fished in is, owing to an obstruction lower down the river, inaccessible to fish of the salmon kind.—*CATHCART v. HOUSTON*, [1915] S. C. (J.) 5.—*SCOT.*

PART V. SECT. 5, SUB-SECT. 3.

k. Annual close season—Possession of salmon—Whether actual physical possession necessary.—Salmon Fisheries (Scotland) Act, 1868, s. 21, renders liable

to a penalty any person who shall have in his possession any salmon taken within the limits of this Act during the annual close time:—*Held*: "possession" within the enactment does not necessarily mean actual

M'ATTEE v. Hogg (1903), F. (Ct. of Sess.) 67, J. *SCOT.*

Salmon Fisheries (Scotland) Act, 1 s. 21, renders liable to a penalty any person, who shall have in his possession any salmon taken during the annual close time. It has been decided that annual close time refers only to net-fishing, & that there is no offence if the salmon was taken by rod & line at a time when rod fishing was open:—*Held*: proof of possession within the close time is *prima facie* proof of the offence, & the *onus* of establishing capture by rod & line rests on

FISHMONGERS OF CITY OF LONDON v. STIVEN, [1912] S. C. (J.) 28; 49 Sc. L. R. 558. *SCOT.*

m. Weekly close season—Use of net—Forfeiture of net.—By R. S. C., c. 95, s. 14, s.-s. 14, from 6 p.m. every Saturday to 6 a.m. of the following Monday, in non-tidal waters, nets or other apparatus used for catching fish must be adapted as to admit of the free passage of fish: during such close season no one shall catch fish by such means, & any fish so taken, together with the nets or other apparatus used, shall be forfeited. Deft., acting under the instructions of a fishery officer, went on plff.'s land & seized a net set in violation of the statute:—*Held*: deft. was protected in what he did.—*BAVER v. KAIZER* (1894), 26 N. S. R. 280. *CAN.*

n. — — — — —.] The bye-law of

Sect. 5.—Prohibitions as to taking and destroying fish: Sub-sect. 3. Sect. 6: Sub-sects. 1 & 2.]

being owner of fishery.]—SWANWICK v. VARNEY, No. 442, ante.

444. — Use of eel trap in weir — Permanent or temporary nature of trap immaterial.] — Salmon Fishery Act, 1873 (c. 71), s. 15, enacts that, "no person shall between Jan. 1 & June 24, place in any inland water any device whatsoever to catch or obstruct any fish descending the stream." A mill weir, constructed in 1838, had attached to it as part of its permanent structure a grating, which, when the weir shuttles were raised, allowed the water to flow through, but stopped the passage of the fish & forced them into a well at the side whence they could not get out. The lessee of the mill & weir being grantee of a power to trap eels, on June 2, 1882, raised the shuttles, & so caused several eels & other fish to pass into the well. On an information against him for placing a device to catch fish descending the stream, he was convicted: *Held*: it was immaterial whether the trap was an old & permanent or new & temporary structure, & that as by raising the shuttles he had set the trap, he was properly convicted of placing a device to catch fish within the sect. — *BRIGGS v. SWANWICK* (1883), 10 Q. B. D. 510; 52 L. J. M. C. 63; 47 J. P. 561; 31 W. R. 565, D. C.

Annotation: Consd. Mu v. Holloway, [1911] 3 K. B. 591.

445. — Use of putts & putchers.] — By bye-law 17 made by the conservators: "The annual close time as to the whole of the Severn fishery district for all modes of salmon fishing except with rod & line shall commence on Aug. 16 in each year & terminate on Feb. 1, following." By Salmon Fishery Law Amendment Act, 1879 (c. 26), s. 2, "notwithstanding anything in Salmon Fishery Acts 1861 to 1878 contained, the annual close season for putts & putchers shall commence on Sept. 1, in each year, & terminate on May 1, in the ensuing year, both inclusive. None of the provisions of the Acts as to the weekly close season shall apply to putts & putchers: — *Held*: resp. was justified in fishing with putchers on Aug. 22, 1905. — *PROSSER v. CADOGAN* (1906), 91 L. T. 777; 70 J. P. 511; 21 Cox, C. 190, D. C.

446. Weekly close season — Use of coop Evidence of occupation of fishery.] — A box or coop for catching salmon had been placed near a mill dam, & was not opened during Sundays. Before 1861 B. had paid for the box, & it had been put there, & on a threat of prosecution for illegally keeping it, it was withdrawn, but afterwards replaced, by whom did not appear. On further

complaint by the conservator, B. said he had a right of fishery there. A person once took a salmon from the box, & gave it to B., who kept it, being told where it was caught: — *Held*: these facts were some evidence that B. was occupier of the fishery, & a conviction under Salmon Fishery Act, 1861 (c. 109), s. 22, sustained accordingly. — *BELL v. WYNDHAM* (1865), 29 J. P. 214.

447. — Use of net — No fish caught — Forfeiture of net.] — By Salmon Fishery Act, 1861 (c. 109), s. 21, "No person shall fish for, catch, or kill by any means other than a rod & line any salmon between twelve o'clock at noon on Saturday & six o'clock on Monday morning; & any person acting in contravention of this sect. shall forfeit all fish taken by him, & any net or movable instrument used by him in taking same." Resps. fished for salmon with a net during the prohibited hours, but they did not catch any fish: — *Held*: the net having been used for the purpose of taking salmon, it had become forfeited. — *RUTHER v. HARRIS* (1876), 1 Ex. D. 97; 33 L. T. 825; 40 J. P. 454; *sub nom.* *RUTHER v. HARRIS*, 45 L. J. M. C. 103, D. C.

Mentd. *Williams v. Evans* (1876), 1 Ex. D.

448. — Capable of catching salmon — Evidence of intention.] — D. had a net fixed & kept up & closed in salmon waters capable of taking salmon during the weekly close time provided by the bye-laws, & in which salmon had been in fact taken, & in respect of which he had taken out a salmon licence. The net was primarily intended to catch coarse fish, & was of a smaller mesh than allowed by a bye-law: — *Held*: provided the justices found intention, there was evidence of fishing for salmon otherwise than by rod & line during the weekly close time, & of attempting to take salmon with smaller meshes than that allowed by the bye-laws. — *DAVIES v. EVANS* (1902), 86 L. T. 419; 66 J. P. 392; 18 T. L. R. 355; 20 Cox, C. C. 177, D. C.

Sale during close season.] — See Sect. 8, *post*.

Bye-law relating to close season.] — See No. 391, *ante*.

SECT. 6.—OBSTRUCTION TO PASSAGE OF FISH.

SUB-SECT. 1.—IN GENERAL.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 11–25, sched. 1.

449. Grate, lock, or gate — Having no fish pass.] — The apparatus of applt. was for stopping fish in order that they might be taken; it was therefore for stopping. The contrivance used by applt.

the Conserv. under Salmon Fish. (Scotland) Acts, 1862 & 1868, with respect to the due observance of the weekly close time, & enacting that a clear opening should be made & kept free from obstruction in the mouth of every stake-net, is not enud by the owner of a stake-net placed *in situ* for fishing in a tidal river, who had closed the pouches of his net during the last 34 hours of the weekly close time, in respect that during the whole of these 34 hours the net had been on dry land owing to the ebb of the tide. — *GALLOWAY (EARL) v. BIRKELL*, [1914] S. C. (J.) 92. — **SCOT.**

o.

At

) Act, 1862, s. 27, makes it a criminal offence for three or more persons to fish illegally for salmon "at any time between the expiration of the first hour after sunset on any day & the beginning of the last hour before sunrise on following morning: — *Held*: the times of sunset & sunrise are the times at which the sun sets & rises at the locus of the alleged offence & not the times at which it sets & rises at Greenwich. — *MACKINNON v. NI* [1916] S. C. (J.) 6. — **SCOT.**

PART V. SECT. 6, SUB-SECT. 1.

p. Fired nets.] — Where defts., who had no licence to fish in that place,

set their nets in such a way as to interfere with the passage of fish to the berth for which pltf. held a licence, pltf. was entitled to recover at common law. — *CHRISTIAN v. CHRISTIAN* (1917), 50 N. S. R. 231. — **CAN.**

q. Drift nets.] — The use of drift nets in a tidal channel for the capture of salmon by night from boats which are not moored or anchored, the nets moving with the tide & the salmon becoming enmeshed in the nets, is not illegal, & are not an obstruction to the free passage of fish. — *IRISH SOCIETY v. HAROLD* (1912), 81 L. J. P. C. 162. — **IR.**

r. Sights & towing paths.] — A party holding a right of salmon

seems to render it impossible for the proprietor above him to have any fish at all. It is a grate, heck, or gate & not a net; & clearly a device which it was intended to prohibit (*per* CUR.).—HOWARD *v.* BIRD (1857), 21 J. P. Jo. 739.

450. Fixed nets—Fixed permanently—Or at intervals of time.]—HOLFORD *v.* GEORGE, No. 426, *ante*.

451. Erection of embankment—Restoring foreshore—Slight impediment to passage of fish.]—A proprietor of salmon fishings in an estuary opposite his estate, restored the foreshore by an embankment sixteen inches higher than the original, which had been swept away by the tide, & this he did for the legitimate purpose of confining the river to its proper channel, & to protect his shore, & not as a device to obstruct or catch fish. The effect of thus raising the embankment was not to prevent or to substantially impede the passage of salmon, although it did to some extent delay them & alter the course which they would take in ascending the estuary, & so facilitated their capture by the proprietor:—*Held*: the raising the embankment was not an illegal obstruction within the meaning of the Salmon Fishery Acts.—SUTHERLAND (DUKE) *v.* ROSS (1878), 3 App. Cas. 736, H. L.

Annotation:—*Refd.* Wedderburn *v.* Atholl, Atholl *v.* Glover Incorporation of Perth, [1900] A. C. 403.

SUB-SECT. 2. WEIRS.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 11–25, 92 (1), & *generally*, WATERS & WATERCOURSES.

452. What constitutes a weir—Fenders & needles.]—Applt. was the owner of land on the right bank of the river T, which was not navigable in that part. Opposite to his land & on same side of the river, at a distance of about fifteen feet, there were two small islands belonging to him separated from each other by a narrow interval. At the upper extremity of the upper of these islands there had been from time immemorial certain fenders, consisting of wooden bars & shutters, by means of which the flow of water down the stream, between the islands & the right bank, fifteen feet in width, could be stopped at the pleasure of applt. When the shutters were not let down so as to stop the water, fish were prevented from passing up by means of a grating. Lower

down the side or part of the main stream a wooden apparatus was fixed, which was known as “the needles,” & which consisted of certain wooden spars fixed in the bed of the river in the shape of the letter V, having its apex pointing up stream, & having an opening at the apex through which salmon could pass. Having passed through, they could not find their way back, neither were they able to pass the grating above. They became thus inclosed in the space between the grating & the needles; & by letting down the shutters, the flow of water being stopped, they could be easily taken. About sixty or seventy years before the making of the orders hereinafter mentioned, the two now existing islands formed only one; but an alteration was made by the predecessor of applt. by making an opening through the island so as to allow the water of the river to pass through, & thus the two islands were formed. At this opening similar fenders were placed, & another set of similar needles were fixed lower down the stream at a spot between the right bank & the lower of the two islands. The area of the old fishing weir was thus enlarged, & the fishing weir itself was made more efficient. By reason of the opening so made in the island a considerable portion of the water of the river flowed through, & thus became lost to the owner of a mill situated lower down the main stream, so that when the river was low the working of the mill was at times interfered with; at such times the mill owner was accustomed to call upon applt. to put down the fenders at the new opening so as to shut back the water, or to shut them down himself, & such proceedings were always acquiesced in by applt. The special comrs. for English fisheries decided that the lower fenders & needles were illegal, & must be shut up & removed respectively, & that although the upper fenders & needles might legally be used by applt. as a fishing weir, he was bound to make & maintain permanently a “free gap,” as provided for by Salmon Fishery Act, 1861 (c. 109), s. 12:—*Held*: (1) the apparatus of fenders & needles used together with the space inclosed between them was a fishing weir within Salmon Fishery Acts, 1861 (c. 109) & 1856 (c. 121); (2) although the provision in Magna Carta prohibiting the putting down of weirs in rivers is general that generality is restrained by 25 Edw. 3, 45 Edw. 3, 1 Hen. 4, c. 12, 4 Hen. 4, c. 11, & 12 Edw. 4, c. 7, & therefore there may be fishing weirs in non-navigable rivers, of which the easement has been acquired since the date of the statute 12 Edw. 4, c. 7; (3) a right to such fishing weirs in private waters may be acquired by grant

found in a question with an adjacent heritor to have no right to erect slights & towing-paths on the *alveus* of the stream.—FORBES *v.* SMITH (1825), 1 Wils. & S. 583.—SCOT.

s. “Flecting”—Net & coble fishing.]—The lessees of certain salmon fishings in a river, when fishing with net & coble, were in the habit of proceeding according to the following method, known as “flecting.” The coble was rowed straight across from the near to the far side of the river, the net paying itself out with the progress of the coble; when the coble came near to the far bank, the man in the coble put his foot on the net so as to prevent further paying out, & rowed the coble down stream keeping its bow close to the far bank, while the man with the towrope, walking on the near side of the river, drew his end of the net correspondingly down stream. The net, thus stretched across the river,

completely obstructed for practical purposes the passage of fish up the river. When the coble came nearly opposite to the hauling place, the man in the coble released the net & rowed swiftly to the near side, where the net was hauled ashore:—*Held*: this method of fishing was not fair net & coble fishing & was illegal, in respect that, during the period when the paying out of the net was prevented & the coble was kept close to the far side of the river, the net took a grasp of the whole width of the river during a longer time than was required for the coble to row round the net, & was a contrivance which prevented the free passage of fish up the river.—OWALD *v.* MCALL, [1919] S. C. 581.—SCOT.

t. Remedy.]—Where riparian proprietors on the lower reaches of a salmon river have by their operations injuriously affected the passage of salmon the proprietors of salmon fish-

ings on the upper reaches are entitled by interdict to prevent a continuance of the wrong.—PITKE & SONS, LTD. *v.* KINTORE (EARL) (1906), 8 F. (Cl. of ss.) 16. Sc. L. R. 11 S. L. T. 21. H. L. SCOT.

PART V. SECT. 6, SUB-SECT. 2.

a. Weir erected in arm of sea. Fewer fish caught in plaintiff's weir.] No action can be maintained for erecting a fish weir between high & low water mark in an arm of the sea, whereby fish, which otherwise would have been caught in plff.'s weir, were caught by deft. CHENEY *v.* GURIAN (1871), N. B. Dig. 381.—CAN.

b. Legality of weir—of special commissioners.] Special comrs. for Irish Fisheries have a general jurisdiction throughout Ireland, but an inquiry as to any weir must be held in the county where the

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Sect. 6.—Obstruction to passage of fish: Sub-sects. 2 & 3. Sects. 7 & 8.]

from other riparian owners, or by enjoyment, or by any other means by which such rights may be constituted; (4) a qualified easement, as to use the weir for fishing purposes, when the whole body of water was not wanted for the use of the mill, may be acquired by user for the time required to confer easements in respect of water; (5) the fishing weir having existed for so long a time, could not be said to be illegal in consequence of the alteration being made by cutting through the island, & by erecting the lower fenders & needles; (6) the stream fifteen feet wide, between the right bank & the islands, was not such a stream as is intended by Salmon Fishery Act, 1861 (c. 109), s. 27, so as to render it necessary that a free gap should be made & maintained in the lower fenders & needles, as provided in Salmon Fishery Act, 1861 (c. 109), s. 12.—**ROLLE v. WHYTE** (1868), L. R. 3 Q. B. 286; 8 B. & S. 116; 37 L. J. Q. B. 105; 17 L. T. 560; 32 J. P. 615; 16 W. R. 593; *sub nom.* **GARNETT v. BACKHOUSE**, **ROLLE v. WHYTE**, L. R. 3 Q. B. 609.

As to (1), (2) & (3) Apld. **Leconfield v. Lonsdale** (1870), L. R. 5 C. P. 657. *Refd.* **Clarke v. Somersetshire Drainage Comrs.** (1888), 57 L. J. M. C. 96; **Barker v. Faulkner** (1898), 79 L. T. 21. *Generally, Mentd.* **Garnett v. Backhouse** (1868), L. R. 3 Q. B.

453. — Row of hatches.]—A row of six hatches extended across the entire width of a river. When all these hatches were down the main body of the river passed down a mill stream & under a mill, ultimately returning to the bed of the river below the mill. When the hatches were opened the water flowed through each hatch down a separate sloping surface of masonry into a separate culvert under a road which crossed the river, & so into a pool. Hatches 1 & 2 were permanently closed. When hatches 3 & 4 were open the water passed down the sloping surfaces, then up & along a close boarded wooden platform resting on the bottom of the culverts, & thence into an eel trap. Spent or injured salmon had been found in the trap:—**Held:** the row of hatches constituted a weir, & that the sloping surfaces of masonry opposite the hatches constituted the apron of a weir within Salmon Fishery Act, 1873 (c. 71), s. 15, & a trap or device for taking fish had been placed upon the apron of a weir within the meaning of that sect.; (2) the trap or device was a device for catching salmon within Salmon Fishery Act, 1865 (c. 121), s. 36.—**MAW v. HOLLOWAY**, [1914] 3 K. B. 594; 84 L. J. K. B. 99; 111 L. T. 670; 78 J. P. 317, D. C.

454. Legality of weirs — Under Magna Carta.]—The statute of Magna Carta, *quod omnes kidelli deponantur de cartero penitus per Thamesiam*, etc. extends only to open weirs for taking fish; the first statute which extends to abating mills, mill-stanks, etc., is 25 Edw. 3, c. 4. 25 Edw. 3, c. 4, & 1 Hen. 4, c. 12, remain in force, & the authority given by the comrs. of sewers, does not extend to mills, mill-stanks, causeys, etc., erected before the reign of Edward I. unless they had been raised & exalted beyond their former altitude, & therefore

made more prejudicial; in which case they are not to be thrown down, but to be reformed by the abatement of the excess & enhancement only.—**CHESTER MILL CASE** (1610), 10 Co. Rep. 137 b; 77 E. R. 1134; *sub nom.* **SEWERS CASE**, 13 Co. Rep. 35.

Annotations:—Refd. **Williams v. Wilcox** (1838), 8 Ad. & El. 314; **Rolle v. Whyte** (1868), L. R. 3 Q. B. 286. **Mentd.** **Foster's Case** (1615), 11 Co. Rep. 56 b.

455. — Statute 12 Edward 4, c. 7—Applicable only to navigable waters.]—ROLLE v. WHYTE, No. 452, *ante*.

456. —]—The provisions of Magna Carta & of the other early statutes, including 17 Ric. 2, c. 9, & the above Act, which prohibit weirs, apply only to navigable rivers.

Sect. 12 of Salmon Fishery Act, 1861 (c. 109), prohibits the use of fishing mill dams for the purpose of catching salmon, except such fishing mill dams “as are lawfully in use at the time of the passing of this Act by virtue of a grant, charter, or immemorial usage.”

A fishing mill dam was erected between 1741 & 1751 in a river above the flow of the tide, & where the river was not navigable. For sixty years before 1861, & as far back as living memory could go, it had been used in substantially the same way as it was used in 1861:—**Held:** (1) the fishing mill dam was not a public nuisance; (2) as a grant may be proved either by production of the grant itself or by evidence of enjoyment consistent only with the existence of such a grant, & from which it may be presumed, the comrs. were bound, on the evidence, to find that the right to the fishing mill dam existed by grant from all the proprietors whose interests could be affected by the fishing mill dam, & consequently that the fishing mill dam was “lawfully in use” at the time of the passing of Salmon Fishery Act, 1861 (c. 109), “by virtue of a grant,” within sect. 12 of that Act.—**LECONFIELD v. LONSDALE** (1870), L. R. 5 C. P. 657; 39 L. J. C. P. 305; 23 L. T. 155; 18 W. R. 1165.

Annotations:—As to (1) Consd. **Barker v. Faulkner** (1898), 79 L. T. 21. *As to (2) Refd.* **Clarke v. Somersetshire Drainage Comrs.** (1888), 57 L. J. M. C. 96; **Barker v. Faulkner** (1898), 79 L. T. 21.

457. — In non-navigable waters — Under claim of long user.]—Qu.: whether a weir which does not destroy the fry of fish, nor impede navigation, & has existed from time immemorial, is illegal within the statute, 2 Hen. 6, c. 19.—**ROBSON v. ROBINSON** (1783), 3 Doug. K. B. 306; 99 E. R. 668.

458. —]—ROLLE v. WHYTE, No. 452, *ante*.

459. —]—BARKER v. FAULKNER, No. 323, *ante*.

460. Right to weir—In non-navigable waters — How claimed—Grant or prescription.]—ROLLE v. WHYTE, No. 452, *ante*.

461. Alteration to weir — Increase in obstruction — Abatement.]—CHESTER MILL CASE, No. 454, *ante*.

462. — Brushwood weir converted to stone one.]—WELD v. HORNBY, No. 322, *ante*.

weir is situated.—**R. v. IRISH FL.** ... **SPECIAL COMRS.** (1869), 17 W. R. 1020. —**IR.**

nt of special com- Whether conclusive.]—The

determination of special comrs. upon the legality or illegality of a weir is a judgment in rem, & conclusive against the world.—**DEVONSHIRE (DUKE) v. DROHAN**, [1900] 2 L. R. 161. —**IR.**

d. Free gaps in weir—What constitutes a “free gap.”—A free not maintained where the flow of the stream has been altered by the of three hatches on one side of the weir thereby causing the sides of the

463. ——— Enhancing, straightening or enlarging.]—WELD v. HORNBY, No. 322, *ante*.

464. ——— What amounts to illegal increase.]—ROLLE v. WHYTE, No. 452, *ante*.

465. Free gap in weirs—When necessary—Stream fifteen feet wide.]—ROLLE v. WHYTE, No. 452, *ante*.

466. Right to use weir—At particular time—Acquisition equivalent to easement of water—User.]—ROLLE v. WHYTE, No. 452, *ante*.

SUB-SECT. 3.—FISHING MILL DAMS.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 11–25, 92 (1).

467. What constitutes fishing mill dam—Not dam solely for milling purposes—Fish occasionally caught.]—By Salmon Fishery Act, 1861 (c. 109), s. 4, “fishing mill dam shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, & partly for the purpose of supplying water for milling or other purposes”:—*Held*: a dam built solely for milling purposes, & without any contrivances for catching fish, is not a fishing mill dam within this sect., although it does in fact render it more easy to catch fish than would have been the case if there had been no dam, & although the owners of the dam have occasionally availed themselves of the facility so afforded for the purpose of catching fish; & such a dam, therefore, cannot be abated under Salmon Fishery Act, 1865 (c. 121), s. 42.—*GARNETT v. BACKHOUSE* (1867), L. R. 3 Q. B. 30; 8 B. & S. 490; 37 L. J. Q. B. 1; 17 L. T. 170; 32 J. P. 5; 16 W. R. 201; *subsequent proceedings, sub nom. ROLLE v. WHYTE* (1868), L. R. 3 Q. B. 286; *sub nom. GARNETT v. BACKHOUSE, ROLLE v. WHYTE* (1868), L. R. 3 Q. B. 699.

Annotation:—Consd. Leconfield v. Lonsdale (1870), L. R. 5 C. P. 657.

468. ——— Dam previously used for fishing—Fishing subsequently abandoned.]—Resp. was charged before justices, under the Salmon Fishery Act, 1861 (c. 109), s. 22, with omitting to maintain a clear opening of not less than four feet wide through the crib, box, or cruipe of a fishery occupied by him, during the weekly close time. It was proved that his mill dam had been a fishing mill dam before 1859, & there were now the remains of a box with fenders over openings of the required size. But part of the old box was broken away; there were no internal appliances, & the box had ceased to be used, or capable of being used, for catching fish. A certificate of the Fishery Comrs. in 1871, however, referred to this dam as a fishing mill dam, but there was no evidence of any alteration since the passing of the Act, by which increased obstruction to fish was created:—*Held*: (1) this dam had ceased to be a fishing mill dam before the Act; (2) sect. 22 did not apply, & the justices were right in dismissing

the charge.—*PIKE v. ROSSITER* (1877), 37 L. T. 635; 42 J. P. 231, D. C.

Annotations:—As to (1) *Refd.* *Rossiter v. Pike* (1878), 4 Q. B. D. 24. *As to* (2) *Folld.* *Rossiter v. Pike* (1878), 4 Q. B. D. 24.

469. ——— ———.]—Where a dam had been used as a fishing mill dam up to a date subsequent to the passing of Salmon Fishery Act, 1861 (c. 109), but the use of it for fishing purposes was then abandoned & all appliances for fishing removed:—*Held*: the dam had ceased to be a “fishing mill dam” within Salmon Fishery Act, 1861 (c. 109), & had become an ordinary mill dam, & consequently Salmon Fishery Act, 1861 (c. 109), s. 20, did not apply, & the occupier of the dam was not bound to remove obstructions to the free passage of fish as required by the sect. —*ROSSITER v. PIKE* (1878), 4 Q. B. D. 24; 48 L. J. M. C. 81; 39 L. T. 496; 43 J. P. 157; 27 W. R. 339, D. C.

470. In non-navigable waters Legality—When in existence at passing of Salmon Fishery Act, 1861 (c. 109).]—*LECONFIELD v. LONSDALE*, No. 456, *ante*.

471. ——— How claimed Grant—Immemorial user.]—*LECONFIELD v. LONSDALE*, No. 456, *ante*.

472. Fish-pass—Absence of—Bar to fishing below dam—Except by rod & line.] A salmon cage was erected within fifty yards below a mill dam, which mill dam had no fish-pass attached:

Held: (1) it contravened Salmon Fishery Act, 1861 (c. 109), s. 12, which prohibits the catching of salmon otherwise than by a rod & line within fifty yards below any dam, unless the dam has a fish-pass; & (2) the case was not within the reservation of ancient rights of fishery, within Salmon Fishery Act, 1861 (c. 109), s. 11, which prohibits the use of fixed engines for the capture of salmon in inland or tidal waters, & excepts from the operation ancient rights & modes of fishing by charter, grant, or immemorial usage. —*MOULTON v. WILBY* (1863), 2 H. & C. 25; 2 New Rep. 40; 32 L. J. M. C. 164; 8 L. T. 284; 27 J. P. 536; 9 Jur. N. S. 472; 11 W. R. 670; 9 Cox, C. C. 318; 159 E. R. 11.

473. ——— Necessity for—Although part of machinery for catching fish removed.]—*HODGSON v. LITTLE*, No. 441, *ante*.

474. ——— ——— Dam no longer used for fishing purposes.]—*ROSSITER v. PIKE*, No. 469, *ante*.

SECT. 7. — CLOSE SEASONS.

Sect. 5, sub-sect. 3, *ante*.

SECT. 8. — SALE AND EXPORT OF FISH.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 32–34, 78.

475. Sale of freshwater fish—During close season—Extent of prohibition—Fish caught outside

not to be in a line with & parallel to the direction of the stream at the weir.—*DEVONSHIRE (DUKE) v. DROHAN*, [1900] 2 I. R. 161.—*IR.*

PART V. SECT. 6, SUB-SECT. 3.

a. Dam dyke—Direction of
—Where an issue was sent to a jury as to whether a dam dyke was “to

the injury & damage of pursuers” as proprietors of salmon fishings in a river, it was not competent for the to direct the jury that the put to issue & the only which they were to consider was, whether it was injurious in the actual condition of the river, & with reference to the existence of the dykes in the river.—*LEYS, MASSON & Co. v.*

(LORD) (1831), 5 8.
34. SCOT.

PART V. SECT. 8.

1. Restraining sale—(Of fish.)
claimed to be entitled to fish in a certain berth under regulations made by the sessions on the authority of a statute. On the evidence the et

. 8.—*Sale and export of fish.* Sects. 9 & 10: Sub-sects. 1 & 2. Part VI. Sect. 1: Sub-sects. 1, 2 & 3.]

statutory area.]—Freshwater Fisheries Act, 1878 (c. 39), s. 11 (4), which forbids the sale or exposure for sale of freshwater fish during the close season, applies to fish caught beyond the limits of that part of the United Kingdom to which the Act applies.—PRICE v. BRADLEY (1885), 16 Q. B. D. 148; 53 L. T. 816; 50 J. P. 150; 34 W. R. 165; *sub nom.* BRADLEY v. PRICE, 55 L. J. M. C. 53; 2 T. L. R. 182, D. C.

Annotation :—Consd. Guyer v. R. (1889), 23 Q. B. D. 100.

SECT. 9.—LEGAL PROCEDURE AND EVIDENCE.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 73-81.

Jurisdiction of justices.]—*See* Part VIII., *post*.

SECT. 10.—LOCAL APPLICATION OF STATUTES AND LOCAL ACTS.

SUB-SECT. 1. LOCAL APPLICATION OF STATUTES.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 82-91, Sched. IV.

SUB-SECT. 2.—LOCAL ACTS.

476. Thames Conservancy Act, 1857 (c. cxlvii)—Power of river bailiffs - To enter boats & seize brood of fish - Penalty for resistance to bailiffs.]—Above Act creates a new corporation, called "The conservators of the river Thames," & by sect. 52 of above Act, transfers to them "all the powers, authorities, rights & privileges," which might be exercised by the mayor of London, "by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy & the preservation & regulation of the river Thames," save only so far as the same may be modified by, or be inconsistent with, the provisions of above Act. Sect. 76 of above Act imposes a penalty, not exceeding £5, on any person who "shall resist or make forcible opposition against any person employed in the due execution of this Act":—*Held*: under above Act, although it does not apparently have the fishery, of the Thames in contemplation, the conservators

inferred that defts. were authorized by plffs. to shoot their seine, plffs. to have half the fish caught, & having done so defts. secured a catch of fish, of which plffs. claimed half under the agreement:—*Held*: plffs. were entitled to the relief which they sought, namely, that defts. should be restrained from selling.—DOMERRY v. POWER (1881), R. E. D. 119.—CAN.

k. — American oysters.]—The Governor-General-in-Council has no power under R. S. C., c. 95, s. 16, to make an order prohibiting the exposure & sale of American oysters during the close season.—*Ex p.* (1895), 33 N. B. R. 2.—CAN.

PART V. SECT. 9.

What required - - Con- for of salmon during season.]—In order to convict a of illegal fishing for under Fisheries Act, R. S. C., c. 95, s. 8, it is not sufficient that deft. had in his possession a salmon during the prohibited season. There must be

some evidence to show when, where, & in what manner the fish had been caught. *Ex p.* KELLY (1890), 29 N. B. R. 271.—CAN.

k. Defence — To charge of fi in prohibited waters—Subordinate tion of accused—Acting under orders of superior officer.]—In a complaint against a seaman charging a contravention of a fishery board bye-law, it was proved that the vessel on which accused was employed had been engaged in trawling within the prohibited area; & that accused occupied a subordinate position on the vessel & acted under the orders of superior officers:—*Held*: it was no defence to the charge that accused occupied a subordinate position & acted under his superior officers' orders.—GORDON v. SHAW, [1908] S. C. (J.) 17; 45 Sc. L. R. 328; 15 S. L. T. 792.—SCOT.

PART V. SECT. 10, SUB-SECT. 2.

1. Salmon Fisheries Act, 1868.]—A fisherman was convicted of a contravention of the Salmon Fisheries

of the Thames are empowered to appoint, under there hands & seals, assistant river keepers, with express authority to enter fishing boats & seize brood of fish, in pursuance of Medway Fishery Act, 1756 (c. 21), s. 5; & a person obstructing such an assistant river keeper in so doing, is not liable to the penalty imposed by Medway Fishery Act, 1756 (c. 21), s. 6; but is liable to the penalty imposed by sect. 6 of above Act.—TURNIDGE v. SHAW (1861), 3 E. & E. 588; 30 L. J. M. C. 113; 3 L. T. 847; 25 J. P. 294; 7 Jur. N. S. 755; 9 W. R. 381; 121 E. R. 563.

477. Tweed Fisheries [Act, 1857 (c. cxlviii)—Offence committed against Salmon Fisheries (Scotland) Act, 1868 (c. 123)—Place where offence committed—Framing of prosecution.]—R. v. SANDERSON (1871), 35 J. P. Jo. 356.

478. — Extent of river at mouth — How measured.]—In above Act to place nets within a river was an offence, & the river was described to extend four miles along the sea-coast from a certain pier. In another part of above Act a distance was described as being in a straight line from another point, but the words straight line were not used as regards the four mile limit. W. committed an offence, & if the straight line were adopted he was within the four miles, but if the sea-coast line were adopted he would not be within that limit:—*Held*: in measuring along the sea coast the measurement ought to follow the line of coast, & not to be the same as a straight line.—TWEED COMRS. v. WOOD (1882), 46 J. P. 760, D. C.

479. — Ratability of fishery owners thereunder—Assessment of poor rate—Deductions in respect of fishery rate.]—By above Act passed for the preservation & increase of salmon, comrs. were empowered to raise a rate from every owner of a fishery in a large district, for the purposes of above Act. Applt. was tenant of a fishery for which he paid a rent of £305, & a rate of £61 to the comrs.:—*Held*: in ascertaining the ratable value of his property the amount of the rate should be deducted, for it was an "expense necessary to maintain the property in a state to command such rent," & so allowed to be deducted under Parochial Assessment Act, 1836 (c. 96), s. 1.—R. v. SMITH (1885), 55 L. J. M. C. 49; 54 L. T. 131; 50 J. P. 215; 2 T. L. R. 223, D. C.

Annotations :—*Reid*. Newport Union v. Stead, Newport Union v. Green, [1907] 2 K. B. 460; Waddle v. Sunderland Union, [1908] 1 K. B. 612; White v. South Stoneham Assessment Committee, [1915] 1 K. B. 103.

Act, 1868. While he held a licence to fish in the Solway Firth in English waters, his landing place, where his nets were found unsecured, was in the Scottish waters of the Firth:—*Held*: notwithstanding that his landing place was in Scotland, that he was not an "occupier" of a Scottish fishery, to which alone the above Act applied.—HOUGHTON v. PHYN (1892), 19 R. (Ct. of Sess.) 37; 29 Sc. L. R. 476, J.—SCOT.

m. Dominion statute.]—Under 14 & 15 Vict. c. 63 (Imp.) defining the boundary between Canada & New Brunswick, the whole of the Bay of Chaleurs is within the present boundaries of Quebec & New Brunswick, within the Dominion of Canada & subject to Fisheries Act, 31 Vict. c. 60 (D) & therefore, drifting for salmon, in the Bay of Chaleurs, although more than three miles from either provincial shore, is a drifting in Canadian waters & within the prohibition of the last mentioned Act.—MOWATT v. MCFEE (1880), 5 S. C. R. 66.—CAN.

Part VI.—Statutory Enactments relating to Salt Water Fisheries and Sea Fishing.

SECT. 1.—SUPERVISION OF SEA FISHERIES.

SUB-SECT. 1.—BOARD OF TRADE.

See Board of Agriculture & Fisheries Act, 1903 (c. 31), s. 1.

SUB-SECT. 2.—BOARD OF AGRICULTURE.

See Board of Agriculture & Fisheries Act, 1903 (c. 31), s. 1, sched.; Sea Fisheries Act, 1868 (c. 45), ss. 29, 37, 40, 44, 45; Oyster & Mussel Fisheries Orders Confirmation Act, 1869, No. 2. (c. 31), s. 2; Sea Fisheries Act, 1875 (c. 15), s. 1; Fisheries (Oyster, Crab, & Lobster) Act, 1877 (c. 42), ss. 5, 7, 10; Sea Fisheries Act, 1884 (c. 27), s. 1; Sea Fisheries Regulation Act, 1888 (c. 54), ss. 1, 2, 4, 8, 11, 12; Sea Fisheries (Shell-Fish) Regulation Act, 1894 (c. 26), s. 1 (2).

SUB-SECT. 3.—SEA FISHERIES COMMITTEES.

See Sea Fisheries Regulation Act, 1888 (c. 54), ss. 1 (3), 2 (1) (b), (c), (d), 2 (2), 3, 5, 6 (1), (5), 8, 13 (a), (b), (c); Fisheries (Oyster, Crab, & Lobster) Act, 1877 (c. 42), ss. 4, 8, 10; Fisheries (Oyster, Crab, & Lobster) Act, 1877, Amendment Act, 1884 (c. 26); Local Government Act, 1888 (c. 41); Fisheries Act, 1891 (c. 37), ss. 7, 9; Sea Fisheries (Shell-Fish) Regulation Act, 1894 (c. 26), s. 1.

480. Appointment of fishery officer — Restrictions as to expenditure—By council appointing committees—To be imposed before officer appointed.]—By Sea Fisheries Regulation Act, 1888 (c. 54), s. 6 (1), "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient" for the purposes therein specified: *Held*: (1) the restrictions & conditions as to expenditure in connection with the appointment of a particular officer cannot be made after the officer has been appointed; (2) *Seem*: where a local fisheries committee has been appointed by more county or borough councils than one, it is open to any one of such councils to make restrictions or conditions as to expenditure under the above sect. without the assent of the other councils.—R. v. PLYMOUTH CORPN., [1896] 1 Q. B. 158; 65 L. J. Q. B. 258; 41 W. R. 620; 12 T. L. R. 157; 40 Sol. Jo. 226, D. C.

Annotation:—As to (2) *Consd.* R. v. North Riding of Yorkshire County Council, [1899] 1 Q. B. 201.

481. ——— Power of one of several

councils to make.]—R. v. PLYMOUTH No. 480, *ante*.

482. ——— ——— ——— ———.]—Where a local sea fisheries committee contains representatives of more than one county or borough council, it is not open to any one of such councils to make conditions or restrictions as to expenditure under Sea Fisheries Regulation Act, 1888 (c. 54), s. 6 (1), but the conditions or restrictions referred to in that subsect. can only be imposed by the common agreement of all the councils represented on the committee.—R. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL, [1899] 1 Q. B. 201; *sub nom.* R. v. YORKSHIRE (NORTH RIDING) COUNTY COUNCIL, *Ex p.* NORTH-EASTERN SEA FISHERIES DISTRICT COMMITTEE, 68 L. J. Q. B. 93; 70 L. T. 521; 63 J. P. 68; 47 W. R. 205; 15 T. L. R. 31; 43 Sol. Jo. 111, D. C.

483. Bye-Laws — Under Sea Fisheries (Shell Fish) Regulation Act, 1894, c. 26—Removal of shell fish.]—The offence of removing undersized shell fish from a fishery, contrary to bye-laws framed under the above Act, is complete whenever such shell fish have been taken up from any part of the fishery with the intention of eventually carrying them away.—THOMSON v. BURNS, THOMSON v. HARTLEY (1896), 66 L. J. Q. B. 176; 76 L. T. 58; 61 J. P. 84; 13 T. L. R. 114; 41 Sol. Jo. 143; 18 Cox. C. C. 191, D. C.

484. ——— Under Sea Fisheries Regulation Act, 1888 (c. 54), s. 2—Trawling.]—COLBECK v. ASHFIELD, No. 488, *post*.

485. ——— ——— ——— ——— Extent of application of bye-law.]—Under the above Act local committees were constituted with power to make bye-laws, & the Devon local committee made bye-laws prohibiting trawling in Start Bay, Teignmouth Bay, & Torbay. When these bye-laws were made it was supposed that fish came into shallow water to spawn, & that the bays were nurseries of young fish. At a later date it was discovered that this theory was wrong. The bye-laws for Teignmouth Bay & Torbay were withdrawn, but the committee refused to repeal the bye-law as to Start Bay because there was a sandbank there which was used by crab catchers, & the presence of trawlers would interfere with their business. Applt. was convicted of trawling in Start Bay in contravention of this bye-law: *Held*: dismissing the appeal that the Act was comprehensive enough to cover the bye-law; there was nothing in the Act to show that its sole object was the protection of immature fish; that the bye-law was for a perfectly legitimate object under the Act, namely, the protection of the crab fishery, & therefore was not *ultra vires*; & on the point of reasonableness, that was a question of fact to be decided

PART VI. SECT. 1, SUB-SECT. 3.

n. Power to make bye-laws.]—A party set his cod-trap on the coast of Labrador, so near to another's trap as to lessen the catch of the latter. It appeared that in 1888 a

law had been passed abolishing cod-traps, but in 1889 a Fisheries' Commission was established with powers to make rules for regulating the prosecution of the fisheries. One of the rules permitted the use of cod-traps, but did not define the distance they

were to be set from each other, as was provided in the law repealed. In an action for damages:—*Held*: as the rules of the Fisheries' Commission only prescribed the use of cod-traps, there is nothing to prevent the setting of a cod-trap near to another so long

Sect. 1.—Supervision of sea fisheries: Sub-sects. 3 & 4. Sect. 2: Sub-sect. 1, A., B. & C.; sub-sect. 2. Sect. 3: Sub-sects. 1, 2 & 3. Sect. 4: Sub-sects. 1, 2, 3 & 4.]

by the justices, & they had found that the bye-law was not too wide in its application.—**FRIEND v. BREHOUT** (1914), 111 L. T. 832; 79 J. P. 25; 30 T. L. R. 587; 58 Sol. Jo. 741, D. C.

Annotation:—Reid. *Onions v. Clarke* (1917), 86 L. J. K. B. 740.

SUB-SECT. 4.—FISHERY OFFICERS APPOINTED BY SEA FISHERIES COMMITTEES.

See Sea Fisheries Regulation Act, 1888 (c. 54), s. 6 (1), (2); Fisheries Act, 1891 (c. 37), s. 13.

486. Right to prosecute for offences—Under Sea Fisheries Act, 1883 (c. 22).—Exclusive right.]—The above Act creates certain offences, & by sect. 11: “The provisions of this Act . . . shall be enforced by sea-fishery officers,” who are defined by that sect.: **Held:** the effect of the above words is that no one except a sea-fishery officer can prosecute for an offence against the Act, & a rule calling upon justices to hear & determine a summons for an offence against the Act, taken out by a private individual, discharged.—**R. v. CURRIE** (1889), 22 Q. B. D. 622; 58 L. J. M. C. 132; 60 L. T. 638; 53 J. P. 470; 37 W. R. 492; 16 Cox, C. C. 618, D. C.

Annotations:—Consd. *Anderson v. Hamlin* (1890), 27 Q. B. D. 221. **Mentd.** *Kyffin v. East London Waterworks Co.* (1896), 60 J. P. 230; *R. v. Stewart*, [1896] 1 Q. B. 300.

487. Without authority of conservators—Fisheries Act, 1891 (c. 37), s. 13.]—POLLOCK v. MOSES, No. 395,

SECT. 2. PROVISIONS AS TO PARTICULAR FISHERIES.

ACT. 1.—GENERAL PROVISIONS.

in Fish.

See Sea Fisheries Act, 1868 (c. 45), s. 68; Sea Fisheries Act, 1883 (c. 22) s. 4, sched. 1. arts. 14-17, 19-22; Sea Fisheries Regulation Act, 1888 (c. 54), s. 2; Fisheries Act, 1891 (c. 37), s. 4, sched. art. 4; Trawling in Prohibited Areas Prevention Act, 1909 (c. 8), ss. 1, 5, 6; Herring Fishery (Branding) Act, 1913 (c. 9), ss. 1, 2, 5; Statutory Rules & Orders (1919), No. 1111.

488. Prohibition against use of trawl—Beam on sea-bottom—Whether other trawl within prohibition.]—By bye-law 1 of the North Eastern Sea Fisheries District bye-laws, made under Sea Fisheries Regulation Acts, 1888 & 1889, & confirmed by order of the Board of Trade, it is provided that “a person shall not use in fishing for sea fish any trawl or trawl net having a beam which

as it does not amount to a breach of the common law.—**MITCHELL v. BARTLETT**, 7 Nfld. L. R. 741.—**NFLD.**

PART VI. SECT. 2, SUB-SECT. 1.—A.

O. **use of**
trawl.]—The Herring
(land) Act, 1889,
trawling “within three
water mark of any part of the coast
of Scotland (except within
by the Fishery Board)

Held: that the prohibited area includes the space between high water mark & low water mark.—**WHYTE v. THOMPSON** (1897), 1 R. (Ct. of Sess.) 55, J.—**SCOT.**

P. **—.]—****RANKIN v. WRIGHT** (1901), 4 F. (Ct. of Sess.) 5; 39 Sc. L. R. 53; 9 S. L. T. 228, J.—**SCOT.**

Q. **—.]—**An attempt to set a trawl-net within prohibited area is using a mode of fishing in contravention of the Acts, & seizure of the net is

is pulled or pushed or otherwise propelled along or over the bottom of the sea”—**Held:** an “otter” trawl, which is a trawl not having any beam across from side to side, but which has two “otter” boards so fixed that the motion through the water keeps them apart, thus stretching a line across the net in the place of a beam, comes within the meaning of bye-law 1.—**COLBECK v. ASHFIELD** (1898), 67 L. J. Q. B. 333; 62 J. P. 214; 46 W. R. 302; 14 T. L. R. 230; 42 Sol. Jo. 291, D. C.

B. Shell Fish.

See Sea Fisheries Act, 1868 (c. 45), ss. 12, 51, 52, 53, 55, sched. art. 11; Fisheries (Oyster, Crab, & Lobster) Act, 1877 (c. 42), s. 4; Sea Fisheries Act, 1883 (c. 22) s. 4 (c); Sea Fisheries Act, 1884 (c. 27).

489. Distinguished from floating fish.]—**BRIDGER v. RICHARDSON, No. 302, ante.**

490. Oysters—Disturbance of oyster beds—Dredging for oyster spat—Illegal.]—13 Ric. 2, st. 1, c. 19, & 17 Ric. 2, c. 9, for the preservation of the fry or brood of fish, are still in force; & the spawn or brood of oysters, called oyster spat is within the provisions of those Acts. Where deft., in an action of trespass *quare clausum*, etc., justifies an entry for the purpose of taking such spawn in the *locus in quo*, being a public navigable tidal river, the plea must show that he took it under circumstances that made the taking legal within the provisions of the several Acts for its preservation.—**MALDON CORPN. v. WOOLVET** (1840), 12 Ad. & El. 13; 4 Per. & Dav. 26; 9 L. J. Q. B. 370; 11 E. R. 711.

Annotation—Reid. *Saltash Corpn. v. Goodman & Blake* C. P. D. 431.

491. ——— Form of conviction—Omission of word knowingly.]—A. was charged with unlawfully using a trawl net so as to disturb an oyster bed, & was convicted & fined 1s. The conviction when filed with the clerk of the peace omitted the word “knowingly,” whereupon a *certiorari* was moved for, & after rule *nisi* the justices drew up a fresh conviction, including the word “knowingly,” & sent the same to the clerk of the peace:—**Held:** the fresh conviction was no answer to the rule, which must be made absolute.—**EX p. AUSTIN** (1880), 50 L. J. M. C. 8; 44 L. T. 102; 45 J. P. 302, D. C.

Annotation:—Mentd. *Ex p. Kenyon* (1881), 45 J. P. 303.

492. ——— Sale during close season—Foreign oysters deposited in English waters—Until wanted for sale.]—By Fisheries (Oyster, Crab, & Lobster) Act, 1877 (c. 42), s. 4, which imposes a penalty on persons selling oysters between May 14 & Aug. 4, in any year, it is provided that a person shall not be guilty of an offence under the sect. if he satisfies the ct. that the oysters “were taken within the waters of some foreign State.”

Applt. was convicted of having sold oysters on

authorised before conviction.—**PYPER v. INGRAM** (1901), 3 F. (Ct. of Sess.) 514; 38 Sc. L. R. 369; 8 S. L. T. 493.—**SCOT.**

R. **—.]—**Herring Fishery (Scotland) Act, 1889, s. 6, prohibiting other trawling in, *inter alia*, the Dornoch Firth as defined by the Act, applied to foreign trawlers.—**PETERS v. OLSEN** (1905), 7 F. (Ct. of Sess.) 86; 42 Sc. L. R. 735; 13 S. L. T. 337, J.—**SCOT.**

PART VI.—ENACTMENTS RELATING TO SALT WATER FISHERIES AND SEA FISHING. 57

a day within the period specified in the Act. It appeared that these oysters having been originally taken in French waters had been brought in a mature state to this country in Feb. or Mar. & laid down for the purpose of storage at a depth of some fathoms in part of a creek used only for the reception of similar French oysters, where they did not breed, & from which they were dredged when required for sale during the close period:—*Held*: the oysters were “taken within the waters of a foreign State,” so as to be excluded from the operation of the Act, & the conviction must therefore be quashed.—*ROBERTSON v. JOHNSON*, [1893] 1 Q. B. 129; 62 L. J. M. C. 1; 67 L. T. 560; 57 J. P. 39; 41 W. R. 223; 9 T. L. R. 68; 37 Sol. Jo. 48; 17 Cox, C. C. 580; 5 R. 108, D. C.

493. — Regulation of fishery by corporate body—Statutory authority—Right to lease foreshore of fishery.]—*TRURO CORPN. v. ROWE*, No. 52, *ante*.

494. Removal of shell fish — What amounts to removal—Intention to remove.]—*THOMSON v. BURNS*, *THOMSON v. HARTLEY*, No. 483, *ante*.

C. Lobsters and Crabs.

See Fisheries (Oyster, Crab, & Lobster) Act, 1877 (c. 42), ss. 8, 9; Sea Fisheries Regulation Act, 1888 (c. 51), s. 2 (c).

B-SECT. 2.—LOCAL PROVISIONS.

Blackwater (Essex).]—*See* 31 & 32 Vict. c. ix.

Boston Deep.—*See* 33 & 34 Vict. c. vi 2 Ed. 7, c. lxxviii.

Colne.]—*See* 33 & 34 Vict. c. lxxxv.

Bosham & Chichester.]—*See* 36 & 37 Vict. c. lxii.

Emsworth.]—*See* 33 & 34 Vict. c. vi; 34 & 35 Vict. c. cxlv.

Falmouth.]—*See* 40 & 41 Vict. c. cxxvi.

Faversham.]—*See* 3 & 4 Vict. c. lix.

Hamble.]—*See* 31 & 32 Vict. c. ix.

Hamford Water.]—*See* 46 & 47 Vict. c. x.

Herne Bay.]—*See* 27 & 28 Vict. c. cclxxx; 28 & 29 Vict. c. clxviii.

Hunstanton le Strange.]—*See* 46 & 47 Vict. c. x.

495. Ipswich—Ipswich Fishery Act, 1867, c. xlvi—Private oyster fishery—Exclusion of public right.]*SMITH v. COOKE*, No. 43, *ante*.

Langston & Chichester Harbour.]—*See* 32 & 33 Vict. c. 31.

Lynn Deep.—*See* 35 & 36 Vict. c. i; 43 & 44 Vict. c. cxlii; 6 Ed. 7, c. cxii.

Medway.]—*See* 2 Geo. 2, c. 19; 30 Geo. 2, c. 21; Medway Regulation Continuance Act, 1868 (c. 53).

Menai Straits.]—*See* 37 & 38 Vict. c. xviii.

Paglesham.]—*See* 37 & 38 Vict. c. xviii.

Poole.]—*See* 48 & 49 Vict. c. xii; 50 & 51 Vict. c. c.

Queenborough.]—*See* 8 & 9 Vict. c. cxliv.

Ramsholt.]—*See* 47 & 48 Vict. c. xiii.

Roach River.]—*See* 29 & 30 Vict. c. cxlv.

Rochester.]—*See* 28 & 29 Vict. c. cxxxvii; 30 & 31 Vict. c. lxxii.

Salcombe.]—*See* 35 & 36 Vict. c. lxiii.

496. St. Ives Bay — 4 & 5 Vict. c. lvii—Action for infringement of statutory right—Will not lie.]—*STEVENS v. JEACOCKE*, No. 63, *ante*.

Swansea.—*See* 34 & 35 Vict. c. cxlv; 46 & 47 Vict. c. x.

Tees.]—*See* 7 Ed. 7, c. lxxxiii.

Tollesbury & Mersea.]—*See* 42 & 43 Vict. c. l.

Truro.]—*See* 39 & 40 Vict. c. xci.

Whitstable.]—*See* 33 Geo. 3, c. 42; 59 & 60 Vict. c. xli.

Seine fishing on coasts of Somerset, Devon, Cornwall.]—*See* 1 Jac. 1, c. 23.

SECT. 3.—PROTECTION OF SEA FISHERIES.

SUB-SECT. 1.—DYNAMITE AND OTHER EXPLOSIVES.

See Sea Fisheries Act, 1868 (c. 45), s. 53; Salmon & Freshwater Fisheries Act, 1923 (c. 16), s. 9.

SUB-SECT. 2.—POLLUTION.

See Malicious Damage Act, 1861 (c. 97), s. 32; Sea Fisheries Act, 1861 (c. 45), s. 53.

Pollution generally.]—*See* Part III., Sect. 10, sub-sect. 1, B., *ante*.

B-SECT. 3.—INSTRUMENTS FOR DESTROYING FISH AND FISHING GEAR.

See Sea Fisheries Act, 1883 (c. 22), ss. 2, 5, 9, sched. 1., Arts. 20, 21.

SECT. 4.—STATUTORY PROVISIONS AS TO SEA FISHING BOATS.

SUB-SECT. 1.—REGISTRATION AND EQUIPMENT

See M. S. Act, 1894 (c. 60), ss. 370, 371, 373, 375; FERRIES, Vol. XXIV., p. 984; SHIPPING.

SUB-SECT. 2.—CERTIFICATES OF SKIPPERS AND SECOND HANDS OF TRAWLERS.

See M. S. Act, 1894 (c. 60), ss. 413, 414, 415, 416; M. S. Act, 1906 (c. 48), s. 81; Statutory Rules & Orders, 1900, No. 806; Statutory Rules & Orders, 1901, No. 309; Statutory Rules & Orders, 1923, No. 949; SHIPPING.

SUB-SECT. 3.—INDENTURES OF APPRENTICESHIP AND AGREEMENTS WITH FISHING BOYS.

See M. S. Act, 1894 (c. 60), ss. 392, 393, 395, 396, 397–398; Order in Council, Feb. 10, 1915 (Statutory Rules & Orders, 1915, No. 146).

SUB-SECT. 4.—ENGAGEMENT AND DISCHARGE OF CREW.

See M. S. Act, 1894 (c. 60), ss. 383, 387–389, 390, 399, 400–403, 407, 409–411.

Sect. 4.—Statutory provisions as to sea fishing boats: Sub-sects. 4, 5 & 6. Sect. 5: Sub-sects. 1 & 2. VII. Sect. 1.]

497. Disputes between owner & crew—Adjudication by deputy superintendent—Of mercantile marine office—Merchant Shipping Act, 1894 (c. 60), ss. 247, 387.]—Sect. 387, sub-sect. 1, of the above Act provides that a superintendent of a mercantile marine office shall inquire into, hear, & determine any dispute between the owner of a fishing boat & any seaman of the boat concerning (*inter alia*) the seaman's discharge, if any party to the dispute calls on him to decide it.

Sect. 247, sub-sect. 2, provides that any act done by a deputy duly appointed shall have the same effect as if done by a superintendent:—*Held*: a deputy superintendent had power to adjudicate upon disputes under sect. 387.—*MAYHEW v. TRIPP*, [1914] 2 K. B. 455; 83 L. J. K. B. 778; 110 L. T. 1002; 12 Asp. M. L. C. 505, D. C.

498. Wilful disobedience—What amounts to—Desertion or absence without leave—Merchant Shipping Act, 1894 (c. 60), s. 376 (1).]—A seaman may be convicted of the offence of wilfully disobeying a lawful command of the master, under sect. 376, sub-sect. 1 (*d*), of the above Act, although the act of disobedience amounts to the offence of desertion or absence without leave under (*a*) or (*b*) of the sub-sect.—*EDGILL v. ALWARD* (J. & G.), 1 T.D., [1902] 2 K. B. 239; 71 L. J. K. B. 690; 87 L. T. 121; 66 J. P. 760; 9 Asp. M. L. C. 341; 20 Cox, C. C. 302, D. C.

SUB-SECT. 6.—DEATH INJURIES AND CASUALTIES.

See M. S. Act, 1891 (c. 60), ss. 385, 386, 417.

SECT. 5.—FOREIGN FISHING BOATS.

SUB-SECT. 1.—IN BRITISH WATERS.

See Sea Fisheries Act, 1883 (c. 22), ss. 3, 4; M. S. Act, 1891 (c. 60), ss. 376, 379, 380, 381; Order in Council Apr. 6, 1889 (Statutory Rules & Orders Revised, Vol. VIII., Merchant Shipping, p. 191).

See Sea Fisheries Act, 1883 (c. 22), s. 7; Fisheries Act, 1891 (c. 37), s. 5; Customs Consolidation Act, 1876 (c. 36); Order in Council, Oct. 7, 1869 (Statutory Rules & Orders Revised, Vol. VIII., Merchant Shipping, p. 196); Order of Board of

PART VI. SECT. 5, SUB-SECT. 1.

a. Seizure of foreign vessel—Inside three mile limit.] Deft., an officer appointed by the Canadian Govt. for the protection of the fisheries, seized a vessel belonging to plff. in the harbour of Gaspe, in the Province of Quebec, on Aug. 18, for breach of 34 Viet. c. 61, & on Aug. 22, brought the vessel to Shediac, in the Province of New Brunswick, but did not deliver her to the collector of customs there. The Act directed that vessels seized should be forthwith delivered to the collector or other principal officer of customs at the port nearest the place where seized. There was a collector of customs at Gaspe, & at several other ports nearer than Shediac. No proceedings having been taken towards the condemnation of the vessel, plff. replevied her on Sept. 5: *Held*: by taking the vessel to Shediac & retaining her there in his own possession deft. became a trespasser *ab initio*, & replevin would lie.—*McGOWAN v. BETTS* (1871), N. B. Dig. 386. CAN.

b. ———.] *SAMUEL GILBERT* (1871), 2 S. V. A. R. 167.—CAN.

a. ———.] Where the Crown alleged in its petition in an action *in rem* for condemnation & forfeiture, that a vessel had violated R. S. C., c. 94, s. 3, by fishing in prohibited waters without a licence, but offered no evidence in support of such allegation:—*Held*: the burden of proving the license to fish was upon deft. *R. v. THE HENRY L. PHILLIPS* (1895), 4 Exch. C. R. 419. CAN.

b. ———.] The crew of a fishing vessel owned in the United States had thrown their seine more than three miles off Gull Ledge in the Province of Nova Scotia, but before they had secured all the fish in the seine both it & the vessel had drifted within the three mile limit, where the vessel was seized by a Canadian cruiser while her crew was in the act of hauling out the seine: *Held*: the vessel was guilty of ill "fishing" within the Treaty of 1818 & Imperial Act, 59 Geo. III., c. 38,

& also under the provisions of R. S. C., c. 94. *R. v. THE FREDERICK GEORGE JR.* (1896), 5 Exch. C. R. 161; Q. R. 27 S. C. 211. CAN.

c. ———.] *Scoble*: coming into the territorial waters of Canada to cure fish caught outside the limits of such waters, will subject the offending vessel to forfeiture. *R. v. THE SAMOSET* (1901), 25 C. L. T. 128; 9 Exch. C. R. 318. CAN.

d. ———.] Action for the confiscation of the steam fishing vessel "Francis Cutting" of Seattle, for fishing in Canadian waters. The sextant observations made by the captain of the Canadian Govt. cruiser in locating the "Francis Cutting" being doubtful, but the compass bearings of the first officer not being successfully attacked:—*Held*: the fishing vessel was a trespasser & was condemned & declared forfeited.—*R. v. THE FRANCIS CUTTING* (1908), 9 W. L. R. 192. CAN.

e. ———.] In an action brought for the forfeiture of the *Edrie* which was found fishing within three marine miles of the coast of Canada, was legally seized by an officer authorised by Customs & Fisheries Protection Act. The burden of proving the illegality of the seizure was on deft. He did not discharge the burden of proof:—*Held*: the vessel would be forfeited.—*R. v. CHLORECK FISH CO.* (1912), 17 B. C. R. 50; 1 D. L. R. 96. CAN.

f. ———.] Where the evidence as to the place of the seizure of a vessel for unlawful fishing within Canadian waters is unsatisfactory, & leaves it doubtful whether or not the vessel seized was, at the time of seizure, within the three mile limit of the Canadian coast, it would be unsafe & unjust to condemn her.—*CARLSON v. R.* (1914), 48 S. C. R. 180.—CAN.

g. ———.] The term "coast" in the treaty of 1818 by which the United States renounced the right to fish within three marine miles from the coast of any British territory, is not confined to the coast of the mainland, & a United States vessel is

therefore liable to seizure for illegal fishing or setting out to fish in violation of Canada Customs & Fisheries Protection Act within three marine miles from the shore of an island of the Dominion of Canada situated fifteen miles from the mainland.—*R. v. THE JOHN J. FALLON* (1917), 16 Exch. C. R. 331; 37 D. L. R. 659; 35 S. C. R. 318. CAN.

h. ———.] A sea-fishing officer, who had reasonable grounds for believing that he had detected a trawler fishing within the three mile limit, ordered the captain to go with his vessel to C., which was the nearest & most convenient port. At the time the sea was too rough to permit of a boat being sent to the trawler to put any one on board:—*Held*: the order to go to C. was a lawful order, although the only express authority given by the statute was authority to "take" the offender to port, & the master of the trawler by refusing to comply was guilty of a contravention of the Act.—*GORDON v. HANSEN*, [1911] S. C. (J.) 131; 51 Sc. L. R. 669; 2 S. L. T. 5. SCOT.

k. ———.] Within boundaries of great lakes.]—An American vessel fishing without a licence upon the Canadian side of the boundary line on one of the great lakes is subject to seizure & condemnation under R. S. C., c. 94.—*THE GRACE* (1894), 4 Exch. C. R. 283.—CAN.

l. ———.] An American vessel was seized by a Canadian cruiser for fishing on the Canadian side of Lake Erie. The Crown brought an action to have her declared forfeited:—*Held*: the vessel was not in Canadian waters, & should be restored to her owners.—*THE KITTY v. R.* (1905), 22 T. L. R. 191.—CAN.

m. ———.] Outside three mile limit.]—Where a foreign fishing vessel has committed a breach of R. S. 1906, c. 47, by entering the three mile limit for some purpose not permitted she is liable to seizure & forfeiture notwithstanding that she was actually seized outside of the three mile limit.—

Customs, Apr. 2, 1881; Order in Council, Apr. 6, 1889 (Statutory Rules & Orders Revised, Vol. VIII., Merchant Shipping, p. 191).

SUB-SECT. 2.—OUTSIDE BRITISH WATERS.

See Sea Fisheries Act, 1843 (c. 79); Sea Fisheries Act, 1868 (c. 45), s. 71; Fisheries (Oyster, Crab, & Lobster) Act, 1877 (c. 42), s. 15; Sea Fisheries

Act, 1883 (c. 22), ss. 4, 5, 15, 22, 24; sched. I., art. 4, 27-37; North Sea Fisheries Act, 1893 (c. 17); Order in Council, 1894 (Statutory Rules & Orders, 1894, No. 121); Order in Council, Mar. 12, 1903 (Statutory Rules & Orders, 1903, No. 211).

499. Offence under Sea Fisheries Act, 1843, c. 79 -- Exclusive jurisdiction of justices - Action for damages in High Court - Not maintainable.] -- MARSHALL v. NICHOLLS, No. 521,

Part VII.—Whale and Seal Fisheries.

SECT. 1.—PROPERTY IN WHALES AND SEALS.

See Stat. De Prerogativa Regis (t c. 13.

500. Whales - Rule of "fast & loose" - Custom of Greenland—What is a "fast" fish.]

In an action of trover for a whale, which had been struck first by an harpooner of plff.'s ship, & afterwards by an harpooner of deft.'s, the counsel on both sides, & all the parties concerned, agreed the law to be, both by the custom of Greenland, & as settled by former determinations at Guildhall, London, as follows:—While the harpoon remains in the fish, & the line continues attached to it, & also continues in the power or management of the striker, the whale is a fast fish; & though during that time struck by a harpooner of another ship, & though she afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, & the fish is the property of the first striker, & of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, & will become the property of any other person who strikes & obtains it.—LITTLEDALE v. SCAITH (1788), 1 Taunt. 213, n.; 127 E. R. 826.

501. ---.]. If while the fish is fast to the harpoon of the first striker another comes up unsolicited & so disturbs the fish that she breaks from the first harpoon & then he strikes her with a harpoon himself & secures her, the fish continues the property of the first striker.

SKINNER v. CHAPMAN (1827), Mood. & M. 59, n.

Annotation:—Mentd. The Tubantia, [1924] P. 78.

R. v. THE VALIANT (1914), 15 Exch. C. R. 16 D. L. R. 821; 19 B. C. R. 521.—CAN.

n. ---.]—R. v. AMERICAN GASOLINE FISHING BOAT (1908), 15 O. L. R. 311; 11 O. W. R. 135.—CAN.

o. Conviction of foreign & Otter trawling --In prohibited waters.]—A Dane, master of a steam-trawler registered in Norway, was charged in the Dornoch Sheriff Ct. with a contravention of Sea Fisheries Acts & Herring Fisheries (Scot.) Acts, by using, on a certain date, the method of fishing known as otter trawling "in a part of the Moray Firth which is within a line from Duncansby Head, in Caithness, to Rattray Point in Aberdeenshire, & is within the area specified in the bye-law (No. 10) made by the Fishery Board for Scotland." The locus of the alleged offence was admittedly within the area specified

in the bye-law, & was out with a line drawn at a distance of one marine league, from low-water mark on the adjacent coast. Accused objected that he was not subject to the jurisdiction of the Dornoch Sheriff Ct.:—Held: accused was subject to the jurisdiction of the Dornoch Sheriff Ct., & his conviction & sentence were legal & competent.—MORTENSEN v. PETERS (1906), 8 F. (Ct. of Sess.) 93; 43 Sc. L. R. 872; 14 S. L. T. 227, J. —SCOT.

PART VII. SECT. 1.

p. Whales - Custom of New Zealand.]—By New Zealand custom a whale which has been killed & secured in what is believed to be a safe position, even though no boat belonging to the captors is attached to it belongs to the captors unless there is an intention of abandonment, although through some mischance it comes adrift &

502. ---.]. By the usage of the [Greenland] whale fishery, a fish is to be considered as a fast fish, which is attached by any means, such as the entanglement of the line round it, etc., to the boat of the first striker, though the harpoon does not continue in the body of the fish. —HOGARTH v. JACKSON (1827), 2 C. & P. 595; Mood. & M. 58, N. P.

Annotation Mentd. The Tubantia, [1924] P. 78.

503. ---. What is a "loose" fish.] —LITTLEDALE v. SCAITH, No. 500, ante.

504. ---.]. The C. whaling brig, on a whaling excursion, took its station at C., a place out of the usual limits assigned to the Northern Whale Fisheries; & having engaged B., a native to assist, sent him out to catch a whale. B. first harpooned the whale, & after his lines were run out, fixed a drog, or inflated seal-skin, to the end of them, & threw the drog & lines overboard. B. then looked out for the whale; but, when it re-appeared, a boat belonging to the A. ship was nearest to it, & first captured it, & claimed the property:—Held: the spot in question was subject to the local custom of the Northern Whale Fishery; & there being no evidence of a contrary custom or agreement between the vessels, the ordinary rule of fast & loose applied; & this whale, being a loose fish at the time, belonged to the A. vessel, which first captured it. —ABERDEEN ARCTIC CO. v. SUTTER (1862), 6 L. T. 229; 10 W. R. 516, H. L.

505. ---. —FENNINGS v. No. 506, post.

506. --- Custom of Gallipagos Islands.]

is found & taken possession of by other whalers. —BALDICK v. JACKSON (1910), 30 N. Z. L. R. 313. N.Z.

q. --- Custom of Shetland.]—The custom by which the heritors of Shetland without giving any consideration therefor, claimed one-third share of all Chasing whales stranded & killed on the sea shores of their respective lands, as a pertinent of the lands -- as in conformity with the immemorial usage of the islands:—Held: unjust & unreasonable & had not the force of law. —BRUCE v. SMITH (1890), 17 F. (Ct. of Sess.) 1000; 27 Sc. L. R. 785. —SCOT.

r. --- What is a "fast" fish.]—A whale being struck, & afterwards getting loose, is the property of the striker who continues fast until is killed. —ADDISON & SONS v. FOW (1794), 3 Pat. App. 334.—SCOT.

s. ---.]—

Sect. 1.—Property in whales and seals. Sects. 2

By the custom of the whale fishery among the Gallipagos Islands, he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it.

By the custom of the Greenland whale fishery, unless he who first strikes a fish continues his dominion until he has reduced it into possession, any other person who kills it acquires the entire property.—**FENNINGS v. GRENVILLE** (LORD) (1808), 1 Taunt. 241; 127 E. R. 825.

Annotations :—**Reid**. Hogarth v. Jackson (1827), 2 C. & P. 595; Jacob v. Seward (1872), L. R. 5 H. L. 464.

Whales & sturgeon as property of Crown.—See CONSTITUTIONAL LAW, Vol. XI., p. 589, Nos. 901, 902, 904.

SECT. 2.—WHALING VOYAGES.

507. Collision—Damage done by whaler—Liability of ship & appurtenances.—The fishing stores of a vessel engaged in the Greenland fisheries held liable to contribute in compensation for damage done to another British ship; such stores being considered appurtenances within Harbours Act, 1813 (c. 159), notwithstanding that the first clause of the Act mentions only ship & freight.—**THE DUNDEE** (1823), 1 Hag. Adm. 109; 166 E. R. 39; *subsequent proceedings, sub nom. GALE v. (1826)*, 5 B. & C. 156.

—**Distd.** *Re Salmon & Woods, Ex p. Gould* (1885), 2 Morr. 137. **Reid**. Langton v. Horton (1842), 5 Beav. 9. **Mentd.** *The Gholamo* (1834), 3 Hag. Adm. 169; *The John Dunn* (1840), 1 Wm. Rob. 159; *Ex p. Rayne* (1841), 1 Q. B. 982; *The Nostra Senora Del Carmine* (1854), 1 Ecc. & Ad. 303; *Cope v. Doherty* (1858), 31 L. T. O. S. 173; *The Duna* (1861), 5 L. T. 217; *The Milan* (1861), Lush. 388; *The Wild Ranger* (1862), Lush. 553; *The Amalia* (1864), 31 L. J. P. M. & A. 21; *The Northumbria* (1869), L. R. 3 A. & E. 6; *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795; *The Dictator*, [1892] P. 304.

508. — — — — — The harpoons, lances, lines, & other fishing stores of a whale ship are not protected by 53 Geo. 3 (c. 159); but as "appurtenances" of the ship, are liable, up to their full amount, as well as the ship herself, towards satisfaction for any damage done by that whale-ship to any other ship.—**GALE v. LAURIE** (18

5 B. & C. 156; 7 Dow. & Ry. K. B. 711; 4 L. J. O. S. K. B. 149; 108 E. R. 58.

Annotations :—**Reid**. Langton v. Horton (1842), 5 Beav. 9; *Coltman v. Chamberlain* (1890), 25 Q. B. D. 328; *Bennett S.S. Co. v. Hull Mutual S.S. Protecting Soc.* (1913), 58 Sol. Jo. 14. **Mentd.** *Dobree v. Schroder* (1837), 2 My. & Cr. 489; *Stuart v. Isomonger, The Diana* (1842), 4 Moo. P. C. C. 12; *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795; *Hoggarth v. Walker* (1900), 69 L. J. Q. B. 634; *Re Margetts & Ocean Accident & Guarantee Corpn.*, [1901] 2 K. B. 792; *The City of Edinburgh*, [1921] P. 70.

509. Payment of crew—Share of produce of cargo—Less customary deductions.—Deft. engaged pltf. as second mate of a vessel in the South Sea whale fishery, & pltf. was to have a forty-fifth share of the net produce. On the return of the ship deft. paid pltf. a sum of money, which he stated to be the forty-fifth share, after the customary deductions. No accounts were produced. Deft. afterwards discovered that several deductions had been made that were not authorised by the custom of the trade:—**Held**: the bill having been filed by pltf. on behalf of himself & the others of the crew, & no case for equitable relief having been made as to the others of the crew, the bill, as to them, to be dismissed.—**SPITTAL v. SMITH** (1829), Tambl. 45; 48 E. R. 19.

510. — — — — — (1) Where a seaman, about to proceed on a trading voyage, entered into & signed arts., whereby he agreed not to sue for wages any of the owners, except one, who was the captain, & who alone was a party to the arts.:—**Held**: he could not sue the other owners, although they sold & received the proceeds of the cargo, & one of them, the managing owner, adjusted the wages, & settled with the seamen.

(2) Pltf.'s wages were adjusted, & the balance struck, subject to certain deductions for insurance & interest on advances made to him before & during the voyage. It was proved that such charges were the usual ones in trading voyages, & that the accounts were always made out so. Pltf. remonstrated against those deductions; but ultimately accepted the balance, & gave a receipt for the whole wages:—**Held**: he could not recover the amount of such deductions.—**M'AULIFFE v. BICKNELL** (1835), 2 Cr. M. & R. 263; 1 Gale, 232; 5 Tyr. 1035; 4 L. J. Ex. 225; 150 E. R. 114.

511. — — — — — **Valuation of cargo—Custom of the trade.**—The master of a vessel in the South Sea whale fishery, on behalf of his owners, agreed with the officers & crew, that each should have

DUNDEE WHALE FISHERY CO. (1830), 5 Murr. 162. **SCOT.**

t. Property in seals.—Where the crews of vessels distributing themselves over large areas of the ice fields, indiscriminately slaughter seals as they go, leaving them round, taking no heed to collect, or mark, or pan, the same.—**Held**: no right of property in the seals. The killing must be accompanied by possession; the finder of the body of a seal, without any indicia of property, is the owner of the same, unless the party claiming as of right, against him, be in a position, then & there, to assert his right of property, point to the specific seals, & exercise corporal control over them.—**POWER v. KENNEDY, KENNEDY v. POWER** (1881), 7 Nfld. L. R. 34.—**NFLD.**

PART VII. SECT. 2.

a. Length of whaling for jury.—It is a

for the jury to say the length of the whaling voyage contemplated, when the agreement is silent on that point.—**GALLAGHER v. SPICKER, BURDETTE v. SPICKER** (1886), 7 Nfld. L. R. 101.—**NFLD.**

b. Taking of seals—Territorial jurisdiction of Newfoundland courts.—It appeared that deft., who was the master of a British ship, killed & took on board his vessel seals previous to the date fixed by the Legislature of Newfoundland for the taking of same. The seals were all taken at a considerable distance beyond the three mile limit, from headland to headland, on the Newfoundland coast. In an action for the penalties under the act, the jurisdiction of the Newfoundland etc. was pleaded, i.e., that the seals were all taken outside the three mile limit on the high seas:—**Held**: the territorial jurisdiction of the etc. of Newfoundland for such offences as that complained of, extends to three miles outside of a

line drawn from headland to headland of the bays of Newfoundland & no further.—**RHODES v. FAIRWEATHER** (1888), 7 Nfld. L. R. 321.—**NFLD.**

c. Who may grant licences—Governor-in-Council.—Licences under Newfoundland Whaling Industry Act, 1902 (c. 11), can only be granted by the Governor-in-Council in the manner prescribed by the Act.—**NEWFOUNDLAND STEAM WHALING CO., LTD. v. NEWFOUNDLAND GOVERNMENT**, [1901] A. C. 399.—**NFLD.**

d. Refusal of crew—To kill seals on Sunday.—Sealers contracted to serve the owners of a sealing ship as their crew, & for remuneration were to receive one-third of the catch. Thirty-five of their number declined to obey the orders of the captain "to kill seals on Sundays." A considerable quantity of seals were taken on these days. The owner of the ship refused any part of the proceeds of the seals taken on Sunday to those who did not

a specified part of the net produce of the voyage. Shortly before the return of the vessel, the owners who were entitled to a part of the net produce, sold a quarter of the cargo at £52 per ton, on their own account. The practice of the trade is, on the arrival of a vessel, to have the cargo estimated by a ship's cooper, & the price fixed at that given in the market on the arrival of the cargo. That mode was adopted in this case, & pltf. being apprised of it settled accordingly:—*Held*: (1) the owners had no right to sell a part of the cargo on their own account, they being only entitled to a share of the produce; (2) pltf., having settled, was too late for relief in equity.—*COCKLE v. WHITING* (1829), Taml. 55; 48 E. R. 23.

512. ———— **Action for share—Prior acquiescence in distribution.**—*COCKLE v. WHITING*, No. 511, *ante*.

513. ———— **Agreement not to sue owners of vessel.**—*M'AULIFFE v. BICKNELL*, No. 510, *ante*.

514. **Whether crew entitled to salvage—By custom of the trade.**—Salvage awarded for the rescue of a fishing vessel frozen up in the D. straits. Government bounties having been granted for the rescue of the vessel, the claim of the salvors for demurrage & the payment of stores not allowed by the ct.

An asserted custom for vessels engaged in

particular voyages to render assistance to each other gratuitously, must be founded upon the principle of mutual benefit & protection of property.

It has been alleged, however, in bar to their claim, that it is the invariable custom for vessels engaged in the whaling fisheries to render any species of assistance to each other gratuitously; & in the reply to the act on petition given by the owners of the S., it is expressly averred, that the master of that vessel was induced to accept the service which has been rendered by a reliance on this particular custom. . . . In ordinary cases, such a custom, if it has any legal existence, would certainly be entitled to the greatest possible weight, & ought to be upheld, & I should not be disposed to overrule it, notwithstanding that, in some instances, the custom may not have been observed (*DR. LUSHINGTON*).—*THE SWAN* (1830), 1 Wm. Rob. 68; 166 E. R. 499.

515. ———— **THE JOHN** (1816), 6 L. T. 615; Pritchard's Admiralty Dig., p. 1890.

SECT. 3.—STATUTORY PROVISIONS AS TO WHALE, SEAL AND WALRUS FISHING VESSELS.

See M. S. Act, 1891 (c. 60), s. 741; M. S. Act, 1906 (c. 48), s. 83; Behring Sea Award Act,

participate in the capture of the same, but allowed a sum as labour for the stowing of the same on the following days. In an action those of the crew who had declined to work claimed to share in the voyage equally with the crew who had worked on Sunday:—*Held*: the crew were only entitled to share in the proceeds of the seals in the capture of which they had participated. There is no law which relieves sealers from going on the ice because of the sanctity of the Sabbath, or justify their refusal when so ordered.—*RICHARDS v. JOB BROTHERS & Co.* (1892), 7 Nfld. L. R. 612. **NFLD.**

PART VII. SECT. 3.

e. Sealing in prohibited waters—Seizure of ship—Onus of proof.—When a British ship is found in the prohibited waters of the Behring Sea, the burthen of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of Seal Fishery (Behring Sea) Act, 1891 (c. 19), s. 1, s. 8, 5.—*THE OSCAR & HATTIE v. R.* (1891), 23 S. C. R. 396.—**CAN.**

f. —————A ship having been seized within the prohibited waters of the thirty-mile zone round the Komandorsky Islands, fully equipped & manned for sealing, not only failed to fulfil the *onus*, cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the Order-in-Council.—*THE MINNIE v. R.* (1891), 23 S. C. R. 478.—**CAN.**

g. —————*THE SHELBY* (1895), 4 B. C. R. 342.—**CAN.**

h. —————*THE AINOKO* (1896), 5 B. C. R. 168.—**CAN.**

k. —————*Re THE AINOKO* (1894), 3 B. C. R. 121.—**CAN.**

l. —————*THE VIVA* (1896), 5 B. C. R. 174.—**CAN.**

m. Behring Sea Award Act—Failure to keep log.—The action was for the condemnation of the ship for a contravention of Art. 5 of the schedule to the Behring Sea Award Act (Imp.), 1894, in that her master did not enter accurately in the official log book the date & place of each fur seal fishing operation, & the number & sex of the seals captured each day, in accordance with the rules for entries in the official log, *i.e.*, "as soon as possible after the occurrence," etc.:—*Held*: the words "as soon as possible," mean within a reasonable time, & upon the evidence, it did not appear that there had been unreasonable delay. *THE BEATRICE* (1895), 4 B. C. R. 317.—**CAN.**

n. ———— Prohibition against use of firearms.—A ship was given a clearance for Behring Sea on a seal & expedition by the American customs officer at Copper Island, after making a manifest of things on board of her. She was boarded in the Behring Sea & searched for indications of an infraction of the Act, particularly regarding the prohibition against the use of fire arms in the taking of seals, under Art. 6 of the schedule. In one seal skin, out of 336 then on board, a hole was discovered which might have been caused by a bullet or buck shot. There was a discrepancy both in number & kind between the ammunition stated in the manifest & that found upon the seizure, & there were fewer loaded shells. The captain of the ship was called as a witness & denied infraction of the Act:—*Held*: since it was not clear that the hole in the seal skin was caused by a shot, or if it was, that the shot was from the ship; & since the discrepancy in regard to the ammunition was accounted for as being apparently attributable to error in the manifest, the action should be dismissed.—*THE E. B. MARVIN* (1895), 4 B. C. R. 330.—**CAN.**

o. —————A vessel had on board, within prohibited waters, certain skins with holes in them which appeared to have been made by bullets:—*Held*: this was sufficient

reason for the arrest of the vessel, & the burden of showing that firearms had not been used was imposed on such vessel. *R. v. THE AURORA* (1896), 5 Exch. C. R. 372. **CAN.**

p. ———— Sealing in close season.—Behring Sea Award Act, 1894, forbids subjects of Great Britain from killing seals during the close season beginning on May & extending to July 31. On May 29, 1907, a British sealing schooner was arrested in the prohibited zone. There were found on board 77 fur seal skins, 6 of them being green with fresh blood on them. While not engaged in sealing at the time of being boarded, the schooner was admittedly within the prohibited zone, & was fully manned & equipped for sealing; & fur seals had been seen in the vicinity for several days before. The master did not give evidence at the trial, nor was any excuse given for his failure to do so. Expert evidence was given on behalf of the Crown that the seals from which the six skins were taken had been killed within four days before May 29, & possible some of them not longer than 24 hours:—*Held*: upon the facts, the schooner was employed in the unlawful killing of seals as charged.—*R. v. THE CARLOTTA G. COX*, 11 Exch. C. R. 312; 8 W. L. R. 124; 13 B. C. R. 460.—**CAN.**

q. —————A master takes upon himself the responsibility of his position; & if through error, want of care or inability to ascertain his true position, he drifts within the zone & seals there he thereby commits a breach of Behring Sea Award Act, 1894.—*R. v. THE BEATRICE* (1896), 5 Exch. C. R. 378.—**CAN.**

r. —————Where the owner of a ship employs a competent master, & furnishes him with proper instruments, & the master uses due diligence, but, for some unforeseen cause, against which no precaution reasonably necessary to be taken can guard, is found sealing where sealing is forbidden, the ct. may properly exercise its discretion & impose a nominal fine

Sect. 3.—Statutory provisions as to whale, seal and walrus fishing vessels. Part VIII. Sects. 1, 2, 3, 4 & 5.]

1894 (c. 2), s. 1, sched. I., arts. 1, 2, 3, 4, 5, 6 ; Seal Fisheries Act, 1875 (c. 18), s. 2 ; Seal Fisheries

(North Pacific) Act, 1895 (c. 21), ss. 1, 7 ; Seal Fisheries (North Pacific) Act, 1912 (c. 10), ss. 1-5 ; Order in Council, Nov. 21, 1895, art. 1 (Statutory Rules & Orders Revised, Vol. IV., Fishery, p. 13) ; Statutory Rules & Orders, 1913, pp. 163, 166.

Part VIII. Jurisdiction of Justices relating to Fishery Offences.

SECT. 1.—IN GENERAL.

Criminal Justice Administration Act, 1914 (c. 58), s. 5 ; Herring Fishery (Branding) Acts, 1913 (c. 9), ss. 2, 3, 5, 6 ; Salmon & Freshwater Fisheries Act, 1923 (c. 10), ss. 73-81 ; MAGISTRATES.

516. Locus in quo of offence — Foreshore — Between high & low water mark.]—The part of the sea shore comprised between high & low water mark forms part of the body of the adjoining county, the justices of which, & not the Admiralty, have jurisdiction to take cognisance of offences there committed, whether or not committed when the shore is covered with water.—*EMBLETON v. BROWN* (1860), 3 E. & E. 234 ; 30 L. J. M. C. 1 ; 6 Jur. N. S. 1298 ; 121 E. R. 429 ; *sub nom.* R. v. 25 J. P. 38.

—*See, generally*, CRIMINAL LAW, Vol. XIV., pp. 137, 138.

517. Time for making complaint — Within six months of offence.]—The effect of Salmon Fishery Act, 1873 (c. 71), s. 62, & Summary Jurisdiction Act, 1848 (c. 43), s. 11, is that a penalty for an offence under Salmon Fishery Acts may be

recovered summarily if the complaint be made within six months from the commission of the offence.—*MORRIS v. DUNCAN*, [1899] 1 Q. B. 4 ; 68 L. J. Q. B. 49 ; 79 L. T. 379 ; 62 J. P. 823 ; 47 W. R. 96 ; 15 T. L. R. 8 ; 43 Sol. Jo. 14 ; 19 Cox, C. C. 186, D. C.

Annotation :—*Mentd.* *Diment v. Roberts* (1924), 93 L. J. K. B. 1038.

518. Conviction — Validity — Fishing without leave.]—Conviction for fishing in a private water quashed for not showing that it was without the consent of the owner.—*R. v. CORDEN* (1769), 4 Burr. 2279 ; 98 E. R. 189.

Annotations :—*Consd.* *Fletcher v. Calthrop* (1845), 6 Q. B. 880. *Refd.* *Tarry v. Newman* (1846), 2 New Mag. Cas. 7 ; *Anderson v. Hamlin* (1890), 25 Q. B. D. 221. *Mentd.* *R. v. Daman* (1819), 2 B. & Ald. 378 ; *Murray v. R.* (1815), 14 L. J. Q. B. 357 ; *Turner's Case* (1846), 9 Q. B. 80 ; *R. v. Hicks* (1855), 4 E. & B. 633.

519. S. P. R. v. FLETCHER (1769), 4 Burr. 2282 ; 98 E. R. 191.

520. S. P. R. v. GOULD (1769), 4 Burr. 2282 ; 98 E. R. 191.

Summary courts of jurisdiction.]—*See* MAGISTRATES.

only.—*R. v. THE OTTO* (1898), 6 Exch. C. R. 188. **CAN.**

a. Killing seals on Sunday — Prohibited by statute.]—56 Vict. c. 22, forbids under a penalty the killing of seals on Sunday by the crew of any ship, or the bringing of the same into any port in this colony. In an appeal against a conviction for bringing into the port of St. John's seals which had been killed upon a Sunday outside the territorial waters of Newfoundland :—*Held* : the bringing into the port of St. John's seals killed outside the territorial waters of Newfoundland on a Sunday was a breach of the Act.—*KEAN v. WINSOR* (1906), 9 Nfld. L. R. 183.—**NFLD.**

PART VIII. SECT. 1.

b. Conviction — Statutory conditions not complied with.] Deft. was convicted under Fisheries Act for using a steam trawler, operating a beam trawl with which to catch fish within the three mile limit : *Held* : as the statutory conditions had not been complied with, the magistrate had no jurisdiction & prisoner was discharged.—*R. v. SMITH* (1909), 8 E. L. R. 33.—**CAN.**

a. — — — .] Deft. was convicted before one justice of the peace on an information under 55 Vict. c. 10, s. 19 (O), charging him with fishing in a certain stream without the permission of the proprietors, & of therefrom forty-five fish :—

Held : the conviction must be quashed, for the penalty fixed for the offence charged exceeded £30. & therefore, under sects. 25 & 26 of the Act, the prosecution should have been before a police magistrate or two or more justices of the peace, or one justice & a fishery overseer.—*R. v. FLOWS* (1895), 26 O. R. 339.—**CAN.**

b. Offences charged disjunctively — Conviction general.]—A general conviction on a complaint which charges deft. with "erecting" or "making use of" a fixed engine for the capture of salmon contrary to Fisheries (Ireland) Act, 1869 (c. 92), s. 16, is bad for uncertainty, since "erecting" denotes an offence distinct from "making use of" under that Act & section, & consequently, two separate offences are disjunctively charged, the conviction not stating of which offence accused was convicted.—*R. v. COTNEY CORK JJ.*, [1917] 2 I. R. 310.—**IR.**

c. What is commencement of prosecution.]—The complaint made to the justices of an offence against Fisheries (Ireland) Act, 1869 (c. 92), s. 16, & not the issuing of the summons, is the commencement of a prosecution under Fisheries (Ireland) Acts.—*R. v. COUNTY CORK JJ.*, [1917] 2 I. R. 430.—**IR.**

d. Action for price of bait.]—Under 49 Geo. III., c. 27, the justices in sessions have no jurisdiction in cases out of a demand for bait,

where the demand exceeds forty shillings.—*HUTTON, McLEA & Co. v. KELLY* (1818), 1 Nfld. L. R. 105.—**NFLD.**

e. Putting bait-fishes on board a ship — Without a licence.]—*O'REILLY v. CRANE* (1907), 9 Nfld. L. R. 292.—**NFLD.**

f. Appeal — To whom made.]—*GOUGH v. MORTON* (1856), 2 Thom. 10.—**CAN.**

g. — — — .]—An appeal lies to the Supreme Ct. from a conviction for penalties under Dominion Fisheries Act, 1868 (c. 60).—*R. v. TODD* (1875), 1 R. & C. 62.—**CAN.**

h. — — — .]—Deft. was convicted before a stipendiary magistrate for violation of certain regulations made under Fisheries Act, R. S. C. (c. 96), s. 17, & an appeal was taken to the county ct. for District No. 3, where the conviction was affirmed. No appeal was taken from the judgment in the county ct., but the stipendiary magistrate was applied to to state a case for the opinion of this ct., with the view of questioning the validity of the conviction, which he did :—*Held* : with the judgment of the county ct. standing in the way, deft. was precluded from asking the stipendiary magistrate to state a case for the purpose of attacking the conviction in this ct.—*R. v. TOWNSHEND* (1902), N. S. R. 401.—**CAN.**

SECT. 2.—SEA FISHERY OFFENCES.

See Sea Fisheries Act, 1843 (c. 79), ss. 11–14 ; Sea Fisheries Act, 1868 (c. 45), ss. 57–60 ; Fisheries (Oyster, Crab & Lobster) Act, 1877 (c. 42), ss. 11–13 ; Sea Fisheries Act, 1883 (c. 22), ss. 16–18 ; North Sea Fisheries Act, 1893 (c. 17), s. 7.

521. Offences under Sea Fisheries Act, 1843 (c. 79), sects. 11–14—Exclusive jurisdiction—Action for damages in High Court—Not maintainable.]—By above Act the articles of a convention between Her Majesty & the King of the French, for the guidance of the fishermen of the two countries in the seas between the British Islands & France, are to have the force of law. By articles 69, 70, 71, 75, all transgressions of the regulations, & all disputes between the fishermen, are to be submitted to the exclusive jurisdiction of, & settled by, the tribunal or magistrates designated by law ; which tribunal may summarily impose penalties for such transgressions, & award compensation to parties injured. The Act declares such tribunal, in England, to be any magistrate or justice of the peace having jurisdiction in the place in which, or in waters adjacent to which, the offence shall have been committed, or to which the offender shall be brought, & such magistrate may impose penalties, & award & enforce compensation to parties injured :—*Held* : no action can be maintained for the breach of any article of the convention, or for damage caused by such breach, the remedy provided by the statute being exclusive.—*MARSHALL v. NICHOLLS* (1852), 18 Q. B. 882 ; 21 L. J. Q. B. 343 ; 19 L. T. O. S. 284 ; 16 J. P. 519 ; 16 Jur. 1155 ; 118 E. R. 333.

Annotations :—*Mentd.* Cleeve v. Harwar, Wilde v. Stanner (1857), 1 H. & N. 873 ; Clegg, Parkinson v. Farby Gas Co., [1896] 1 Q. B. 592 ; Peebles v. Oswaldtwistle Urban District, [1897] 1 Q. B. 625.

SECT. 3.—POWER TO ORDER ENTRY UPON SUSPECTED PLACES OR PREMISES.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), ss. 69, 70.

Power of inspectors & water bailiffs generally.]—See Part V., Sect. 3, *ante*.

SECT. 4.—DISQUALIFICATION OF JUSTICES.

See, now, Salmon & Freshwater Fisheries Act, 1923 (c. 16), s. 76 ; MAGISTRATES.

522. Interest of justices—As grantees of fishing rights—Under reservation in deed—Members of corporate body.]—FULLER v. BROWN, No. 170, *ante*.

523. — As prosecutor — Member of prosecuting association.]—On Feb. 23, 1861, H. was convicted on an information laid against him by L., a superintendent watcher appointed by the Tees Salmon Fishery Landowners Assocn. under Salmon Fisheries Act, 1861 (c. 109), s. 20. The convicting justices were members of the Assocn., & one of them was a member of the committee,

& had been present at a meeting of the Assocn. which authorised proceedings to be taken against H. :—*Held* : the conviction was bad on the ground of interest in the justices.—*R. v. ALLAN* (1864), 4 B. & S. 915 ; 32 L. J. M. C. 98 ; 10 Jur. N. S. 796 ; 10 Cox, C. C. 405 ; 122 E. R. 702 ; *sub nom.* *R. v. HODGSON*, 3 New Rep. 503 ; 9 L. T. 761 ; 28 J. P. 484 ; 12 W. R. 423.

Annotations :—*Consd.* Leeson v. General Council of Medical Education & Registration (1889), 43 Ch. D. 366. *Foll.* *R. v. Henley*, [1892] 1 Q. B. 504. *Consd.* Allinson v. General Council of Medical Education & Registration, [1894] 1 Q. B. 750. *Refd.* Brown v. Cocking (1808), L. R. 3 Q. B. 672 ; *R. v. Huggins, etc.*, JJ. (1895), 11 T. L. R. 205 ; *R. v. Burton, Ex p. Young*, [1897] 2 Q. B. 468 ; *R. v. London County JJ., Ex p. South Metropolitan Gas Co.* (1907), 97 L. T. 716.

524. — — — — — Conservator—Riparian owner.]—A mining co. was convicted under Salmon Fisheries Act, 1865 (c. 121), of having polluted the river Greta by justices, one of whom was a riparian owner of the river Derwent of which the Greta is a tributary. The same justice as conservator of the river Derwent had a year previously been appointed by the Conservancy Board a member of a committee to investigate whether the mining co. used the best practicable means of filtering the effluent water from their mine & had been party to a report that the mining co. had failed to do so :—*Held* : the justice had had such an interest in the matter as to have disqualified him from adjudicating upon it.—*R. v. SPEDDING* (1885), 2 T. L. R. 163 ; 49 J. P. Jo. 801, D. C.

525. — — — — — .] A justice of the peace was present at a meeting of a board of conservators & voted for a resolution directing prosecution under Salmon Fishery Act, 1865 (c. 121). He afterwards sat as one of three justices who tried the case & convicted deft. :—*Held* : he was disqualified notwithstanding Salmon Fishery Act, 1865 (c. 121), s. 61. *R. v. HENLEY*, [21 1 Q. B. 504 ; 61 L. J. M. C. L. T. 675 ; 50 J. P. 391 ; 40 W. R. 383 ; 36 Sol. Jo. 233 ; 17 Cox, C. C. 518, D. C.

ns : *Refd.* *R. v. Stockport JJ.* (1896), 60 J. P. *R. v. Burton, Ex p. Young*, [1897] 2 Q. B.

SECT. 5.—BONÂ FIDE CLAIM OF RIGHT.

526. General rule—Jurisdiction ousted.] When upon the hearing by justices of the peace of an information a claim of right is set up by deft., such claim, if made *bonâ fide* & with some show of reason, will oust their jurisdiction ; & although it is for the justices to determine whether or not such claim of right is made *bonâ fide* & with a show of reason, yet, if they determine that it is not so made, this ct. will review their determination & overrule it if come to on insufficient grounds.

Upon an information under Larceny Act, 1861 (c. 96), s. 21, against deft. for attempting to take, otherwise than by angling, fish in a river in which prosecutor had a private right of fishery, prosecutor proved the purchase by him of the manor of S., with the fishery appurtenant thereto, & gave other evidence in support of his right. Deft. proved that the river was a tidal navigable river, & called two witnesses, who said that they

PART VIII. SECT. 2.

k. Using cray-fish pots in prohibited waters—Forfeiture of Discretion of magistrates.]—BAIN v.

RAE (1917), 13 Tas. L. R. 57.—AUS.

PART VIII. SECT. 5.

l. Necessity of showing colourable

It v. EGAL JJ. (Ir. Jur. 185. IR. m. —.) *JOHNSTON v. MELDON* (1891), 30 L. R. Ir. 15.—IR.

Sect. 5.—*Bonâ fide* claim of right.]

had fished in it for forty years without interruption. The justices convicted deft. :—*Held* : a *bonâ fide* claim of title to fish in that place was made by deft. before the justices, & there was no reasonable evidence on which they could find that it was not made *bonâ fide*, & the conviction was quashed.

A right of fishing in a tidal navigable river is *primâ facie* a public right (WIGHTMAN, J.)—*R. v. STIMPSON* (1863), 4 B. & S. 301 ; 2 New Rep. 422 ; 10 Jur. N. S. 41 ; 122 E. R. 472 ; *sub nom.* *R. v. STIMPSON*, *R. v. PEEK*, 32 L. J. M. C. 208 ; 8 L. T. 536 ; 27 J. P. 678 ; 9 Cox, C. C. 356.

Annotations :—*Distd.* *Hudson v. MacRae* (1863), 4 B. & S. 585. *Consd.* *Paley v. Birch* (1867), 8 B. & S. 336. *Lovesy v. Stallard* (1874), 30 L. T. 792. *Refd.* *Booth v.* (1869), 33 J. P. 691 ; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417 ; *R. v. Critchlow* (1878), 26 W. R. 681 ; *Burton v. Hudson*, [1909] 2 K. B. 561.

527. — S., while exercising a right of fishery in a canal, was interfered with by the lessees of the adjacent land, & after a scuffle, S. was returning home along a towing-path which belonged to G., under whom he claimed to fish, when he tried to stride over the fence across this path, but being unable to do so, knocked it down, & was charged with maliciously & wilfully damaging & breaking the fence. Before the justices S. set up a claim of right, stating that he had fished there for forty years, with the permission of the owner :—*Held* : there being no sufficient evidence of malice, & the claim of right being set up on reasonable grounds, the justices ought to have stayed their hands, & therefore the conviction was bad.

Here there was an assertion of right to fish in the very place in question, & deft. was returning from exercising the alleged right of fishing. He set up this right before the justices & produced a letter from the party entitled & under whom he claimed. The justices were not bound to receive that letter, still, if deft. *bonâ fide* claimed the right & gave reasons for doing so, the justices were ousted of their jurisdiction (WIGHTMAN, J.).—*R. v. SNAPE* (1863), 27 J. P. 131 ; 11 W. R. 431.

528. — R. was convicted of fishing salmon with a fixed engine in a navigable river. The engine was a V. balk, composed of stones, wattles, & net having meshes under the legal size. At the hearing R. produced a lease of the fishery, at the place in question, from the lord of the manor, & contended that it was an ancient mode of fishing, & legal at the time of Salmon Fishery Act, 1861 (c. 109), s. 11 :—*Held* : as there was nothing to show that the claim of right was not made *bonâ fide*, the jurisdiction of the justices was ousted. — *RABY v. SEED* (1864), 29 J. P. 37.

529. — B. being summoned for trespassing in a several fishery, employed a solr. to attend at petty sessions & set up his right as a member of the public to fish, as being the occupier of a cottage on the bank of a navigable lake which was the *locus in quo*, or otherwise having the right, & offered to defend any action in a superior ct. Prosecutor contended that it was impossible the public could have a right to fish in such lake, which was not tidal, nor was the river running out of it tidal. The justices convicted B. :—*Held* : as deft. *bonâ fide* claimed the right, & did all he could to prove such *bona fides*, & the point was not yet entirely settled by authority, the justices

ought to have stayed their hands, & not convicted. —*R. v. BURROW* (1869), 34 J. P. 53.

Annotations :—*Consd.* *Hargreaves v. Diddams* (1875), L. R. 10 Q. B. 582 ; *Mussett v. Burch* (1876), 35 L. T. 486. *Refd.* *Pearce v. Scotcher* (1882), 9 Q. B. D. 162 ; *Reece v. Miller* (1882), 8 Q. B. D. 626.

530. — — — — —]—The magistrates have found that this claim is made *bonâ fide*, & that, therefore, we need not further discuss. The only further question is as to whether it is one which by law can be made. It may not have been very correctly stated, it may not have been put forward in correct technical language before the magistrates : but we must not be nice about a matter of that kind, if we see that in substance a right is claimed which is capable of existing, & that there is some evidence of it. Now the right, as it seems to me, is capable of being claimed when it is put into proper phraseology. The allegation is that some time or other, the epoch being lost in the mists of antiquity, the owner of the soil, the lord of the manor granted to each of his freehold tenants the right to himself, his heirs & assigns, to fish. In the case of prescription, which is based on lost grant, the right is subject to no limitation as far as its use & reasonableness is concerned. The owner of the soil, the owner of the bed of the river, has a perfect right, if he chooses, & if the fishing belongs to him, to grant a right to fish to any number of persons, although it may destroy his own right. Therefore it is not a circumstance fatal to the prescriptive right claimed that it may be exercised by an unlimited number of persons. It is a circumstance to be taken into consideration when one comes to consider, as a matter of fact, whether prescription is made out by the evidence ; & in dealing with each case you would always be apt to take as one of the circumstances making against the probability of the original grant the fact that it was capable of indefinite multiplication. That goes no further than its being a matter for observation on the evidence. It seems to me it was perfectly competent for the lord of the manor at the outset, as the owner of the freehold & at the same time the owner of the part of the river upon which this so-called right is claimed, to grant the right in question to the owners of a particular freehold, their heirs & assigns ; but then it is said quite rightly that there must be some evidence of that. Pltf.'s counsel says it is necessary, in order to support an allegation of that kind, to prove that there has been user of the right by deft.'s predecessors in title in respect of the particular tenement of which he is now the owner. I do not think that that is at all necessary. If you show that there are a number of other persons exactly similarly situated with respect to the manor as this present deft., & that they or a number of them have exercised the same right which is now claimed, that is evidence that the right belongs to all the tenants in the manor who are similarly situated. Here it seems to me there is some evidence. It is vague & it is slight ; but I think there is some evidence. If this evidence were offered by a pltf. to a jury, in my view the case would not & ought not to be withdrawn by any judge from the jury. It seems to me that the magistrates were right in the present case, & that there was some evidence, although slight, of the existence of the right claimed. In one sense I am rather sorry to be compelled to come to this conclusion, because it is obvious that the alleged right is of such a kind & such a character that it would require extremely strong evidence to establish it. It is a claim which may be really very difficult to

establish, & that has no chance of being established unless it is established by much more cogent evidence than that which has been given in the present case. Still there is evidence, & we cannot now decide the question of fact. We have only to say whether the magistrates were right or wrong in abstaining from dealing with the summons. I think they could, in this state of evidence, only have proceeded if they had supposed the claim of right was not *bonâ fide*, or if they had been prepared against the law to try & decide the question of title (WILLS, J.).—CHESTERFIELD v. FOUNTAINE, [1908] 1 Ch. 213, n.; 77 L. J. Ch. 114, n.; 98 L. T. 237, n., D. C.

Annotations :—**Consd.** Chesterfield v. Harris, [1908] 2 Ch. 397. **Refd.** Harris v. Chesterfield, [1911] A. C. 623.

531. What is a bonâ fide claim—Justices to decide upon—Review by High Court.]—R. v. STIMPSON, No. 526, ante.

532. ——— Prohibition not granted. Where justices had convicted a party of unlawfully taking fish in a private fishery, this ct. refused to issue a prohibition against their proceeding to enforce it, on the ground that deft. claimed a right of fishing before the justices; & they refused to require the informant to produce his title deeds.—*Ex p. HIGGINS* (1843), 17 L. J. Q. B. 63, n.; 2 L. T. O. S. 167; 8 J. P. 486; 10 Jur. 838.

533. ——— Sufficiency of evidence to oust jurisdiction—Letter of leave to fish from owner.]—R. v. SNAPE, No. 527, ante.

534. ——— Verbal evidence.]—PALEY v. BIRCH, No. 309, ante.

535. ——— .] B. was summoned before justices, & convicted for unlawfully taking fish in private waters of the river Tees not adjoining a dwelling house. The river was tidal, & B. set up a claim of public right to fish there. The evidence showed that the public never fished on the spot, but some fishermen from an adjoining town had done so during all living memory, always paying a small sum to A., the owner of the land

adjoining :—*Held* : the justices were justified on the evidence in convicting B., as the right of the public was not established.—*BOOTH v. BROUGH* (1869), 33 J. P. 694.

536. ——— Conveyance granting locus in quo.]—P., as servant of a freeholder, who held a conveyance of the manor & the right of fishery, cut the nets of a copyholder while fishing. P., on being summoned for assault, produced the conveyance, but no evidence was given of the freeholder ever having exercised the right, while evidence was given that all copyholders had the right to fish, & had exercised it for fifty years :—*Held* : the justices were right in convicting P., & in overruling the claim of right set up by him in the name of his master.—*PRIEST v. ARCHER* (1887), 51 J. P. 725, D. C.

537. ——— Slight evidence — Although far short of conclusive proof.]—CHESTERFIELD v. FOUNTAINE, No. 530, ante.

— **Where right cannot exist by law.]—See Nos. 43, 61, 68, 69, 76, ante; No. 511, post.**

538. Claim to right which cannot exist in law Claim by public to fish in private fishery—Jurisdiction not ousted Bona fides of claim immaterial.]—HUDSON v. MACRAE, No. 61, ante.

539. ——— .]—*SMITH v. COOKE*, No. 43, ante.

540. ——— Absence of mens rea immaterial.]—HUDSON v. No. 64, ante.

541. ——— BRANCASTER FISHERY (1875), 39 J. P. Jo. 372.

542. ——— .]—*HARGREAVES v. DIDDAMS*, No. 76, ante.

543. ——— .]—*MUSSETT v. No. 68, ante.*

544. ——— .]—*PEARCE v. No. 69, ante.*

545. ——— .]—*REECE v. MILLER*, No. 37, ante.

FIXTURES.

See AGRICULTURE ; BILLS OF SALE ; LANDLORD AND TENANT ; MORTGAGE ; REAL PROPERTY
AND CHATTELS REAL.

FLAGS.

See SHIPPING AND NAVIGATION.

FLATS.

See LANDLORD AND TENANT

FLEET.

See ROYAL FORCES.

FLEET MARRIAGES.

See HUSBAND AND WIFE.

FLOODS.

See WATERS AND WATERCOURSES.

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FOOD AND DRUGS.

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<i>British Pharmacopœia</i>	„	MEDICINE AND PHARMACY.	<i>Excise Duties</i>	„	REVENUE.
<i>Chemists</i>	„	MEDICINE AND PHARMACY.	<i>False Trade Description</i>	„	TRADE MARKS.
<i>Civil Remedies</i>	„	SALE OF GOODS.	<i>Fish, Sale of</i>	„	FISHERIES.
<i>Close Times</i>	„	FISHERIES ; GAME.	<i>Fruit Pickers</i>	„	PUBLIC HEALTH.
<i>Compensation generally</i>	„	LOCAL GOVERNMENT ; PUBLIC HEALTH.	<i>Game, Sale of</i>	„	GAME.
<i>Cowsheds and Dairies</i>	„	PUBLIC HEALTH.	<i>Inns</i>	„	INNS AND INN-KEEPERS.
<i>Crabs and Lobsters</i>	„	FISHERIES.	<i>Inspectors of Factories</i>	„	FACTORIES.
<i>Drugging Animals</i>	„	ANIMALS.	<i>Inspectors of Markets</i>	„	MARKETS.
			<i>Inspectors of Nuisances</i>	„	PUBLIC HEALTH.

Intoxicating Liquors,
Sale of, generally . See INTOXICATING
 LIQUORS.
Markets MARKETS.
Medical Officers of
Health FACTORIES; PUBLIC
 HEALTH.
Merchandise Marks
 TRADE MARKS.
Oysters FISHERIES.
, Sale of MEDICINE AND PHAR-
 MACY.

Restaurants and Hotels See INNS AND INN-
 KEEPERS.
Sale of Goods Act SALE OF GOODS.
Shops FACTORIES.
Slaughter-houses. PUBLIC HEALTH.
Summary Jurisdiction. MAGISTRATES.
Tobacco and Snuff REVENUE; TRADE
 AND TRADE UNIONS.
Trade Marks TRADE MARKS.
Water, Purity of. WATER SUPPLY.
Weights and Measures. WEIGHTS AND
 MEASURES.

Part I.—In General.

Conditions on sale of food.] —See SALE OF GOODS.

Warranty on sale of food —Of fitness for food.] —See SALE OF GOODS.

Part II.—Adulteration and Impoverishment.

NOTE.—In this Part *Sale of Food & Drugs Act*, 1875 (c. 63); *Sale of Food & Drugs Act Amendment Act*, 1879 (c. 30); *Margarine Act*, 1887 (c. 29); *Sale of Food & Drugs Act*, 1899 (c. 51); & *Butter & Margarine Act*, 1907 (c. 21), are referred to as *1875 Act*, *1879 Act*, *1887 Act*, *1899 Act*, & *1907*

medicinally is not an article of food nor a drug within 1875 Act, ss. 2, 3, 6.—BENNETT v. TYLER (1900), 81 L. T. 787; 64 J. P. 119; 19 Cox, C. C. 434, D. C.

4. “Food” — Baking powder.] —On an indictment under 1875 Act, s. 3, for selling “Norfolk Baking Powder,” a baking powder one of the ingredients of which was alum:—*Held*: no offence had been committed.

I do not think this baking powder is an article of food (*per cur.*).—WARREN v. PHILLIPS (1880), 44 J. P. 61.

5. ———.]—A. sold a baking powder composed of 20 per cent. of bicarbonate of soda, 40 per cent. of ground rice, & 40 per cent. of alum, which is injurious to health:—*Held*: such baking powder was not an article of food, & the sale of it so compounded was not an offence within 1875 Act, s. 3.—JAMES v. JONES, [1894] 1 Q. B. 304; 63 L. J. M. C. 41; 58 J. P. 230; 42 W. R. 400; 10 T. L. R. 208; *sub nom.* JONES v. JAMES, 70 L. T. 351; 17 Cox, C. C. 726, D. C.

See, now, 1899 Act, s. 26.

6. ——— Chewing gum.] —Applt. demanded three sticks of chewing gum to be sold to him by resp. Each stick was labelled “Cloves, for chewing only, & not to be eaten,” On analysis, the article was certified to contain 35 per cent. of paraffin wax. Another ingredient was gum mastic. Resp. was charged with an offence against 1875 Act, s. 6. The justices held that chewing gum was not food within the meaning of the Act, & dismissed the information against resp.:—*Held*: the justices were right.—SHORTT

SECT. 1. DEFINITIONS.

“Article of food” 1875 Act, s. 3.]—See Sect. 3, sub-sect. 1, *post*.

“Beer.”] —See Part V., Sect. 1, *post*.

“Butter.”] —See Part V., Sect. 3, sub-sect. 1,

1. “Drug” — Beeswax.] —In a prosecution, under 1875 Act, s. 6, of a grocer for selling beeswax adulterated by being mixed with paraffin:—*Held*: beeswax, so sold, was not a drug.—FOWLE v. FOWLE (1896), 75 L. T. 514; 60 J. P. 758; 13 T. L. R. 12; 41 Sol. Jo. 49; 18 Cox, C. C. 402, D. C.

Annotation:—*Mentd.* Ellis v. Nott-Bower (1896), 60 J. P. 760.

2. ——— Medicated soap.] —HOUGHTON v. TAPLIN (1897), 13 T. L. R. 386, D. C.

Annotation:—*Expld.* Dickens v. Randerson, [1901] 1 K. B. 437.

3. ——— Chewing gum.] —Chewing gum expressly & admittedly sold as an article to be chewed only & not to be eaten nor to be used

the sale of whatever may injuriously affect the lives, health, morals, or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made *bona fide* with the object

of regulation alone, even though to a certain extent trade & commerce are affected thereby.—KEEFE v. MCLENNAN (1876), 11 N. S. R. (2 R. & C.) 5; 2 Cart. 400.—CAN.

PART II. SECT. 1.

of
 to regulate sale.]—A provincial legislature is entitled to legislate with a view to regulate within the province

v. SMITH (1895), 11 T. L. R. 325; 59 J. P. Jo. 213, D. C.

7. ———.]—*BENNETT v. TYLER*, No. 3, *ante*.

SECT. 2.—ANALYSIS OF SAMPLES.

SUB-SECT. 1.—IN GENERAL.

Necessity for analysis—Condition precedent to prosecution.]—*See* Nos. 256, 257, *post*.

SUB-SECT. 2.—PROCURING SAMPLES.

A. Who may procure.

See 1875 Act, s. 13; 1879 Act, s. 3; 1899 Act, s. 14.

8. **Agent—Of authorised officer.]—***HORDER v. SCOTT*, No. 53, *post*.

9. ———.]—S., the sanitary inspector, went with D. to a shop where butter was sold, & sent into the shop D., who bought a pound for a shilling. D. came out & gave it to S., who within two minutes went inside & gave notice to the shopkeeper that he had bought it for analysis, & he then & there divided it into parts, etc. S. laid the information for selling butter not of the nature, etc., of butter:—*Held*: the purchaser of the article was S. & not D., & S. properly gave the notice & laid the information.—*STACE v. SMITH* (1880), 45 J. P. 141, D. C.

10. ———.]—The inspector sent his servant into a public house to purchase a bottle of gin. When the servant had been in the house a minute, & had paid for the gin, the inspector entered. He had given the servant the money to buy the gin:—*Held*: the inspector was the purchaser, & the justices were wrong in dismissing the information on the ground that he was not the purchaser, & was not prejudiced.—*GARFORTH v. ESAM* (1892), 56 J. P. 521; 8 T. L. R. 243, D. C.

11. ———.]—**Police constable acting under authorised officer.]—**(1) The police constable was acting under the general authority of resp. & the case comes within [1875 Act], s. 13. Although he was not himself an authorised official he was acting under the authority of one who was (*WRIGHT J.*).

(2) There was clearly a refusal to sell, & the fact of no second tender having been made is immaterial (*WRIGHT, J.*).

(3) How far is the owner of a shop liable for the act of his manager? An employer is liable for the act of his servant in such a case as this, upon the well-known principle that where the gist of the offence is not in reality criminal then the master may be held liable. It seems to me that these Food Adulteration Acts could not be worked if persons who keep shops were not to be held liable for acts done by their servants in carrying on the ordinary course of the business

(*WRIGHT, J.*).—*FARLEY v. HIGGINBOTHAM* (1898), 42 Sol. Jo. 309, D. C.

12. ———.]—**Agent himself qualified officer.]—**A sample of milk in course of delivery to a purchaser may be procured by an inspector under 1879 Act, s. 3, by an agent, & the inspector may cause the sample so obtained through his agent to be analysed, & may himself in his own name lay an information & take the proceedings under the sect. for the recovery of penalties, although he has not himself taken the sample & although the agent who took the sample was himself an inspector who was competent to take proceedings.—*TYLER v. DAIRY SUPPLY CO., LTD.* (1908), 98 L. T. 867; 72 J. P. 132; 6 L. G. R. 422; 21 Cox, C. C. 612, D. C.

—— **Of private purchaser.]—**(1) An attempt has been made to apply 1875 Act, treating the man who brought the milk to the consignee's premises as his "agent" with reference to the taking of samples. They were, in fact, taken in his presence; & the proceeding was under 1875 Act. Objections were taken, however, that the Act did not apply to such a case, & that the proceeding was improperly taken under it. The second Act [1879 Act] had been passed to provide for such cases, for the very reason that the first Act [1875 Act] did not apply; & in fact, the provisions of that Act were not applied in this case. The person who took the samples was not "the person purchasing the article"; that person did not indicate his intention to submit them to analysis, nor did he apply to the seller or his agent to have them analysed, nor did he "offer" to divide the article into three parts, for what he did was, without any "offer," to take the three samples. This was all contrary to the plain language of the Act. 1879 Act required that the proceeding should be by a medical officer or other officer charged with the execution of the Act. If that course had been taken here it would have been right, but it was not taken (*MATHEW, J.*).

(2) It is of great importance that the analyst's certificate should state from whom he actually & physically received the sample which he analysed (*WILLS, J.*).—*HARRIS v. WILLIAMS* (1889), 6 T. L. R. 47, D. C.

B. Where Samples may be procured.

See 1875 Act, s. 13; 1879 Act, s. 3; 1899 Act, s. 14.

14. **Outside district for which officer appointed.]—***R. v. SMITH*, No. 238, *post*.

15. ———.]—The power conferred upon an inspector of nuisances under 1879 Act, s. 3, to procure at the place of delivery a sample of milk in course of delivery to the purchaser in pursuance of a contract of sale cannot be exercised by an inspector outside the district for which he is appointed.

Neither an inspector of nuisances nor a public analyst can act under 1879 Act, s. 3, where the place of delivery of the milk in course of delivery under the contract of sale is not within the district for which he is appointed.—*MENAIR v. CAVE*, [1903] 1 K. B. 24; 72 L. J. K. B. 26; 87 L. T.

PART II. SECT. 2, SUB-SECT. 2.—A.

8 i. **Agent—Of authorised officer.]—**The article said to be adulterated was alleged to have been purchased by complainant, an inspector of weights &

measures. The proof showed that it was purchased by his assistant for him. An appeal against the conviction on the ground that the charge had not been proved, was dismissed.

MACKIRBY v. MACKIRBY (1893), 20 R. (Cl. of Sess.) 58; 30 Sc. L. R. 607, J.—*SCOT*.

2 ii. ———.]—*MASSEY v. KELSO* 2), 3 Adam, 622.—*SCOT*.

Sect. 2.—Analysis of samples: Sub-sect. 2, B. & -sect. 3, A. (a) &

680; 67 J. P. 50; 51 W. R. 112; 19 T. L. R. 6; 47 Sol. Jo. 14; 1 L. G. R. 28; 20 Cox, C. C. 361, D. C.

Annotation:—Reid. Ross v. Helm, [1913] 3 K. B. 462.

16. "Place of delivery"—Place where purchaser takes possession—Not place whence purchaser pays carriage.]—By 1879 Act, s. 3, certain officers therein named "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk"; & power is given to submit such sample for analysis, & take proceedings as provided by 1875 Act, s. 13. Applt., who lived at C., contracted with a dairy co. for the sale to them of the milk from his dairy, to be delivered at London, or at such other station as the purchasers should from time to time appoint; the carriage of the milk from C. to be paid by the purchasers. The purchasers appointed H. as a station for the delivery of milk under the contract. Applt. consigned milk from C. to the purchasers at H.; immediately on its arrival at the latter station, & before possession was taken of it by the purchasers, a sample was taken by resp., which, upon analysis, was found to be adulterated by the addition of water:—*Held*: notwithstanding the provision for payment of the carriage by the purchasers, H. was the place of delivery of the milk to the purchasers within the meaning of the sect.; & applt. was, therefore, rightly convicted of an offence under the Acts.—*FILSHIE v. EVINGTON*, [1892] 2 Q. B. 200; 66 L. T. 199; 56 J. P. 312; 40 W. R. 380; 8 T. L. R. 306; 36 Sol. Jo. 275; 17 Cox, C. C. 481, D. C.

Annotation:—Reid. Helliwell v. Haskins (1911), 105 L. T. 438.

17. ——— Delivery at railway station.]—Applt. entered into a verbal contract with L. for the daily supply of milk. It was delivered at Reading from Basingstoke:—*Held*: sample properly taken at Reading station.—*LUSH v. WILSON* (1890), 51 J. P. 73.

18. ———]—SANDERS v. SADLER. No. 225, *post*.

19. ———]—ELDER v. BISHOP AUCKLAND CO-OPERATIVE SOCIETY, LTD., No. 227, *post*.

20. ——— "In course of delivery"—Whether sample taken in course of delivery question of fact.]—By 1879 Act, s. 3, any inspector charged with the execution of the Act may procure at the place of delivery to the purchaser any sample of any milk "in course of delivery" to the purchaser in pursuance of any contract for the sale to the purchaser of the milk:—*Held*: (1) the question whether a sample of milk is taken by the inspector "in course of delivery" within 1879 Act, s. 3, is a question of degree. If upon summary proceedings taken under 1875 Act, s. 6, for selling adulterated milk justices find that a sample of the milk was taken "in course of delivery," the Div. Ct. cannot interfere with the finding if upon the facts it can possibly be supported in law.

(2) Applt. sold & consigned milk to a purchaser under a contract which provided that the milk was to be delivered to the purchaser at a named railway station & that "arrival of the milk at the railway station shall constitute delivery by the vendor to the purchaser." By direction of resp., an inspector of food & drugs, police officers met the train on its arrival at the railway station, took possession of a churn containing the milk as it was removed from the train, placed it upon the platform, & prevented the consignee from taking possession of it until resp. arrived at the station about twenty minutes later. Resp. then took a sample from the churn by dipping a pint measure into it. Upon summary proceedings taken against applt. under 1875 Act, s. 6, for selling adulterated milk to the prejudice of the purchaser, the justices were of the opinion that the sample was procured in "course of delivery to the purchaser" within 1879 Act, s. 3:—*Held*: as upon the facts it was possible to support the finding, the Div. Ct. could not interfere with it.—*COX v. EVANS*, [1917] 1 K. B. 275; 86 L. J. K. B. 539; 115 L. T. 779; 81 J. P. 53; 14 L. G. R. 1178; 25 Cox, C. C. 561, D. C.

21. ——— Sample taken after article handed to customer—Whole transaction witnessed by officer.]—Under a verbal contract of sale resp. delivered to a woman at her doorstep a quantity of liquid purporting to be pure milk. The liquid was poured by resp. from a can into a jug belonging to the woman, who paid for the milk & at once re-entered her house with the jug in her hand & shut the door. Thereupon an inspector, who had witnessed the transaction, immediately went to the door of the woman's house, & knocked at the door which was opened by the woman who had the jug of liquid in her hand, & he obtained from her the liquid which resp. had sold to her. He took a sample of the liquid & when analysed it was found to contain 30 per cent. of added water. The woman stated that she held the jug in her hand until the inspector came to the door, & that she had not interfered with its contents, & her statement was accepted. Upon an information against resp. under 1879 Act, s. 3, the justices were satisfied that the contents of the jug were in exactly the same condition when obtained by the inspector as when delivered by resp., but dismissed the information on the ground that the delivery was completed & that same was not taken "in course of delivery" within the meaning of the sect.:—*Held*: there was evidence on which the justices could find that the delivery was complete before the sample was taken, & the justices having so found their decision could not be interfered with.—*HELLIWELL v. HASKINS* (1911), 105 L. T. 438; 75 J. P. 435; 27 T. L. R. 463; 9 L. G. R. 1060; 22 Cox, C. C. 603, D. C.

Annotation:—Distd. Cox v. Evans, [1917] 1 K. B. 275.

22. ——— Consignee prevented from obtaining possession until sample taken.]—COX v. EVANS, No. 20, *ante*.

C. Refusal to Sell.

See 1875 Act, s. 17.

23. Application by officer to purchase—Whether production of officer's authority necessary

PART II. SECT. 2, SUB-SECT. 2.—C.
by officer to purchase—Whether officer should a

*his identity—Or purpose for which article required.]—*It is not necessary, in order to support a conviction for a refusal to sell, that an inspector under

Food & Drugs Act, 1875, should declare his identity or the purpose for which he requires the article. It is sufficient if the inspector ask for the article,

PART II.—ADULTERATION AND IMPOVERISHMENT.

—No demand by seller to see authority.]—P., a publican, on request, supplied H. with rum out of a bottle on a shelf in the bar. After tasting it, H. requested to have half a pint of rum. P. was about to supply H. out of another vessel, but H. demanded the supply out of the same bottle, saying he was an inspector & it was for analysis. H. refused, & was summoned for such refusal under 1875 Act, s. 17, & was convicted:—*Held*: (1) as P. had not demanded to see H.'s authority, H. was not bound to produce it; (2) P. was bound to supply the sample out of the same bottle as that from which he first supplied H. — *PAYNE v. HACK* (1893), 58 J. P. 165, D. C.

24. — Article out of particular vessel.]—*PAYNE v. HACK*, No. 23, *ante*.

—.]—*See, also*, Nos. 25, 26, *post*.

25. — Article “exposed for sale” — Demand for new milk from vessel containing skimmed milk — Delivery to customers of skimmed milk as such.]—An inspector asked applt. for a pint of new milk out of a particular can, which in fact contained skimmed milk. Thereupon applt. deliberately upset all the milk from the can into the road, & said to the inspector, “I was not going to let you have skimmed milk for new.” Appellant alleged that he was about to deliver the skimmed milk to his regular customers for skimmed milk:—*Held*: (1) as there was no evidence that applt. was offering for sale the skimmed milk as new milk, he could not be convicted of an offence under 1875 Act, s. 17; (2) 1899 Act, s. 11, does not apply to ordinary skimmed milk, but only to condensed milk.—*FRENCH v. CARD* (1909), 101 L. T. 428; 73 J. P. 389; 7 L. G. R. 890, D. C.

26. — Demand for milk from vessel containing milk to be added to other liquids—Milk alone not sold to customers.]—Resp. carried on business as a confectioner & eating-house keeper. An inspector applied to the manager of resp.'s shop to purchase a glass of milk required by him for the purpose of analysis. There was at the time milk in a pan on the counter, but resp.'s manager had instructions from him not to sell milk alone, but only to add it to cups of tea or other liquids, & the milk in the pan on the counter was kept there to be sold in that manner only. Resp.'s manager on this ground refused to sell to the inspector a glass of the milk: *Held*: although the milk was only intended to be sold in the manner above mentioned it had nevertheless been exposed to sale & was on sale by retail within the meaning of 1875 Act, s. 17, & resp. was therefore liable to a penalty in respect of the refusal to sell.—*McNAIR v. TERRONI*, [1915] 1 K. B. 526; 84 L. J. K. B. 357; 112 L. T. 503; 79 J. P. 219; 31 T. L. R. 82; 13 L. G. R. 377; 24 Cox, C. C. 598, D. C.

27. — Necessity for tender — Demand for second supply of article after first supply overturned by seller.]—*FARLEY v. HIGGINBOTHAM* (1898), 42 Sol. Jo. 309, D. C.

tendering the price thereof, & it be refused him.—*CLARKIN v. McCARTAN* (1888), 22 L. L. T. 95.—*IR*.

c. — Article “exposed for — Demand for milk from can from which public supplied.”—Under Sale of Food & Drugs Act, 1875, s. 17, an inspector is entitled to demand to be supplied in the same manner as the public are being supplied & consequently if a dairyman, supplying milk to the public by retail from cans

refuses to supply an inspector, on demand, with milk except from the top of one of the cans instead of from its cran, from which the public are being supplied, he is guilty of a contravention of the enactment.—*SOUTAR v. KERR*, [1907] S. C. (J.) 49; 41 Sc. L. R. 462; 14 S. L. T. 875.—*SCOT*.

PART II. SECT. 2, SUB-SECT. 3.— A. (b).

31 i. By whom Private purchaser.]

28. What amounts to refusal — Overturning article supplied after payment of price.]—*FARLEY v. HIGGINBOTHAM* (1898), 42 Sol. Jo. 309, D. C.

—.]—*See, also*, Nos. 23, 25, 26, *ante*.

29. Effect of refusal — Seller snatching back article & returning price — Whether seller guilty of larceny.]—Applt. sold a tin of coffee to resp., but discovering that he was an inspector under 1875 Act, snatched it back & returned him the money paid for it:—*Held*: he could not under the circumstances be convicted of feloniously stealing.—*HEWSON v. GAMBLE* (1892), 56 J. P. 531; 8 T. L. R. 301, D. C.

30. — By servant — Liability of master.]—*FARLEY v. HIGGINBOTHAM* (1898), 42 Sol. Jo. 309, D. C.

SUB-SECT. 3. DEALING WITH SAM

A. Notification of Intention to be analysed.

(a) Necessity for Notifi

Condition precedent to prosecution.]—*See* Nos. 252-256, *post*.

(b) By and to Whom Notification given.

See 1875 Act, s. 14.

31. By whom Private purchaser.] The provisions of 1875 Act, s. 14, apply to the purchase of an article by a private person as well as by one of the public officers named in the Act: so that it is a condition precedent to the right of a private purchaser to take proceedings for a penalty under the Act that he should have given to the seller the notification required by that sect.

Under 1875 Act, s. 14, the purchaser of any article with the intention of submitting it to analysis shall, after the purchase has been completed, “forthwith” give the seller the notification provided by the section. The facts show that they [resps.] kept it on their premises for two days, & gave no notification to the seller of any intention to have the analysis made until the third day (*FIELD, J.*). — *PARSONS v. BIRMINGHAM DAIRY CO.* (1882), 9 Q. B. D. 172; 51 L. J. M. C. 111; 16 J. P. 727; 30 W. R. 718, D. C.

Annotations: *Consd.* *Buckler v. Wilson*, [1896] 1 Q. B. 83. *Distd.* *Monro v. Central Creamery Co.*, [1912] 1 K. B. 578.

32. — .]—Applt. was convicted, on the complaint of the guardians of a union, by county justices, under 1887 Act, for selling margarine otherwise than in a package marked “Margarine,” contrary to s. 6. The margarine was delivered to the purchaser in a borough which had not a separate court of quarter sessions:—*Held*: (1) the county justices had jurisdiction;

— The notice of intention to have an article analysed, & the other procedure which is prescribed by Sale of Food & Drugs Act, 1875, s. 14, only applies to proceedings taken under that Act by the persons mentioned in s. 13, & to proceedings by persons who at the time of making a purchase intend to submit the article purchased to analysis. Upon the supply of articles, in pursuance of a general contract to supply, there cannot be an intention on the part of the p

Sect. 2.—Analysis of samples: Sub-sect. 3, A. (b), (c) & (d), B. (a) & (b), & C.]

(2) the justices having found that the article sold was not a perishable article, 1879 Act, s. 10, did not apply, & it was not necessary that the summons should be served within twenty-eight days from the time of the purchase; (3) the margarine not having been purchased for test purposes, or with the intention of submitting it to analysis, it was not a condition precedent to the prosecution under 1887 Act that the notification of intention to have it analysed, prescribed by 1875 Act, s. 14, should have been given to applt. *BUCKLER v. WILSON*, [1896] 1 Q. B. 83; 65 L. J. M. C. 18; 73 L. T. 580; 60 J. P. 118; 41 W. R. 220; 12 T. L. R. 94; 40 Sol. Jo. 146, D. C.

Annotations: As to (1) Refd. R. v. Beacontree, J.J., R. v. Wright, [1915] 3 K. B. 388. *As to (3) Distd. Monro v. Central Creamery Co.*, [1912] 1 K. B. 578. *Refd. Tyler v. Kingham*, [1900] 2 Q. B. 413.

33. To whom — Seller's agent — Porter at railway station.] *ROUCH v. HALL*, No. 253, *post*.

34. — Agent other than agent who sold article.] When an article of food has been purchased for the purpose of analysis by the public analyst, the notification of the intention to have the same analysed, required by 1875 Act, s. 14, to be given "to the seller or his agent selling the article," may be given to an agent who has not sold the article. *DAVIES v. BURRELL*, [1912] 2 K. B. 213; 81 L. J. K. B. 736; 107 L. T. 91; 76 J. P. 285; 28 T. L. R. 389; 10 L. G. R. 645, D. C.

(c) Time for Notification.

See 1875 Act, s. 14.

35. "Forthwith" Notification two days after sample procured.] *PARSONS v. BIRMINGHAM DAIRY CO.*, No. 31, *ante*.

36. Notification within two minutes of purchase by agent.] S., the inspector, standing outside, sent B., a constable, into M.'s inn to buy gin, & after B. came out, both went two minutes later inside, & told M. that the gin was bought for analysis, & divided it. The gin was found thirty-seven degrees under proof:—*Held*: the justices were wrong in holding that the object of purchase was not notified "forthwith," pursuant to 1875 Act, s. 14.—*SOMERSET v. MILLER*, 54 J. P. 614, D. C.

Compare, No. 51, *post*.

(d) Form and Contents of Notification.

See 1875 Act, s. 14.

37. Sufficiency of notification — Necessity for indication of analysis by official person—Omission of "by public analyst."]—*BARNES v. CHIPP*, No. 252.

38. — "By county analyst."]—W., the seller of spirits, was informed after the pur-

chase that the article was to be examined by the "county analyst," & W. knew that the county analyst was the public analyst of the place:—*Held*: the notice to W. was sufficient, though the words "public analyst" were not expressly used by the purchaser.—*WHEELER v. WEBB* (1887), 51 J. P. 661, D. C.

B. Division of Sample.

(a) In General.

Necessity for—Condition precedent to prosecution—Under 1907 Act.]—*See* No. 409, *post*.

39. Offer to divide — Necessity for.]—E. purchased a pint of milk from C., & after the purchase told C. that he intended to have the milk analysed, & then offered to divide it with the seller, who refused to accept it. The milk was found to be adulterated to the extent of 9.5 degrees of added water:—*Held*: it was necessary for E. before the purchase to offer to divide the milk into three parts in so many words, & that this offer was sufficient compliance with 1875 Act.—*CHAPPELL v. EMSON* (1883), 48 J. P. 200, D. C.

40. — — What amounts to.]—*CHAPPELL v. EMSON*, No. 39, *ante*.

41. — — —.]—*HARRIS v. WILLIAMS*, No. 13, *ante*.

—.]—*See*, now, 1899 Act, s. 13.

(b) Method of Division.

See 1875 Act, s. 14; 1899 Act, s. 2 (1) (a).

42. General rule — Division must allow of proper analysis.]—(1) Where an article of food is purchased for the purpose of analysis under 1875 Act, s. 14, each of the three parts, into which the article is required by that sect. to be divided, must be sufficient to admit of a proper analysis being made of that part.

(2) The certificate of the analyst correctly stated the parts or the percentages of foreign ingredients in the same, but the analyst, in giving the reasons for his opinion why the sample was adulterated, by an error in copying stated it contained only 25 parts of A. E. per 100,000 parts of P. S. instead of 32.7 parts. The analyst was called to correct this error which could be corrected by the figures given in the certificate itself:—*Held*: the certificate was good.—*LOWERY v. HALLARD*, [1906] 1 K. B. 398; 75 L. J. K. B. 249; 93 L. T. 814; 70 J. P. 57; 54 W. R. 520; 22 T. L. R. 186; 4 L. G. R. 189; 21 Cox, C. C. 75, D. C.

Annotations: As to (1) Consd. Suckling v. Parker, [1906] 1 K. B. 527. *Refd. Winterbottom v. Allwood*, [1915] 2 K. B. 608.

43. Where several articles—Necessity for division of each article.]—Where a purchase is made of several articles of food or drugs at the same time for the purpose of analysis, each article purchased must be divided into three parts, & otherwise

to whom the articles are supplied, to submit those articles to analysis within s. 14.—*ENNISKILLEN UNION GUARDIANS v. HILLIARD* (1884), 15 Cox, C. C. 643.—*IR*.

d. — — — Or official.]—*Pretoria Municipal Public Health By-laws*, s. 20, ch. 4, applies to the taking of a sample by an official or by a private person.—*ALLORTO v. PRETORIA MUNICIPALITY* (1919), T. P. D. 253.—*S. AF*.

PART II. SECT. 2, SUB-SECT. 3.—
A. (d).

e. Sufficiency of notification — Whether express words showing intention necessary.]—It is a sufficient notification under Health Act, 1890, s. 61, to the seller of any article of the purchaser's intention to have such article analysed if what is done by the purchaser does in substance inform the seller of his intention to have the article although express words

showing such intention are not used.—*FORD v. URQUHART* (No. 2) (1896), 21 V. L. R. 690.—*AUS*.

PART II. SECT. 2, SUB-SECT. 3.—
B. (b).

f. Mixture of contents of several bottles.]—The informant purchased in deft.'s factory three bottles of raspberry vinegar manufactured by deft., intimating his intention of having the vinegar analysed. He opened the

PART II.—ADULTERATION AND IMPOVERISHMENT.

dealt with as required by 1875 Act, s. 14. Where a purchase is made of six bottles of the same article of food or drug, each bottle is for the purposes of the Act a separate article, & it is therefore not a sufficient compliance with the requirements of 1875 Act, s. 14, for the purchaser to divide them into three lots of two bottles each without opening any of the bottles, & to hand one lot to the analyst, one to the seller, & to retain one himself.—*MASON v. COWDARY*, [1900] 2 Q. B. 419; 69 L. J. Q. B. 667; 82 L. T. 802; 61 J. P. 662; 49 W. R. 28; 16 T. L. R. 434; 44 Sol. Jo. 531; 19 Cox, C. C. 536, D. C.

Annotations:—*Distd. Smith v. Savage*, [1905] 2 K. B. 88. *Refd. Girling v. Child* (1921), 124 L. T. 700.

44. — What are separate articles—Article in small bottles.—*MASON v. COWDARY*, No. 43, *ante*.

45. — Article in small packets.—Upon the hearing of an information under 1875 Act, s. 6, it appeared that the purchaser asked the seller, a grocer, if he sold cream of tartar, & the seller produced a box containing penny packets labelled cream of tartar. The purchaser asked for, & was supplied with, four packets from the box, all of which were similar in size, outward appearance, & label, & paid fourpence for them; he then emptied the contents of the four packets into one heap & divided the whole quantity into three parts and sealed them up, handing one part to the seller, another to the public analyst, & retaining the third himself:—*Held*: each packet was not a separate article for the purposes of the Act, & the mode in which the contents of the packets were dealt with by the purchaser was a sufficient compliance with the requirements of 1875 Act, s. 14.—*SMITH v. SAVAGE*, [1905] 2 K. B. 88; 74 L. J. K. B. 576; 92 L. T. 775; 69 J. P. 245; 53 W. R. 477; 21 T. L. R. 424; 49 Sol. Jo. 430; 3 L. G. R. 582; 20 Cox, C. C. 817, D. C.

Annotations:—*Refd. Parkinson v. McNair* (1905), 69 J. P. 399; *Girling v. Child* (1921), 124 L. T. 700.

46. — Milk in separate churns.—A consignment of milk sent by resp. to a purchaser was contained in three churns, containing respectively twelve, fourteen, & ten gallons. An inspector took a sample from each churn, had each sample separately analysed, & thereafter laid one information under the Sale of Food & Drugs Acts, against resp. in respect of the whole consignment. At the hearing of the information the certificates of the three analyses were put in, & the analyst gave evidence, based upon those analyses, as to the quantitative or true average of the constituents of the whole consignment of thirty-six gallons, & he stated that the method which had been adopted of taking the samples was at least as accurate as taking a sample from the contents of the three churns mixed together. The justices dismissed the information on the ground that the method of taking the samples was not proper & legal:—*Held*: the method adopted was proper & legal & the justices were therefore wrong in dismissing the information.—*WILDRIDGE v. ASHTON*, [1924] 1 K. B. 92; 93 L. J. K. B. 30; 130 L. T. 205; 87 J. P. 197; 40

T. L. R. 28; 68 Sol. Jo. 165; 21 L. G. R. 702; 27 Cox, C. C. 545, D. C.

C. Sealing &

See 1875 Act, s. 14.

Necessity for—Condition precedent to prosecution.—*See* Nos. 50, 257.

47. Sufficiency - General rule.—*McQUINN v. RICHARDS* (1901), cited in Halsbury's Laws of England, Vol. XV. at p. 16, n.

48. — Butter wrapped up in grease-proof paper.—*PEARKS, GUNSTON & TEE, LTD. v. WARD, HENNER v. SOUTHERN COUNTIES DAIRIES CO.*, No. 101, *post*.

49. — Sample becoming incapable of analysis through decomposition.—*SUCKLING v. PARKER*, No. 257.

50. — On Feb. 12, 1911, resp. purchased from applt. some tins of "sardines in olive oil." Applt. delivered to resp. tins of sardines which in fact contained cotton seed oil instead of olive oil. Resp. opened the tins, & having put the contents into three jars which he covered with grease proof paper & securely sealed, delivered one of the jars to applt. On the same day resp. caused the contents of one of the jars to be analysed by the public analyst. There was no negligence in the sealing of the jars on the part of resp., & about a fortnight after the purchase of the sardines information was conveyed to applt. as to the result of the analysis & as to the probability of legal proceedings being instituted against him. Resp. subsequently laid an information against applt. under 1875 Act, s. 6, for selling to the prejudice of the purchaser a certain article of food, namely, the sardines in olive oil, which was not of the nature & quality of the article demanded, & on Mar. 11 a summons in respect of the charge was served upon applt. Applt. did not send for analysis the jar delivered to him by resp. until Mar. 17, 1911, when owing to the condition of its contents they could not be analysed & it was admitted that they were not capable of being analysed on Mar. 11, the date of service of the summons:—*Held*: it was not necessary under 1875 Act, s. 14, that the jar should be so sealed or fastened up that it would be capable of analysis at the time the summons was served on applt., & as he had had a reasonable opportunity, if he so desired, of having the sample effectively analysed in order to check the analysis made by the public analyst, the prosecution would lie.—*WINTERBOTTOM v. ALLWOOD*, [1915] 2 K. B. 608; 84 L. J. K. B. 1225; 112 L. T. 590; 79 J. P. 161; 31 T. L. R. 68; 13 L. G. R. 551; 24 Cox, C. C. 632.

51. — Sample not completely sealed forthwith.—The tin containing the third sample should have been secured with tape, or something of that kind. I dismiss the summons on the ground that the third sample has not been sealed in accordance with the [1875] Act (*per Cur.*).—*R. v. Lewis* (1907), 71 J. P. Jo. 616.

bottles, mixed their contents, & rebottled the mixture into three bottles each of which was marked & sealed, & one was delivered to the vendor, one to an analyst, while the third was retained by the informant:—*Held*: there was but one purchase of a

quantity of one article of food & Health Act, 1890, s. 61 (a), had been complied with.—*ROCHE v. LAVIS* (1903), 29 V. L. R. —**AUS.**

Whole sample must be divided.—When a sample is procured for the

purposes of analysis, under Health Act, 1898, the whole of the sample so taken should be divided into three parts & not the greater portion.—*SIMPSON v. DALTON* (1905), 7 W. A. L. J. 248.—**AUS.**

Sect. 2.—Analysis of samples: Sub-sect. 3, D. & E.;

E. Production of Sample at Hearing.
1875 Act, ss. 14, 21, & cases *infra*.

D. Delivery of

See 1875 Act, ss. 14, 16; 1889 Act, s. 15.

52. Necessity for delivery — To seller or his agent—Sample procured in course of delivery.] — *ROUCH v. HALL*, No. 253, *post*.

53. Who may deliver — Deputy for purchaser.] — 1875 Act, s. 13, enables an inspector of nuisances or any one of other specified officers to procure a sample of food or drugs, & if he suspect it to be sold to him contrary to the Act, to submit it for analysis to the district analyst, & 1875 Act, s. 20, enables the person causing the analysis to be made to take proceedings for the recovery of the penalty imposed for such offence; it is not necessary that the officer taking such proceedings should have acted personally in the purchase of the sample, & the person purchasing the sample on his behalf need not himself deliver the sample to the analyst, but may hand it to another for the purpose of such delivery.

Officers, such as the inspectors of nuisances or inspectors of weights & measures, have numerous duties to perform, & if we held that to procure a sample under [1875 Act], s. 13, the inspector must personally visit the shop, we should limit the operation of a very beneficial Act (*FIELD, J.*). *HORDER v. SCOTT* (1880), 5 Q. B. D. 552; 49 L. J. M. C. 78; 42 L. T. 660; 41 J. P. 520; 28 W. R. 918, D. C.

Annotations:—Folld. Stace v. Smith (1880), 45 J. P. 141.
Consd. Tyler v. Dairy Supply Co. (1908), 98 L. T. 867.

54. What must be delivered — Whether whole sample Sample procured in course of delivery.] — By 1879 Act, s. 3, an inspector is enabled to procure "at the place of delivery any sample of any milk in the course of delivery" to the purchaser or consignee, & if he suspect the milk to have been sold contrary to 1875 Act, he "shall submit the same to be analysed." An inspector having taken a sample of milk under 1879 Act, s. 3, divided it, retained one part, & submitted the other part to be analysed: — *Held*: he was not bound to submit for analysis the whole of the sample taken by him. — *ROLFE v. THOMPSON*, [1892] 2 Q. B. 190; 61 L. J. M. C. 181; 67 L. T. 295; 56 J. P. 125; 8 T. L. R. 611; 17 Cox, C. C. 551, D. C.

PART II. SECT. 2, SUB-SECT. 3.— D.

h. Whether sample should be sent by registered post.] *Held*: Sale of Act, 1875, s. 16, was an & did not prevent given that the parcel had been sent to the analyst in a manner other than by registered post. — *AUSTIN v. DUNSHAUGHLIN UNION GUARDIANS* (1911), 45 L. L. T. 213. — **IR.**

PART II. SECT. 2, SUB-SECT. 3.— E.

k. Production essential.] — *PLUMB v. TRURION, Ex p. TRURION* (1914), S. R. Q. 239. — **AUS.**

l. — .] In a prosecution under of Food & Drugs Acts, for the of milk below standard, the third of the milk in question, which is directed to be retained & produced at the trial with a view to its being available for analysis at Somerset House, had been lost through the bursting of the bottle in which it was contained: — *Held*: the inability of prosecutor to produce the third sample at the trial rendered it impos-

sible for him to obtain a conviction. — *HUTCHISON v. STEVENSON* (1902), 3 Adam, 651. — **SCOT.**

m. Whether sample produced portion of article sold Question of fact.] — A person convicted of an offence in respect that he had sold watered milk, brought a bill of suspension on the ground that whereas he had been charged & convicted of selling the milk on Mar. 31, the portion of milk to which the certificate of the analyst founded on referred, was marked Mar. 30: — *Held*: it was a question of fact whether the milk analysed was truly a portion of that sold by accused on Mar. 31, & that the ct. must assume that the judge who convicted had satisfied himself on this point. — *HOWE v. KNOWLES*, [1909] S. C. (J.) 61. — **SCOT.**

PART II. SECT. 2, SUB-SECT. 4.— B. (b) i.

n. Compliance with prescribed form —What amounts to.] — By directions contained in a footnote to the form of certificate prescribed by regulation, it is required that such cer-

SUB-SECT. 4.—THE ANALYSIS.

A. The Public Analyst.

55. Power to analyse sample taken outside district.] — *R. v. SMITH*, No. 238, *post*.

56. — — .] — *McNAIR v. CAVE*, No. 15, *ante*.

B. The Certificate.

(a) Necessity for.

Condition precedent to prosecution.] — See Nos. 256, 262.

(b) Form and C

i. In General.

See 1875 Act, s. 18, sched.

57. Should contain sufficient particulars to enable justices to decide whether offence committed.] — *GOULDER v. ROOK, BENT v. ORMEROD, LEE v. BENT, BARLOW (OR PALMER) v. NOBLETT*, No. 96, *post*.

On prosecution for importation of adulterated or impoverished food.] — See Part IV.,

ii. Receipt and Weight of Sample.

58. Receipt of sample — Necessity for statement from whom sample actually received.] — *HARRIS v. WILLIAMS*, No. 13, *ante*.

59. Weight of sample — When insertion necessary.] — The insertion in the certificate given by a public analyst under 1875 Act, of the weight of the sample analysed is obligatory only where the weight of the sample is material to the accuracy of the analysis, & its omission does not necessarily invalidate the certificate where the accuracy of the analysis does not in any way depend upon the weight of the sample. — *SNEATH v. TAYLOR*, [1901] 2 K. B. 376; 70 L. J. K. B. 872; 65 J. P. 518; 49 W. R. 719, D. C.

tificate should be addressed to the person submitting the food for analysis. The sample of food had been submitted to the analyst by complainant, an inspector, but the analyst's certificate was addressed to the secretary of a local board of health, by whom the inspector was employed: — *Held*: there was a substantial compliance with the prescribed form. — *KESWORTHY v. McCORMICK* (1913), 15 W. A. L. R. 61. — **AUS.**

o. — — .] — *AUSTIN v. DUNSHAUGHLIN UNION GUARDIANS* (1911), 45 L. L. T. 213. — **IR.**

p. — — .] — *GORDON v. LOVE*, [1911] S. C. (J.) 75. — **SCOT.**

PART II. SECT. 2, SUB-SECT. 4.— B. (b) ii.

59 i. Weight of sample — When insertion necessary.] — The analyst in filling up the statutory form of certificate need not state the weight of the sample analysed or that it could not be conveniently weighed. — *HUNTER v. WINTROP* (1904), 4 Adam, 471. — **SCOT.**

PART II.—ADULTERATION AND IMPOVERISHMENT.

iii. Constituent Parts of Sample.

60. Necessity for setting out constituent parts of sample—Adulteration of food.]—The certificate given by a public analyst of the result of an analysis under 1875 Act need not set out the parts contained in the sample where the case is not one of adulteration; it need only state the "result" of the analysis. The "observations" which, in the form of certificate given in the schedule to the Act follow after the result of the analysis are only to be made in case of adulteration. But the addition, in cases where adulteration is not charged, of "observations," amounting only to an expression of opinion on the part of analyst & not to a finding of fact, though unauthorised & improper, will not necessarily vitiate the certificate.

Under the heading "observations" comes a statement that the abstraction of fat is a fraud & may be injurious to health. Upon carefully considering the form of certificate given in the schedule, I notice that the "observations" are only to be made where the case is one of adulteration, & that they are not to be made in such a case as the present, where adulteration is not suggested. . . . the observations of the public analyst in the present case are therefore unauthorised, & ought not to have been made (CHARLES, J.).—BAKEWELL v. DAVIS, [1894] 1 Q. B. 296; 63 L. J. M. C. 93; 69 L. T. 832; 58 J. P. 228; 10 T. L. R. 10; 10 R. 617, D. C.
Annotation:—**Folld.** Jenkins v. Naden (1919), 88 L. J. K. B. 1137.

61. ——— "Excess of water over & above what is allowed by Act."]—A public analyst gave a certificate that a sample of rum contained "an excess of water over & above what is allowed by Act of Parliament," which he estimated at 13 per cent.:—*Held*: this certificate did not afford evidence which would warrant a conviction. It should have specified the total quantities of pure spirit & of added water contained in the sample. It was not for the analyst, but for the justices, to determine conclusions of law & of fact.—NEWBY v. SIMS, [1891] 1 Q. B. 478; 63 L. J. M. C. 228; 70 L. T. 105; 58 J. P. 263; 10 T. L. R. 206; 38 Sol. Jo. 202; 10 R. 596, D. C.
Annotations:—**Consd.** Fortune v. Hanson, [1896] 1 Q. B. 202; 65 L. J. M. C. 71; 71 L. T. 145; 60 J. P. 88; 11 W. R. 431; 12 T. L. R. 161; 40 Sol. Jo. 210; 18 Cox, C. C. 258, D. C.
Distd. Bridge v. Howard, [1897] 1 Q. B. 80. **Consd.** Jenkins v. Naden (1919), 88 L. J. K. B. 1137. **Refd.** Lee v. Bent (1901), 84 L. T. 719.

62. ——— "— per cent. of added water."]—In a prosecution under 1875 Act, for selling adulterated milk to a purchaser, the only evidence of adulteration was the certificate of the public analyst, which stated that the sample submitted to him "contained the percentage of foreign ingredients as under: 5 per cent. of added water":—*Held*: the certificate was bad as evidence, under the Act, of adulteration, because it did not state the constituent parts of the sample analysed.—FORTUNE v. HANSON, [1896] 1 Q. B. 202; 65 L. J. M. C. 71; 71 L. T. 145; 60 J. P. 88; 11 W. R. 431; 12 T. L. R. 161; 40 Sol. Jo. 210; 18 Cox, C. C. 258, D. C.

Annotations:—**Consd.** R. v. Smith, [1896] 1 Q. B. 596. **Distd.** Bridge v. Howard, [1897] 1 Q. B. 80. **Consd.** Jenkins v. Naden (1919), 88 L. J. K. B. 1137.

63. ——— Statement of scientific basis on which opinion founded.]—In a prosecution under 1875 Act, for selling adulterated milk, the certifi-

cate of the public analyst stated that the sample submitted to him contained 6 per cent. of added water, & went on to say, "This opinion is based on the fact that the sample contained 7.97 per cent. solids not fat, whereas genuine milk contains not less than 8.5 per cent. solids not fat":—*Held*: the certificate was good, although it did not state the constituent parts of the sample analysed.—BRIDGE v. HOWARD, [1897] 1 Q. B. 80; 65 L. J. M. C. 229; 75 L. T. 300; 60 J. P. 790; 45 W. R. 78; 13 T. L. R. 5; 11 Sol. Jo. 20; 18 Cox, C. C. 421, D. C.

Annotation:—**Consd.** Jenkins v. Naden (1919), 88 L. J. K. B. 1137.

64. ——— "Contains serious quantity of arsenic."] GOULDER v. ROOK, BENT v. ORMEROD, LEE v. BENT, BARLOW (OR PALMER) v. NOBLETT, No. 96, *post*.

65. ——— Brandy having been analysed, the certificate stated: "I am of opinion that the sample contained parts as under, or the percentages of foreign ingredients as under; it has been reduced from 25 degrees under proof to 27.6 degrees under proof":—*Held*: the certificate was sufficient.—FINDLEY v. HAAS (1903), 88 L. T. 465; 67 J. P. 198; 19 T. L. R. 353; 47 Sol. Jo. 406; 1 L. G. R. 377; 20 Cox, C. C. 399, D. C.

66. Impoverishment of food.] BAKEWELL v. DAVIS, No. 60, *ante*.

67. ——— Resp. was summoned for selling milk not of the nature, substance & quality demanded by the purchaser, it being deficient in milk fat to the extent of 53 per cent. The certificate of the analyst stated: "I am of opinion that the sample contained the parts as under, & the percentages of foreign ingredients as under: Milk fat, 1.1 per cent.; milk solids other than milk fat, 5.6; specific gravity at 60° F., 1.0296. Observations: This milk is deficient in milk solids other than milk fat to the extent of 2.9 per cent., which is equivalent to the addition of 34.2 per cent. of water. It is also deficient in milk fat to the extent of 53.1 per cent. of the milk fat":—*Held*: the certificate was sufficient, though it did not in terms refer to the standard laid down by Sale of Milk Regulations, 1901, r. 1. BAYLEY v. COOK (1905), 92 L. T. 170; 69 J. P. 139; 53 W. R. 110; 21 T. L. R. 235; 3 L. G. R. 301; 20 Cox, C. C. 779, D. C.

Annotation:—**Apld.** Jenkins v. Naden (1919), 88 L. J. K. B.

68. ——— On a prosecution for having unlawfully sold to the prejudice of the purchaser milk which was "not of the nature, substance, & quality of the article demanded," the certificate given by a public analyst of the result of an analysis made by him under 1875 Act, is admissible in evidence if it sets out the matter complained of, namely, the deficiency in fat. It need not set out the constituent parts of the sample analysed.

Where, therefore, the analyst's certificate, so far as material, was as follows: "I am of opinion that the said sample contained the parts as under, namely, 2.5 per cent. of fat. Compared with the limit of the Board of Agriculture it was deficient in fact to the extent of 16.67 per cent."—*Held*: the certificate was admissible in evidence.—

PART II. SECT. 2, SUB-SECT. 4.— B. (b) iii.

60 i. Necessity for setting out constituent parts of sample—Adulteration

of food.]—Held: the analyst's certificate sufficiently contained the result of the analysis, although it did not state the exact proportions or com-

p of the added
Er p. VAUGHAN (1911), 11 S. R. N.
S. W. 250; 28 N. S. W. N. 71.
AUS.

Sect. 2.—Analysis of samples: Sub-sect. 4, B. (b) iii. & iv., & (c). Sect. 3: Sub-sects. 1 & 2.]

JENKINS v. NADEN (1919), 88 L. J. K. B. 1137; 121 L. T. 142; 83 J. P. 154; 35 T. L. R. 368; 17 L. G. R. 324; 26 Cox, C. C. 410.

69. Effect of clerical error.] — LOWERY v. HALLARD, No. 42, *ante*.

iv. Observations.

70. General rule—When to be made.] —BAKEWELL v. DAVIS, No. 60, *ante*.

71. Article liable to decomposition—Statement whether change in constitution of article.] —PEARCE v. BARSTOW (1880), 44 J. P. 699.

Annotation:—Folld. R. v. Smith, [1896] 1 Q. B. 596.

72. ———.] — HUDSON v. BRIDGE, No. 161, *post*.

73. Article injurious to health—Statement that article rendered injurious to health by admixture.] —HULL v. HORSNELL, No. 84, *post*.

74. As to constituent parts of normal article—No standard prescribed.] —ROBINSON v. NEWMAN, No. 78, *post*.

(c) Effect of.

See 1875 Act, s. 21; 1899 Act, s. 22.

75. Whether conclusive—In absence of contrary evidence.] —At the hearing of an information under 1875 Act, the production of the certificate of the analyst is not conclusive evidence if deft. tenders himself as a witness & gives evidence on his own behalf.—HEWITT v. TAYLOR, [1896] 1 Q. B. 287; 65 L. J. M. C. 68; 74 L. T. 51; 60 J. P. 311; 41 W. R. 431; 12 T. L. R. 192; 40 Sol. Jo. 277; 18 Cox, C. C. 226, D. C.

76. ———.] —R. sold milk to H. which was stated to be purchased for analysis, & the milk was duly divided into parts as required by 1875 Act, & on analysis the certificate of the analyst, after stating the constituents, said the milk was adulterated with 20 per cent. of water. R. being charged with selling adulterated milk, the analyst's certificate was given in evidence, & H. gave no evidence to contradict it, but the magistrate thinking that the state of the milk might be explained by its standing several hours in a large can, & the best milk at the top ladled out before the purchase, dismissed the summons:—*Held*: the magistrate was wrong, & as there was no evidence to contradict the certificate of the analyst he ought to have acted on it, & convicted R.—HARRISON v. RICHARDS (1881), 45 J. P. 552, D. C.

Annotations: Folld. Elder v. Dryden (1908), 99 L. T. 20; Robinson v. Newman (1917), 86 L. J. K. B. 814.

77. ——— Analyst not called.] —Resp. was charged under 1875 Act, s. 6, with unlawfully selling to the prejudice of the purchaser new milk adulterated with 14.4 per cent. of water. The analyst's certificate was put in, & stated that the milk "contained . . . non-fatty solids, 7.28 per

cent.; fat, 2.50 per cent. Observations: When judged by Sale of Milk Regs. 1901, the sample shows a deficiency of non-fatty solids corresponding to an addition of 14.4 per cent. of water." No evidence was called for resp. The justices found as a fact that the adulteration of this milk by the addition of 14.4 per cent. of water had not been established, & they dismissed the charge:—*Held*: the justices were wrong, as the certificate of the analyst was evidence of the offence charged until displaced by evidence to the contrary.—ELDER v. DRYDEN (1908), 99 L. T. 20; 72 J. P. 355; 6 L. G. R. 786, D. C.

78. ———.] —In proceedings against resp. under 1875 Act, s. 6, for selling vinegar not of the nature, substance, & quality demanded, the analyst's certificate which was in the form prescribed by the schedule to the Act, stated that the sample analysed contained 2.91 per cent. of acetic acid, & the following "observations" were added: "Normal vinegar contains at least 4 per cent. of acetic acid. This sample, therefore, is deficient in acetic acid to the extent of 27.2 per cent. of the minimum quantity which normal vinegar contains. This is equivalent to the presence in the sample of 27.2 per cent. of excess water." No notice was given by resp. requiring the analyst to be called as a witness, nor did resp. give any evidence to rebut the statement in the certificate as to the quantity of acetic acid which normal vinegar contains. The justices dismissed the information on the ground that there was no evidence that a standard had been laid down as to the constituent parts of vinegar, & that, in the absence of evidence, the statement of the analyst's certificate as to normal vinegar containing at least 4 per cent. of acetic acid was unauthorised, & could not be acted upon:—*Held*: (1) the justices were wrong, inasmuch as by the form of certificate given in the schedule to the Act the analyst was entitled to insert the observation as to the quantity of acetic acid in normal vinegar; (2) as there was no evidence to contradict the certificate, the justices ought to have acted upon it, & convicted resp.—ROBINSON v. NEWMAN (1917), 86 L. J. K. B. 814; 117 L. T. 96; 81 J. P. 187; 15 L. G. R. 475; 25 Cox, C. C. 749, D. C.

—— That article altered by abstraction.] —*See* No. 178, *post*.

79. In what proceedings admissible — Proceedings against wholesale dealer—Certificate used in proceedings against retail dealer—Defence of warranty from wholesale dealer.] —Where, upon the hearing of a summons under 1875 Act, s. 6, deft. establishes the defence under 1875 Act, s. 25, that he bought the article with a written warranty & sold it in the same state as when he purchased it, the certificate of the public analyst used in those proceedings is not evidence in subsequent proceedings before justices against the person from whom deft. purchased the article. Upon the hearing of a summons under 1875 Act, s. 6, for selling as butter an article which was not of the nature, substance, & quality of the article demanded, the certificate of the public analyst

PART II. SECT. 2, SUB-SECT. 4.—
B. (b) iv.

71 i. Article liable to decomposition—Statement whether change in condition of article.] —In a suspension of a conviction of a contravention of Sale of Food & Drugs Act, 1875, by selling as butter an article which was not

butter:—*Held*: the article analysed being of a kind liable to decomposition it was imperative that the report should state whether any change had taken place in its composition which might have interfered with the analysis.—(1904), 4 Adam,

PART II. SECT. 2, SUB-SECT. 4.—
B. (c).

q. Whether conclusive.] —In proceedings where a certificate is admitted in evidence, it is not conclusive evidence of the facts stated, & it is competent for deft. to controvert it by cross-examination or by rebutting

showed the article sold to be margarine; the summons was, however, dismissed on deft. proving a purchase with a written warranty from resps. A summons was then taken out against resps. under 1887 Act, s. 6, for delivering the margarine in a package not marked as required by the sect., & at the hearing before justices the same certificate was tendered as evidence against resps., but was rejected:—*Held*: the certificate was not evidence against the resps. that the article sold & delivered by them was margarine, & the evidence was properly rejected.—*TYLER v. KINGHAM & SON, LTD.*, [1900] 2 Q. B. 413; 69 L. J. Q. B. 630; 83 L. T. 169; 64 J. P. 598; 16 T. L. R. 394; 19 Cox, C. C. 547, D. C.

SECT. 3.—OFFENCES.

SUB-SECT. 1.—MENS REA AS ELEMENT OF OFFENCE.

Whether mens rea essential element—Sale of adulterated articles.]—See Nos. 94-98, post.

— Abstraction & sale of altered articles.]—See Nos. 172-175, post.

— Adulteration of bread.]—See No. 396, post.

Mens rea generally, see CRIMINAL LAW, Vol. XIV., pp. 31 *et seq.*

Liability of company—Mixing injurious ingredients with food.]—See No. 101, post.

— Sale of adulterated articles.]—See Sub-sect. 3, B. (b), post.

— Giving false warranty.]—See No. 237, post.

Liability of corporations generally, see CORPORATIONS, Vol. XIII., pp. 408-411.

Liability of master for acts of servant or agent—Sale of adulterated articles.]—See Sub-sect. 3, B. (c), post.

— Refusal to sell sample.]—See No. 11, ante.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 38 *et seq.*; MASTER & SERVANT.

Possession of unwholesome food.]—See Nos. 346-354, post.

Imposing conditions on sale of food in wartime.]—See No. 532, post.

Sale of food above maximum price in wartime.]—See Nos. 541, 542, post.

SUB-SECT. 2.—INJURIOUS MIXTURES.

See 1875 Act, s. 3.

80. “Article of food”—Baking powder.]—JAMES v. JONES, No. 5, ante.

81. — Chewing gum.]—BENNETT v. TYLER, No. 3, ante.

82. — Preserved cream.]—A grocer on being asked for two pots of cream sold two pots of cream labelled: “Rich cream. This cream contains a small percentage of boron preservative to retard sourness.” No indication beyond the

label was given to the purchaser as to the composition of the cream, which, on analysis, was found to contain boracic acid. In the trade there were two kinds of cream known & sold, preserved cream & cream, & the boracic acid was generally used by the trade as a preservative to keep the cream good. It was found as a fact that cream if mixed with boracic acid equivalent to that found in the cream sold was uninjurious as regards adults, but was injurious to the health of children & invalids, & that this class of cream was given to children:—*Held*: the preserved cream so sold was not in itself an “article of food,” but was an article of food, namely, cream, mixed with an ingredient; that the article so mixed was “injurious to the health” within 1875 Act, s. 3, although it was not injurious to normal adult persons, & the seller was properly convicted under the sect. of selling an article of food mixed with an ingredient so as to render the article injurious to health.—*CULLEN v. MCNAIR* (1908), 99 L. T. 358; 72 J. P. 376; 24 T. L. R. 692; 6 L. G. R. 753; 21 Cox, C. C. 682, D. C.

Annotations:—*Expld.* *Williams v. Friend*, [1912] 2 K. B. 471. *Consd.* *Haigh v. Aerated Bread Co.*, [1916] 1 K. B. 878.

83. — — — — —.]—Appl., an inspector under Sale of Food & Drugs Acts, asked for, & was supplied by resps. with, a shillingworth of “preserved cream.” On analysis this was found to be cream with which boric acid had been mixed. “Preserved cream,” i.e., a mixture of cream & boric acid, is sold as a well known commodity, but it was found that cream containing boric acid in any quantity is injurious to health, more particularly in the case of children & of invalids:—*Held*: although the article was sold as a mixed article, namely “preserved cream,” resps. had, within 1875 Act, s. 3, sold an article of food, namely, cream with which an ingredient, namely boric acid, had been mixed, which rendered the cream injurious to health, & therefore they were liable to the penalty imposed by that sect. — *HAIGH v. AERATED BREAD CO., LTD.*, [1916] 1 K. B. 878; 85 L. J. K. B. 880; 114 L. T. 1000; 80 J. P. 284; 32 T. L. R. 127; 14 L. G. R. 665; 25 Cox, C. C. 378, D. C.

84. “Injurious to health”—Article must be rendered injurious to health by admixture.]—(1) Under 1875 Act, s. 3, the article of food must be rendered injurious to health by being mixed with some ingredient. It is not sufficient that the ingredient with which the food is mixed is injurious to health.

(2) The certificate of the analyst in the case of an alleged offence under this sect. is not insufficient, if it complies with the form in the schedule to the 1875 Act, merely because it does not state that the ingredient so mixed “rendered the article injurious to health.”—HULL v. HORSNELL (1904), 92 L. T. 81; 68 J. P. 591; 21 T. L. R. 32; 49 Sol. Jo. 34; 2 L. G. R. 1280; 20 Cox, C. C. 759, D. C.

85. — When article deemed to be—Copper sulphate in peas.]—Where on analysis a 1-lb. bottle of peas was found to contain three grains of sulphate of copper, equal to eight-tenths of a grain of metallic copper, inserted by the manufacturers for the purpose of preserving, fixing, or

evidence.—*NOAD v. HIGGS* (1913), 15 W. A. L. R. 21.—*AUS. F. — — —.]—FYE v. HAMILTON* (1894), 1 Adam, 484.—*SCOT.*

s. — — —.]—*Held*: in the absence of evidence in exculpation, the analyst's certificate was conclusive evidence of the facts therein stated, & did not

require to be confirmed by an of the other two samples.—*CHALMERS v. M'MEeking*, [1921] S. C. (J.) 54 58 Sc. L. R. 227.—*SCOT.*

Sect. 3.—Offences: Sub-sects. 2 & 3, A. & B. (a)

of restoring the natural colour of the peas:—*Held*: the article was thereby rendered “injurious to health” within 1875 Act, s. 3.—*SUMMERS v. GRIST* (1896), 60 J. P. 346.

86. ————.]—Resp. was summoned for selling preserved peas the colour of which had been retained by the addition of sulphate of copper, but in such small quantity as not to be injurious to health, & evidence was given that preserved peas are habitually sold with such addition. The justices dismissed the summons:—*Held*: the decision was justifiable on the facts of the case.—*FRIEND v. MAPP* (1904), 68 J. P. 589; 2 L. G. R. 1317, D. C.

87. ———— **Boric acid in cream—Class of persons affected.**—*CULLEN v. MCNAIR*, No. 82, *ante*.

88. ————.]—*HAIGH v. AERATED BREAD CO., LTD.*, No. 83, *ante*.

89. **Who liable—Company.**—*PEARKS, GUNSTON & TEE, LTD. v. WARD, HENNER v. SOUTHERN COUNTIES DAIRIES CO.*, No. 101, *post*.

SUB-SECT. 3.—SALE OF ADULTERATED ARTICLES.

A. In General.

See 1875 Act, s. 6.

90. **Elements of offence—False representation—Need not be express.**—An information was laid against resp. for that he sold as unadulterated an article of food, to wit, butter, which was adulterated. It was proved that an inspector of nuisances went to the shop of resp. & asked for “a pound of butter at 7d.,” & the shopman handed to him a pound, resp. being present. On being analysed, it was proved to have been largely adulterated with lard, tallow, etc., or material of that nature. The police magistrate was of opinion that it was necessary to prove that the butter when sold was represented as unadulterated, & that it was also necessary to prove that resp. knew that the butter had been mixed with some other substance, with intent fraudulently to increase its weight or bulk, & he therefore dismissed the information:—*Held*: it was not necessary that any express representation that the article sold was unadulterated should be made at the time of sale of a simple article like butter. Butter was asked for, & something handed over as butter, & that was selling “as unadulterated.”—*FITZPATRICK v. KELLY* (1873), L. R. 8 Q. B. 337; 42 L. J. M. C. 132; 28 L. T. 558; 38 J. P. 55; 21 W. R. 681.

Annotations:—*Consd.* *Dyke v. Gower*, [1892] 1 Q. B. 220. *Refd.* *Pope v. Tearle* (1874), L. R. 9 C. P. 499; *Roberts v. Egerton* (1874), 30 L. T. 633; *Sherras v. De Rutzen*, [1895] 1 Q. B. 918.

91. ———— **Must be made at time of sale—Retraction before sale.**—To constitute an offence under 1875 Act, s. 6, the representation of the

“nature, substance, & quality” of the article must be made at the time of the sale. A prior false representation in this respect is no offence within the Act, provided a true one is made at the time the sale actually takes place.—*KIRK v. COATES* (1885), 16 Q. B. D. 49; 55 L. J. M. C. 182; 54 L. T. 178; 50 J. P. 148; 34 W. R. 295; 2 T. L. R. 83, D. C.

Annotation:—*Refd.* *Higgins v. Hall* (1886), 51 J. P. 293.

——— **Representation false to knowledge of purchaser.**—*See* No. 111, *post*.

92. ———— **Fraud.**—*R. v. FIELD, ETC. JJ., Ex p. WHITE*, No. 147, *post*.

——— **Mens rea.**—*See* Sub-sect. 3, B. (a), *post*.

93. **Sale on Sunday.**—Though the effect of a contravention of Sunday Observance Act, 1877 (c. 7), upon a contract of sale is to avoid it, in the sense that it cannot be sued upon, in a civil action, it does not avoid it so far as to relieve the seller from liability to prosecution if the article sold, being an article of food, was adulterated.—*ELDER v. KELLY*, [1919] 2 K. B. 179; 88 L. J. K. B. 1253; 121 L. T. 94; 83 J. P. 166; 35 T. L. R. 391; 17 L. G. R. 413; 26 Cox, C. C. 406, D. C.

Sale by servant—Liability of servant.—*See* No. 222, *post*.

——— **Liability of master.**—*See* Sub-sect. 3, B. (c), *post*.

B. Liability of Seller.

(a) In General.

94. **Mens rea not essential element—Mistake by seller.**—*WADD v. BRAYLEY* (1887), 51 J. P. 423.

95. ———— **Ignorance of seller.**—By 1875 Act, s. 6, “no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, & quality of the article demanded by such purchaser, under a penalty not exceeding £20”:—*Held*: an offence within that sect. was committed, although the seller did not know that the article sold was not of the nature, substance, & quality demanded.—*BETTS v. ARMSTEAD* (1888), 20 Q. B. D. 771; 57 L. J. M. C. 100; 58 L. T. 811; 52 J. P. 471; 36 W. R. 720; 16 Cox, C. C. 418, D. C.

——— *Appld.* *Pain v. Boughtwood* (1890), 24 Q. B. D. 353. *Refd.* *Brown v. Foot* (1892), 61 L. J. M. C. 110; *Pearks, Gunston & Tee v. Ward, Henner v. Southern Counties Dairies Co.*, [1902] 2 K. B. 1; *Smithies v. Bridge* (1902), 71 L. J. K. B. 555.

96. ————.]—(1) Beer, with which a certain quantity of arsenic injurious to health had been mixed in the process of manufacture accidentally & in ignorance, was sold by a retailer without knowledge or reasonable grounds for suspicion of the presence of the arsenic in the beer:—*Held*: there was evidence that the beer was not of the nature, substance, & quality of the article demanded by the purchaser, & the retailer could be convicted under 1875 Act, s. 6.

(2) Certificates of public analysts stating in one case that the sample of beer “contains arsenic,” & in the other case that it “contains a serious quantity of arsenic”:—*Held*: insufficient.

PART II. SECT. 3, SUB-SECT. 3.—B. (a).

1. Adulterated articles

different receptacles for sale—Only one offence.—The keeping for sale of an adulterated article of food in various distinct receptacles on the same

premises on the same day constitutes only one offence, under Pure Food Act, 1905, s. 35, even though the portions contained in the various

The certificate of the analyst must be a document in proper form & . . . ought to contain in it sufficient materials to enable the magistrates to form a judgment on those materials whether the offence charged had been committed (LORD ALVERSTONE, C.J.).—GOULDER *v.* ROOK, BENT *v.* ORMEROD, LEE *v.* BENT, BARLOW (OR PALMER) *v.* NOBLETT, [1901] 2 K. B. 290; 70 L. J. K. B. 747; 81 L. T. 719; 65 J. P. 646; 49 W. R. 684, 701; 17 T. L. R. 503; 45 Sol. Jo. 504, 505; 19 Cox, C. C. 725, D. C.

Annotations:—As to (1) **Consd.** Smithies *v.* Bridge, [1902] 2 K. B. 13. As to (2) **Refd.** Hudson *v.* Bridge (1903), 67 J. P. 186. *Generally, Refd.* Hunt *v.* Richardson, [1916] 2 K. B. 446.

97. — Adulteration by stranger.]—Resp. a milk salesman, contracted to supply pure milk to an association. The milk was to be delivered to the association at the railway terminus in London. Resp. delivered the milk in a pure & unadulterated condition to the servants of the railway co. at his local station, & the milk was adulterated without his knowledge or consent during the transit from the local station to the terminus:—**Held**: resp. was liable to be convicted under 1875 Act, s. 6.—PARKER *v.* ALDER, [1899] 1 Q. B. 20; 68 L. J. Q. B. 7; 79 L. T. 381; 62 J. P. 772; 47 W. R. 142; 15 T. L. R. 3; 43 Sol. Jo. 15; 19 Cox, C. C. 191, D. C.

As to — **Folld.** Andrews *v.* Luckin (1917), 87 L. J. K. B. 507. **Consd.** Buckingham *v.* Duck (1918), 120 L. T. 84. **Refd.** Oatley *v.* Lemon (1905), 92 L. T. 200; Warrington *v.* Windhill Industrial Co-op. Soc. (1918), 88 L. J. K. B. 280.

98. — — — — —]—Where a farmer under a contract of sale of pure milk, delivered at a railway station genuine milk for dispatch by rail to the purchaser, & the milk was found by an inspector of nuisances, on reaching the arrival station, to be deficient in milk fat & other solids, & there was no evidence before the justices that it was not tampered with on the journey:—**Held**: the mere fact that the milk was genuine at the time when it was handed over to the railway co. did not relieve the farmer from liability for selling milk not of the nature, substance, & quality demanded by the purchaser.—ANDREWS *v.* LUCKIN (1917), 87 L. J. K. B. 507; 117 L. T. 726; 82 J. P. 31; 34 T. L. R. 33; 16 L. G. R. 199; 26 Cox, C. C. 124, D. C.

See, further, Part V., Sect. 4, sub-sect. 3, *post*.

Mens rea generally, *see* CRIMINAL LAW, Vol. XIV., pp. 31 *et seq.*

99. Necessary & harmless additions.]—HORDER *v.* GRAINGER, No. 117, *post*.

100. Unavoidable mixture—What amounts to.]—BOSOMWORTH *v.* BRIDGE (1892), 36 Sol. Jo. 594, D. C.

(b) Liability of Corporations.

101. Corporation liable—Company.]—(1) 1875 Act, s. 6, enacts that no person shall sell to the prejudice of the purchaser any article of food or

any drug which is not of the nature, substance & quality of the article demanded by such purchaser, under a penalty not exceeding £20:—**Held**: a joint stock co. incorporated under Cos. Acts can be convicted of an offence under 1875 Act, s. 6.

Speaking for myself, I am inclined to think that a corpn. would come under [1875 Act] s. 3 as well as under sect. 6 (CHANNELL, J.).

(2) A sale may be to the prejudice of the purchaser within 1875 Act, s. 6, although the purchaser had special knowledge, not derived from information given by the seller, that the article sold was not of the nature, substance, & quality demanded by him. The test is whether the sale would have been to the prejudice of a purchaser who had not that special knowledge.

(3) The sample of butter bought was wrapped up by the purchaser in grease-proof paper & the analyst was of the opinion that there was more water on the butter at the time of the purchase than at the analysis & that no change had taken place in the butter:—**Held**: it is a matter of fact for the justices whether 1875 Act, s. 14, has been complied with.—PEARKS, GUNSTON & TEE, LTD. *v.* WARD, HENNEN *v.* SOUTHERN COUNTIES DAIRIES CO., [1902] 2 K. B. 1; 71 L. J. K. B. 656; 87 L. T. 51; 66 J. P. 774; 18 T. L. R. 538; 20 Cox, C. C. 279, D. C.

As to (1) **Refd.** Smithies *v.* Bridge (1902), 71 L. J. K. B. 555; Hawke *v.* Hulton, [1909] 2 K. B. 93; *Re* Royal Naval School, Seymour *v.* Royal Naval School, [1910] 1 Ch. 806; Chuter *v.* Freeth & Pocock, [1911] 2 K. B. 832; *R. v.* Ascanio Puck & Pulee (1912), 76 J. P. 487; Mousell *v.* L. & N. W. Ry., [1917] 2 K. B. 836; Pearks' Dairies *v.* Tottenham Food Control Committee (1918), 88 L. J. K. B. 623. *Generally, Refd.* Korten *v.* West Sussex County Council (1903), 88 L. T. 166.

102. — — — — —] A shop assistant sold to & to the prejudice of a purchaser an article of food which was not of the nature, substance, & quality of the article demanded. The occupier of the shop & proprietor of the business carried on there was a limited co. trading in its registered name. The general manager, who was a director & also the secretary of the co., resided on the premises & occasionally conducted the business of the shop in person. In his absence his wife took charge, assisted by the shop assistant. The business was carried on under the exclusive & unrestricted control of the general manager, who was practically the only shareholder in the co. He was not in the shop at the time of the sale in question. The general manager having been convicted of an offence under 1875 Act, s. 6:—**Held**: the facts showed the shop assistant to be the servant of the co. & not of the general manager, & the conviction was wrong.—BOOTH *v.* HELLIWELL, [1914] 3 K. B. 252; 83 L. J. K. B. 1548; 111 L. T. 512; 78 J. P. 223; 30 T. L. R. 529; 12 L. G. R. 940; 24 Cox, C. C. 361, D. C.

Liability of corporations generally, *see* CORPORATIONS, Vol. XIII., pp. 408–411.

receptacles are not equally adulterated. —O'CONNOR *v.* BINI, [1908] V. L. R. 567.—AUS.

a. When seller freed from blame.]—Where a sale is effected contrary to Pure Food Act, 1905, s. 32, the person selling is not guilty of an offence if he proves so far as he personally is concerned the exculpatory facts referred to in that sect.—O'CON-

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NOR *v.* JENNER, [1909] V. L. R. 468.—AUS.

b. — — — — —]—*R. v.* PARADIS & PAQUET (1922), 69 D. L. R. 342; 37 Can. Crim. Cas. 318.—CAN.

PART II. SECT. 3, SUB-SECT. 3.—B. (b).

101 i. Corporation li

—An incorporated co., trading under the name of "The City & Suburban Dairies," was charged under that name without the addition of the name of the partners:—**Held**: the complaint was competent.—CITY & SUBURBAN DAIRIES *v.* MACKENNA, SCOTTISH FARMERS' DAIRY CO. LTD. *v.* MACKENNA, [1918] S. C. (.) 105.—SCOT.

Sect. 3.—Offences: Sub-sect. 3, B. (c) & (d), & C. (a) (b) 4.

(c) Liability of Master for Act of Servant or Agent.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 38 et seq.

103. Act of servant unauthorised—Contrary to express instructions.]—A servant of applt. sold lard adulterated with foreign matter without a proper label indicating its character. On the hearing of a summons against applts. under 1875 Act, s. 6, it was proposed, on behalf of applts., to call evidence to show that the action of the servant was contrary to their express instructions. The justices refused to admit the evidence:—*Held*: 1875 Act does not make a master responsible for the unauthorised acts of his servant, & the evidence should have been admitted.—**KEARLEY v. TONGE** (1891), 60 L. J. M. C. 159; *sub nom.* **KEARLEY v. TYLOR**, 65 L. T. 261; 56 J. P. 72; 17 Cox, C. C. D. C.

Annotations:—Consd. **Pearks, Gunston & Tee v. Ward, Hennen v. Southern Counties Dairies Co.**, [1902] 2 K. B. 1; **N.F. Houghton v. Mundy** (1910), 8 L. G. R. 838.

104. ———.]—P., a servant of applt. was employed to sell milk out of cans by retail. The cans were received by applt. the master, on arrival from the country, & a sample taken from each can before it was sent out for sale. Applt. had published a warning to his servants that any servant whose can of milk did not correspond with the sample taken from it would be liable to instant dismissal. P.'s can was duly sampled, & the sample proved to be unadulterated. Subsequently to his taking out the can for the sale of milk, P. admitted watering the milk, some of which milk he sold to an inspector, who thereupon summoned applt. the master under 1875 Act, s. 6. Applt. was convicted by a magistrate & fined the full penalty: *Held*: (1) applt. was rightly convicted, on the ground that he was the seller within the meaning of the Act, & was liable for his servant's action in selling adulterated milk; (2) the fact of the sale of adulterated milk was sufficient proof of the offence without evidence of any connivance by applt. though evidence rebutting connivance might properly be admitted by the magistrate with a view to mitigate any penalty he might otherwise have thought fit to impose.—**BROWN v. FOOT** (1892), 61 L. J. M. C. 110; 66 L. T. 619; 56 J. P. 581; 8 T. L. R. 268; 17 Cox, C. C. 509, D. C.

As to (1) Folld. **Parker v. Alder**, [1899] 1 Q. B. 20. *Consd.* **Buckingham v. Duck** (1918), 120 L. T. 84. *Reid.* **Pearks, Gunston & Tee v. Ward, Hennen v. Southern Counties Dairies Co.**, [1902] 2 K. B. 1; **Smithies v. Bridge** (1902), 71 L. J. K. B. 555; **Andrews v. Luckin** (1917), 87 L. J. K. B. 507; **Warrington v. Windhill**

Industrial Co-op. Soc. (1918), 82 J. P. 149; **Whittaker v. Forshaw**, [1919] 2 K. B. 419.

105. ———.]—**FARLEY v. HIGGINBOTHAM** (1898), 42 Sol. Jo. 309, D. C.

106. ———.]—Resp., a grocer, while his assistant was out of the shop, had made up for his own use a half-pound packet consisting of a mixture of butter & margarine. This packet was inadvertently left upon the counter while resp. went to attend to a customer in another part of the shop, but it was not placed there for the purpose of sale. Resp.'s assistant then came in, & immediately afterwards a man came in & asked for half a pound of salt butter, & was served by the assistant with same half-pound of mixed butter & margarine. The assistant, seeing the half-pound packet lying on the counter ready made, thought that it was there for the purpose of sale, but in selling it he was acting without the authority & contrary to the express instructions of resp. that he was to sell butter always from the bulk & not in ready made packets. Upon an information against resp. under 1875 Act, s. 6, for selling an article which was not of the nature, substance, & quality of the article demanded:—*Held*: resp. was liable for the act of his servant, even though such act was unauthorised by him & was done contrary to his express instructions, & he ought to have been convicted.—**HOUGHTON v. MUNDY** (1910), 103 L. T. 60; 74 J. P. 377; 8 L. G. R. 838, D. C.

Annotation:—Distd. **Whittaker v. Forshaw**, [1919] 2 K. B. 419.

107. — Limited authority to sell.]—**ELDER v. BISHOP AUCKLAND CO-OPERATIVE SOCIETY, LTD.**, No. 227, *post*.

108. — No authority to sell—Authority merely to deliver.]—Resp. sent his daughter with milk to be delivered to two customers who had previously ordered it. An inspector of police demanded some of the milk from her & she sold it to him, & on analysis it was found to be adulterated with water:—*Held*: resp. was not liable to conviction under 1875 Act, s. 6, for selling milk not of the nature, substance & quality demanded, as his daughter had merely authority to deliver the milk to the customers & not to sell it.—**WHITTAKER v. FORSHAW**, [1919] 2 K. B. 419; 88 L. J. K. B. 989; 121 L. T. 320; 83 J. P. 210; 35 T. L. R. 487; 63 Sol. Jo. 608; 17 L. G. R. 457; 26 Cox, C. C. 475, D. C.

(d) Liability of Servant.

109. Servant may be "seller."—**HOTCHIN v. HINDMARSH**, No. 222, *post*.

PART II. SECT. 3, SUB-SECT. 3. B. (c).

c. Act of servant unauthorised—Limited authority to serve.]—T. employed his father P. to carry milk to a creamery in pursuance of a contract whereunder T. used to be paid according to the quality of the milk. P. had no authority to supply milk to any one else. K. an inspector under Food & Drugs Acts, demanded a sample of the milk in course of delivery, to the creamery, & on analysis it was found to be deficient by 6 p.c. in butter fats:—*Held*: as the contract contemplated the supply of pure milk, though it might vary in quality, the supplying of adulterated

milk was an act to the prejudice of the creamery.—**KEENAN v. COSTELLOE** (1910), 44 I. L. T. 218.—**IR.**

1. — No authority to sell—Authority merely to deliver.]—The respondent C. was gratuitously taking the respondent S.'s milk to town for delivery to a dairyman when an officer under Sale of Food and Drugs Act, 1908, demanded a sample. C. submitted to the demand & accepted payment for the sample, which on examination was found defective:—*Held*: C. was not S.'s agent for the purposes of s. 7 of the Act, as he had no authority from S. to sell the milk, & that even if he had sold the sample taken by the officer that unauthorised

act would not have brought S. within the section.—**BOWDEN v. SANGER**, [1918] N. Z. L. R. 286.—**N.Z.**

108 ii. —.]—In the prosecution of a dairyman for selling by the hand of his servant, milk which was not genuine, it was proved that this servant who sold the milk had no authority so to do, his duty being merely to deliver milk to his master's customers:—*Held*: as the servant had exceeded his authority in selling the milk there had been no sale by the accused.—**LINDSAY v. DEMPSTER**, [1912] S. C. (J.) 110; 49 Sc. L. R. 999; 2 S. L. T. 177; 6 Adam, 707.—**SCOT.**

C. Prejudice of Purchaser.

(a) In General.

See 1875 Act, s. 6.

110. Whether purchaser prejudiced—Purchase for analysis.]—Where an article of food, which was not of the nature, substance, & quality of the article demanded, was sold to an inspector of nuisances, who purchased for the purpose of analysis under 1875 Act, s. 13, with money belonging to the authority by whom he was employed:—*Held*: such sale was “to the prejudice of the purchaser” within 1875 Act, s. 6.

I entertain no doubt, however, that by the word “purchase” [1875 Act], s. 6, intended to include an official purchaser authorised to purchase for analysis (LUSH, J.).—*HOYLE v. HITCHMAN* (1879), 4 Q. B. D. 233; 40 L. J. M. C. 97; 40 L. T. 252; 43 J. P. 430; 27 W. R. 487, D. C.

Annotations:—*Reid. Horder v. Scott* (1880), 5 Q. B. D. 552; *Holt v. Morris* (1893), 57 J. P. 441; *Smith v. Wisden* (1901), 85 L. T. 760; *Hunt v. Richardson*, [1916] 2 K. B. 446; *Harvey v. Herefordshire County Council* (1920), 123 L. T. 428.

— — —.]—See, now, 1879 Act, s. 2.

111. — Knowledge of purchaser—Inference from price.]—W. was charged before justices with selling for new milk an article not of the nature, substance, & quality demanded, contrary to 1875 Act, s. 6. A sergeant of police, acting under H.’s orders, who was an inspector under the Act, purchased the milk from W. who, when he was asked for new milk, sold skimmed, & charged a penny a pint, the usual price for skimmed. The justices differed, one being of the opinion that only a penny a pint being asked the purchaser must have been aware it was skimmed milk he was buying:—*Held*: the knowledge of the purchaser was immaterial, & case remitted to the Bench to convict.—*HEYWOOD v. WHITEHEAD* (1897), 76 L. T. 781; 13 T. L. R. 503; 18 Cox, C. C. 615, D. C.

112. — Purchaser with special knowledge.]—*PEARKS, GUNSTON & TEE, LTD. v. WARD, HENNER v. SOUTHERN COUNTIES DAIRIES CO.*, No. 101, *ante*.

— — — Notice to purchaser.]—See Sub-sect. 3, C. (b), *post*.

(b) Notice to Purchaser.

i. In General.

See 1875 Act, ss. 6, 8.

113. Seller not liable.]—Where the seller of an article brings to the purchaser’s knowledge the

fact that the article sold to him is not of the nature, substance, or quality of the article he demands, the sale is not to “the prejudice of the purchaser,” within 1875 Act, s. 6, & consequently no offence is committed within that sect. 1875 Act, s. 8, points out a mode of giving notice to the purchaser that is made by the statute sufficient, but it is not intended by that sect. that whenever the mode therein specified is not adopted there shall necessarily be an offence against sect. 6.—*SANDYS v. SMALL* (1878), 3 Q. B. D. 449; 47 L. J. M. C. 115; 39 L. T. 118; 42 J. P. 550; 26 W. R. 814.

Annotations:—*Folld. Gage v. Elvey* (1883), 10 Q. B. D. 518. *Reid. Hoyle v. Hitchman* (1879), 4 Q. B. D. 233; *R. v. Dennis*, [1894] 2 Q. B. 458; *Fowle v. Fowle* (1896), 75 L. T. 514; *Palmer v. Tyler* (1897), 61 J. P. 389; *Smith v. Wisden* (1901), 66 J. P. 150; *Pearks, Gunston & Tee v. Houghton*, [1902] 1 K. B. 889; *Dawes v. Wilkinson*, [1907] 1 K. B. 278; *Williams v. Friend*, [1912] 2 K. B. 471; *Batchelour v. Geo.*, [1914] 3 K. B. 242; *Clifford v. Battley*, [1915] 1 K. B. 531; *Preston v. Grant* (1924), 88 J. P. 198; *Rodbourne v. Hudson* (1924), 41 T. L. R. 132.

114. — Except in case of fraud.]—R. went into L.’s shop, & asked for a half-pound of coffee, for which he was charged 9d., being the price of pure coffee. When the coffee was put in a parcel & lying on the counter, & after payment, R. said he bought it for analysis, whereupon L. pointed out on a label outside the parcel the words “this is a mixture of coffee & chicory.” On analysis the coffee was only 60 per cent., & the justices found that the chicory was used fraudulently to increase the bulk, & convicted L.:—*Held*: the justices on such a finding of fact as to fraud were right.—*LIDDIARD v. REECE* ((1878), 44 J. P. 233.

115. — — —.]—H. went into M.’s shop, & asked for a quarter of a pound of coffee. While it was weighed out M. pointed out that the coffee sold was mixed with chicory, & the label on the outside so stated. The price paid was 1s. 4d. per pound, & on analysis it contained only 15 per cent. of pure coffee. M. sold it exactly as it came from the manufacturer:—*Held*: the magistrate was bound, notwithstanding the label, to find whether the chicory was used fraudulently to increase the bulk, & if so he ought to convict. *v. MEDDINGS* (1880), 44 J. P. 231.

— — —.]—(1) Applts. were summoned for selling to the prejudice of the purchaser coffee adulterated with 74 per cent. of chicory. It was proved that an inspector on asking for half a pound of coffee was supplied, at the price of 11d., with half a pound of a mixture of which 74 per cent. was chicory & 26 per cent. was coffee, & with two coupons entitling him to certain other

PART II. SECT. 3, SUB-SECT. 3.—
C. (a).

110 i. Whether purchaser prejudiced—Purchase for analysis.]—A licensing inspector went to deft.’s hotel, & acting under the powers conferred by Licensing Act, s. 19, demanded & obtained a sample of brandy for which he paid 2s. Having had the sample analysed he laid an information against the hotelkeeper, under Adulteration Act, s. 5, for selling, to the prejudice of the purchaser, an article of drink which was not of the nature, substance, or quality demanded, & obtained a conviction:—*Held*: there had been no sale within the meaning of s. 5 & the conviction was erroneous.—*LENTHALL v. CROW* (1895), 16 N. S. W. L. R. 111; 11 N. S. W. W. N. 166.—*AUS.*

constitute an offence under Sale of Food & Drugs Act, 1875, s. 6, the sale must be to the prejudice, though not necessarily the pecuniary prejudice of the purchaser, & a public officer purchasing for analysis under the compulsory powers conferred by ss. 13 to 17 could not be prejudiced in the sense of s. 16.—*DAVIDSON v. M’LEOD* (1877), 5 R. (Ct. of Sess.) 1; 15 Sc. L. R. 198, J.—*SCOT.*

d. What amounts to prejudice.]—A sale is effected “to the prejudice of the purchaser” within Health Act, 1890 (No. 1098), s. 43, when the purchaser is supplied with an article of food wholly different to the particular article demanded by him.—*RIDER v. FREKBODY* (1898), 24 V. L. R. 429.—*AUS.*

e. — Notice after completion of sale.]—It is not sufficient to prevent a sale from being one to the prejudice of the purchaser within Health Act, 1890, s. 43, that the vendor before the article has been taken away by the purchaser but after the completion of the actual sale has brought to the purchaser’s notice that it is not of the nature demanded.—*RIDER v. BACHUS MARSH CONCENTRATED MILK CO.*, [1905] V. L. R. 147.—*AUS.*

f. —.]—A seller on asked for chicory supplied the purchaser with a composite substance containing chicory without informing him of that fact:—*Held*: the supply of a food or drug other than that demanded was a sufficient prejudice to the purchaser.—*MEHR v. JOHAR NASSERO MUNICIPAL COUNCIL*, [1918] T. P. D. 137.—*S. AF.*

FOOD AND DRUGS.

Sect. 3.—Offences: Sub-sect. 3, C. (b) i., ii. & iii.]

articles. The article sold was labelled "Coffee Mixture," with the words "Sold as a mixture of chicory & coffee," in small print. The inspector's attention was not drawn to the label prior to the sale. The magistrates held that the offence charged had been committed, & that as the chicory had been added fraudulently to increase the weight & bulk of the article sold, the label afforded no protection to applts.:—*Held*: there was evidence to justify this finding.

(2) The following notice was annexed to articles in the shop which were intended to be given in exchange for coupons: "Given away with $\frac{1}{4}$ lb. of tea, also with $\frac{1}{4}$ lb. mixed coffee, $\frac{1}{4}$ lb. cocoa mixture or three tablets of soap."

The expression "mixed coffee" does not necessarily lead the purchaser to assume that the coffee is mixed with something that is not coffee. The word "mixed" did not necessarily convey any information to the person who had it before him (BUCKNILL, J.).—*STAR TEA CO., LTD. v. NEALE* (1909), 73 J. P. 511; 8 L. G. R. 5, D. C.

117. —.].—With regard to the contention that the sample was not of the nature, substance, & quality demanded, the 1875 Act, s. 6, stated that the article should not be sold to the prejudice of the purchaser, but 1875 Act, s. 6 (1), provided that the seller should not be deemed to commit an offence within the Act if the matter or ingredient added was not injurious to health & did not fraudulently increase the bulk, weight or measure, or conceal the inferior quality of it. When the inspector's assistant purchased the sample he asked for mustard, but I hold that he did not expect to get pure mustard, i.e. the mustard seed which had simply been crushed between rollers & then reduced to powder, but table mustard, such as was supplied in the ordinary way for table purposes. Neither the wheat flour nor the turmeric which was mixed with the mustard was injurious to health, nor were they fraudulently intended to increase the bulk, weight or measure of the article, nor to conceal its inferior quality. Those added ingredients were not to the prejudice of the purchaser, while a label distinctly & lightly printed, stating that the article was mixed, was delivered with the packet at the time it was sold. I, therefore, consider the Act of Parliament [1875 Act] has been complied with, & for the reasons I have given I shall dismiss the case (*per CUR.*).—*HORDER v. GRAINGER* (1880), 44 J. P. Jo. 188.

118. —. Notice must be clear & unequivocal.]—An agent of, & acting at the instance of, an inspector under 1875 Act, entered the shop of a provision dealer &, pointing to an article labelled "Valleyfield Finest Oleine Cheese," demanded two pounds of cheese. The words "Finest Oleine" were in smaller type than the other words. He did not notice the word "oleine" & did not know its meaning. He received the article & paid for it. The inspector then entered the shop

& notified that he intended to have the substance analysed. The purchaser did not receive any label notifying that the article was a mixture. The analysis showed the article to contain 70 per cent. of fat other than milk fat. The magistrate held that there was no sufficient indication of the admixture of the foreign ingredient, & that the purchaser was supplied to his prejudice with an article not of the nature & substance demanded:—*Held*: the vendor was rightly convicted of selling the article to the prejudice of the purchaser.—*COLLETT v. WALKER* (1895), 64 L. J. M. C. 267; 59 J. P. 600; 11 T. L. R. 572, D. C.

—*STAR TEA CO., LTD. v. NEALE*, No. 116, *ante*.

120. —.].—In selling spirits diluted with water only, the seller is not liable to a penalty under 1875 Act, s. 6, if he brings to the knowledge of the purchaser at the time of the sale the fact that the spirits are diluted so as to be reduced more than the number of degrees under proof specified in 1879 Act, s. 9, because, if that fact be brought to the knowledge of the purchaser, the sale cannot be said to be to the prejudice of the purchaser. It is not necessary that the seller should give notice of the admixture of the water with the spirits by a label in accordance with the provisions of 1875 Act, s. 8.—*PALMER v. TYLER* (1897), 61 J. P. 389.

Annotations: —*Refd.* *Dawes v. Wilkinson*, [1907] 1 K. B. 278; *Rodbourn v. Hudson* (1924), 41 T. L. R. 132.

121. Substance of information to be given question of law—Sufficiency of notice question of fact.]—*RODBOURN v. HUDSON*, No. 140, *post*.

ii. By Label.

122. That coffee mixed with chicory—"Coffee & chicory."—*HIGGINS v. HALL*, No. 133, *post*.

123. —.].—*OTTER v. EDGLEY*, No. 134, *post*.

124. —.].—*STAR TEA CO., LTD. v. NEALE*, No. 116, *ante*.

125. On wrapper.]—*PEARKS, GUNSTON & TEE, LTD. v. HOUGHTON*, No. 143, *post*.

126. —.].—*HAYES v. RULE*, No. 144, *post*.

127. Covered by wrapping.]—J. was charged with selling cocoa not of the substance, etc. The article was packed in a tin, & a label in small print stated the cocoa was mixed, & the tin was delivered, wrapped in opaque paper, to purchaser. The article had been so sold, mixed, for thirty years. When analysed there was 30 per cent. cocoa & 70 per cent. starch:—*Held*: the quarter sessions were wrong in holding the label did not comply with 1875 Act, s. 8, & in holding that the mixture was for fraudulent purposes.

There was a label on the article which distinctly stated that the article was mixed. It has been seriously contended that it was no label because it was wrapped up in opaque paper at the time of being sold. The paper covering was merely the usual

PART II. SECT. 3, SUB-SECT. 3.— **C. (b) ii.**

g. False statement as to remedial effect of drug.]—Under Pure Food Act, s. 5 (m), a drug is falsely described when it is in package & the package or any label attached thereto bears a statement regarding such drug or the ingredients or substance contained

therein, which is false or in any particular:—*Held*: a false statement as to the remedial effect of a drug being a mere statement of opinion does not come within the purview of the Act.—*Ex p. BOYNTON* (1917), 17 S. R. N. S. W. 152; 34 N. S. W. W. N. 60.—**AUS.**

h. Sufficiency of notice—Standard

fixed by court.]—An inspector entered a shop & asked what kinds of brandy were sold there; he was told "Tricoche's brandy," but did not catch the word & left the premises. He returned in ten minutes, & asked for a bottle of brandy. He was supplied with a bottle of liquid labelled "Old Brandy, Tricoche & Co., Cognac, xxx," which proved on analysis to be inferior

way of giving the article to a purchaser. . . . To say that there was no label because of it being wrapped up is an absurdity (MATHEW, J.).—JONES v. JONES (1894), 58 J. P. 653; 10 T. L. R. 300; 38 Sol. Jo. 326, D. C.

Annotations:—**Distd.** Pearks, Gunston & Tee v. Houghton, [1902] 1 K. B. 889. **N.F.** Batchelour v. Geo, [1914] 3 K. B. 242. **Folld.** Clifford v. Battley, [1915] 1 K. B. 531. **Reid.** Toler v. Bishop (1895), 73 L. T. 403; Star Tea Co. v. Neale (1909), 73 J. P. 511.

128. ———.]—A purchaser having asked for cream was supplied with a mixture of cream & boric acid. The mixture was poured from a can into an earthenware pot. Affixed to the pot was a label on which were legibly printed the words, "Preserved cream containing boric acid not exceeding 0.5 per cent." The pot having been filled was placed on the counter & at once covered with a plain paper bag. The purchaser could not & did not see that the pot bore any label. The pot was placed in the bag for the convenience of the purchaser, & there was no intention of concealing the label from him:—*Held*: the vendor, having failed to bring to the mind of the purchaser the fact that there was a label on the pot, had not supplied to the person receiving the article a notice to the effect that same was mixed within the meaning of 1875 Act, s. 8.—**BATCHELLOUR v. GEE**, [1914] 3 K. B. 242; 83 L. J. K. B. 1714; 111 L. T. 256; 78 J. P. 362; 30 T. L. R. 506; 12 L. G. R. 931; 24 Cox, C. C. 268, D. C.

Annotation:—**N.F.** Clifford v. Battley, [1915] 1 K. B. 531.

129. ———.]—Applt. requested resp., a grocer, to sell to him a number of articles, including a half pound of coffee. Resp. sold to applt. all those articles wrapped together in a piece of brown packing paper for the convenience of applt. in taking them away & in accordance with what is a well recognised & general custom of trade. There was no notice or statement upon the outer wrapper. No verbal statement was made to the purchaser at the time of the sale or delivery to him of the goods, both of which took place in resp.'s shop. Upon opening the parcel the purchaser saw that the half pound of coffee was enclosed in a wrapper bearing the words, "This is sold as a mixture of coffee & chicory." Those words were clearly & legibly printed, & no other words appeared upon the wrapper. The purchaser had no opportunity of seeing & did not in fact see the notice until he opened the brown paper parcel. The coffee contained 22 per cent. of chicory. The admixture of chicory was not excessive & was not intended fraudulently to increase the bulk, weight, or measure of the article sold, nor to conceal its inferior quality. It is a usual & well known practice in the grocery trade to supply a mixture of coffee & chicory & to deliver the mixture in a wrapper bearing the words which were upon the wrapper used in the present case:—*Held*: resp. was within the protection afforded by 1875 Act, s. 8, & had therefore not committed an offence under 1875 Act,

s. 6. Sect. 8 does not say that the person delivering the article must "give notice," but if he "shall supply . . . a notice by a label" to a person receiving the article to the effect that same is mixed he shall not be guilty of an offence under sect. 6, & there is no obligation upon him to call the attention of the purchaser to the label.—**CLIFFORD v. BATTLE**, [1915] 1 K. B. 531; 84 L. J. K. B. 615; 112 L. T. 765; 79 J. P. 180; 31 T. L. R. 117; 13 L. G. R. 505; 24 Cox, C. C. 653, D. C.

130. Material words in smaller type than rest of label.—**COLLETT v. WALKER**, No. 118, *ante*.

131. Material word struck out & "substitute" written in pencil.—(1) Resp.'s servant, having been asked by applt., an inspector charged with the execution of the Sale of Food & Drugs Acts, for paregoric, sold him a substance which contained only half the proper amount of alcohol & no tincture of opium, which it should have contained, according to the British Pharmacopoeia. It was placed in a bottle labelled "Paregoric, Poison," but the word "poison" was struck out, & the word "substitute" written in pencil, & the bottle was wrapped up in paper before it was handed to applt. At the hearing before the justices it was proved that paregoric was not sold, as the assistant was unqualified, & so could not sell poisons, & that on the day following the sale resp. wrote applt. a letter informing him of the true facts of the case:—*Held*: under the circumstances there was no sale to the prejudice of the purchaser, & so no offence had been committed under 1875 Act, s. 6.

(2) *Seemle*: the case did not come within 1875 Act, s. 8, as a sale of an article mixed with a non-deleterious ingredient where notice of the mixing is given by a label at the time of delivering the article.—**BUNDY v. LEWIS** (1908), 99 L. T. 833; 72 J. P. 489; 7 L. G. R. 55; 21 Cox, C. C. 744, D. C.

No defence in case of fraud.—*See Nos. 114-116, ante.*

Disclosure of alteration of article.—*See Subject. 5, B., post.*

iii. By Verbal Communication.

132. What must be stated.—35 & 36 Vict. c. 74, s. 3, enacts that, "any person who shall sell any article of food . . . knowing same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, & who shall not declare such admixture to any purchaser thereof before delivering same & no other, shall be deemed to have sold an adulterated article of food . . . under this Act":—*Held*: a person who had sold mustard admixed with flour & turmeric, substances not injurious to health, declaring at the time of such sale that he did not sell the article as pure mustard, had been guilty of no offence under 35 & 36 Vict. c. 74, & it was

to the standard accepted by the sheriff-substitute:—*Held*: the purchaser had not such notice of the nature of the liquid supplied to him as to render invalid a conviction for selling it to his "prejudice."—**WILSON & M'PHEE v. WILSON** (1903), 68 J. P. 175.—**SCOT.**

k. ———. *Label not conspicuous.*—The quantity of water in buttermilk was largely in excess of the quantity allowed by the regulations, & the notice on the label attached to defts.

churn was not conspicuous, & was not sufficiently brought to the notice of the purchaser, & the buttermilk was not of the nature, substance, & quality demanded:—*Held*: the magistrates were right in convicting defts., & the notice to the purchaser by label was insufficient.—**McLORCHIN v. FULTON** (1921), 55 L. L. T. 202.—**IR.**

milk — "Not ranted 3 p.c."—A dairyman sold to a purchaser, who asked for sweet milk,

milk from a can which was labelled "not guaranteed 3 p.c." The purchaser saw the label, & understood it to mean that the milk in the can was not guaranteed to contain 3 p.c. of milk fat. Subsequently analysis disclosed that the milk was sweet milk, with some admixture of skimmed milk:—*Held*: the label did not sufficiently notify that the contents were not sweet milk.—**SORTER v. LEAN** (1903), 4 Adam, 280.—**SCOT.**

FOOD AND DRUGS.

Sect. 3.—Offences: Sub-sect. 3, C. (b) iii. & iv.]

not necessary, in order to comply with s. 3, that he should declare the nature & proportion of the substances admixed.—*POPE v. TEARLE* (1874), L. R. 9 C. P. 499; 43 L. J. M. C. 129; 30 L. T. 789; 38 J. P. 583; *sub nom.* *R. v. BEDFORD JJ.*, *POPE v. TEARLE*, 22 W. R. 950.

188. That coffee mixed with chicory.]—A. went into H.'s shop & asked for half a pound of coffee. H. said he did not keep it, whereon A., pointing to certain tins labelled "coffee & chicory," H. said she sold that as a mixture, & A. asked for half a pound of it, which H. sold. The mixture contained about 30 per cent. of coffee. H. was charged with selling coffee not of the nature, etc., of coffee:—*Held*: the justices were wrong in convicting H. of selling coffee, for that she sold only a mixture as she was entitled to do, & in doing which she committed no offence within 1875 Act, s. 6.—*HIGGINS v. HALL* (1886), 51 J. P. 293, D. C.

134. —.] — O. sold French coffee, the label stating that it was mixed with chicory, & the purchaser was also told same. The analysis showed there was 60 per cent. chicory, & 40 per cent. coffee. The justices convicted O., holding that, as the proportion of chicory was not stated, it must have been added fraudulently to increase the bulk:—*Held*: the justices were wrong, & there was no evidence to support a conviction.—**OTTER v. EDGLEY** (1893), 57 J. P. 457, D. C.

iv. *By Written Notice in Premises.*

135. General rule.] — Where a sale has taken place of an article of food which was not of the nature, substance, & quality demanded, the presumption is that the purchaser has been prejudiced within 1875 Act, s. 6, & it is no defence to a prosecution under that sect. to show that a general notice protecting the seller was exhibited, unless the purchaser actually saw the notice or his attention was drawn to it at or before the time of sale.

Resp. was the licensee of a public-house. Applt. entered the bar & asked for half a pint of whisky with which he was supplied. After due compliance with 1875 Act, the whisky was analysed & proved to be 42·28 degrees under proof. In the bar was a notice in the following terms : " All spirits sold in this establishment are diluted & no alcoholic strength is guaranteed." The justices found that applt. did not observe the notice & his attention was not drawn to it, nor was he told that the spirits sold to him were sold as diluted spirits at or before the time he made the purchase. On an information by applt. under 1875 Act, s. 8, alleging that resp. had sold to the prejudice of the purchaser an article of food which was not of the nature, substance, & quality demanded by him, the justices were of opinion that the notice exhibited in the bar was a sufficient notice to applt. even though he did not see it, &

that by reason of the notice so exhibited applt. was not prejudiced by the sale:—*Held*: the presumption that a purchaser was prejudiced to whom an article was sold which was not of the nature, substance, & quality demanded was not rebutted by showing that the seller had exhibited a notice which the purchaser did not see, & to which his attention was not drawn. The 1875 Act, had reference to transactions with individual purchasers & it was not enough to show that the "average" purchaser would see & read the notice, if complainant did not see it in fact.—*PRESTON v. GRANT*, [1925] 1 K. B. 177; 94 L. J. K. B. 125; 132 L. T. 203; 88 J. P. 198; 41 T. L. R. 90; 69 Sol. Jo. 276, D. C.

Annotation :—*Reid. Rodbourne v. Hudson* (1924), 41 T. L. R. 132.

136. Public-house.]—Applt. sold to resp. gin more than 35 degrees under proof, but, at the time of sale, brought to his knowledge a printed notice hanging up in the room, to the effect that all spirits were sold “as diluted spirits, no alcoholic strength guaranteed”:—*Held*: (1) although applt. had not a good defence under 1870 Act, s. 6, he was not by that sect. deprived of any defence which he would have had under 1875 Act; & (2) the sale not having been to the prejudice of the purchaser, no offence had been committed under 1875 Act, s. 6.—*GAGE v. ELSEY* (1883), 10 Q. B. D. 518; 52 L. J. M. C. 44; 48 L. T. 226; 47 J. P. 391; 31 W. R. 500, D. C.

Annotations :—As to (1) **Consd.** Dawes v. Wilkinson, [1907] 1 K. B. 278. As to (2) **Consd.** Rodbourne v. Hudson (1924), 41 T. L. R. 132.

137. —.]—T. went into J.'s public-house &, without going into the bar or kitchen went into a club room & asked for whisky, & that supplied was 37 degrees under proof. A notice that "all spirits sold are diluted" was stuck up in the bar & kitchen, but not in the club room, & nothing was said to T. on delivery:—*Held*: the justices ought to have inquired before deciding whether T. knew that the practice was at J.'s house to sell only diluted spirits, in which case no conviction was proper.—*MORRIS v. JOHNSON* (1890), 54 J. P. 2; 6 T. L. R. 171, D. C.

Annotation :—**Reid**. *Rodbourne v. Hudson* (1924), 41 T. L. R. 132.

138. — Sufficiency of notice—Notice that all articles sold are diluted.]—MORRIS v. ASKEW (1893), 57 J. P. Jo. 724, D. C.

Annotation :—*Reid v. Rodbourne* (1924), 41 T. L. R. 132.

139. ——— Notice that all articles sold are not of any guaranteed strength.]—A notice exhibited by an innkeeper that "All spirits sold in this establishment in order to comply with the Food & Drugs Act, will not be of any guaranteed strength" is not sufficient to bring to the mind of the purchaser the fact that the spirits sold are diluted to a strength below the standard provided by 1879 Act, s. 6. Therefore, where rum is sold by the innkeeper consisting of 96·3 parts of rum of 25 degrees under proof as

PART II. SECT. 3, SUB-SECT. 3.—
C. (b) iv.

188 i. Public-house.—Sufficiency of notice—Notice that all articles sold are diluted.)—Where a person sells spirits mixed with water, having at the same time a conspicuous notice posted in the room in which the spirits are sold notifying that all spirits sold there are so mixed, he is not liable to prosecution under Adulteration Act, 1880, s. 7.

as the exhibiting of the notice, whether seen by the purchaser or not, negatives the imputation of fraud. *Semble*: such notice, though not brought to the knowledge of the purchaser, is a sufficient declaration of the admixture. —**HARDING v. MILTON** (1884), 3 N. Z. L. R. 17 (S. C.).—**N.Z.**

139 i. _____ that all
articles sold are not of any

strength.}]—A licence-holder exhibited in his premises a notice in the following terms:—"All spirits sold in this establishment are diluted. No strength guaranteed." In response to a demand for "whisky," he sold to a purchaser spirit which was found on analysis to be more than thirty-five degrees under proof:—*Held*: in spite of the notice, the sale was in contravention of Sale of Food & Drugs Act, 1875, s. 6.

mentioned in 1879 Act, s. 6, & 3·7 parts of added water, the notice is not sufficient to protect the innkeeper from conviction under 1875 Act, s. 6, for selling rum to the prejudice of the purchaser. —**DAWES v. WILKINSON**, [1907] 1 K. B. 278; 76 L. J. K. B. 182; 96 L. T. 26; 71 J. P. 23; 23 T. L. R. 34; 51 Sol. Jo. 29; 5 L. G. R. 1; 21 Cox, C. C. 340, D. C.

Annotation:—**Consd.** *Rodbourn v. Hudson* (1924), 41 T. L. R. 132.

140. ———.]—(1) Applt., the licensee of a public house, was asked by a purchaser for one & a half quarterns of rum. Applt. supplied the rum from a bottle which had no label on it, but which was in the bar where the purchaser saw & read a notice in these terms: "All spirits sold at this establishment are of the same superior quality as heretofore, but to meet the requirements of the Sale of Food & Drugs Acts they are now sold as diluted spirits. No alcoholic strength guaranteed." Nothing was said at the time about the strength of the rum, which on analysis was found to be 41½ degrees under proof. In a prosecution of applt. for selling the rum to the prejudice of the purchaser, the justices were of opinion that the above notice was ambiguous & did not convey to the mind of the purchaser the fact that when he asked for rum he was supplied with spirits so diluted as to reduce the strength below the minimum specified in Licensing Act, 1921 (c. 42), s. 10, & they therefore found that the sale was to the prejudice of the purchaser, & convicted applt.:—**Held**: the notice was misleading, & the justices were entitled to find that the sale was to the prejudice of the purchaser.

(2) Where a person charged with selling to the prejudice of the purchaser an article of food not of the nature, substance & quality demanded by him, relies on the display of a notice, the two questions involved are:—(a) What is the substance of the information which must be given to the purchaser? This is a question of law, & the purchaser must be told in substance that the thing which he is getting is not the thing which he asked for; (b) were the steps taken sufficient in all the circumstances to convey this information to the mind of an average purchaser? This is a question of fact in each case, & only arises when the particular purchaser in question in fact saw the notice.—**RODBOURN v. HUDSON**, [1925] 1 K. B. 225; 94 L. J. K. B. 129; 132 L. T. 444; 89 J. P. 25; 41 T. L. R. 132; 69 Sol. Jo. 275.

141. ———.]—**PALMER v. TYLER** (1897), 61 J. P. 389, D. C.

Annotations:—**Distd.** *Dawes v. Wilkinson*, [1907] 1 K. B. 278. **Consd.** *Rodbourn v. Hudson*, [1925] 1 K. B. 225.

142. ——— **Notice not seen by purchaser.**—**PRESTON v. GRANT**, No. 135, *ante*.

143. Shop.]—Appls., a firm of provision merchants, displayed on the wall of their shop in a conspicuous position, so as to be visible to any one entering the shop, a large notice to the effect that their butter, as sold at that establishment, was choicest butter, blended with pure English full cream milk, by new & improved machinery, whereby it retained about 20 to 24 per cent. of moisture. A purchaser who did not see the notice, & whose attention was not called to it, bought half a pound of shilling butter, which was

handed to him was wrapped in two pieces of paper; on the inside paper or wrapper was printed a notice similar to that hung up in the shop, the outer wrapper being a piece of plain opaque paper. When analysed, the butter was found to contain 23·8 per cent. of water, which was 7·8 in excess of the natural amount of 16 per cent.:—**Held**: (1) assuming that only one kind of butter was sold in the shop, the seller was protected by the notice displayed on the wall of the shop, & the sale was not to the prejudice of the purchaser within 1875 Act, s. 6; (2) *Seemle*: the label on the inner wrapper in which the butter was delivered was not a sufficient notice by label within 1875 Act, s. 8. — **PEARKS, GUNSTON & TEE, LTD. v. HOUGHTON**, [1902] 1 K. B. 889; 71 L. J. K. B. 385; 86 L. T. 325; 66 J. P. 422; 50 W. R. 605; 18 T. L. R. 362; 46 Sol. Jo. 395, D. C.

Annotations:—*As to* (1) **Consd.** *Preston v. Grant* (1924), 88 J. P. 198. **Refd.** *Rodbourn v. Hudson* (1924), 41 T. L. R. 132. *As to* (2) **Folld.** *Batchelour v. Gee*, [1914] 3 K. B. 212. **Consd.** *Clifford v. Battley*, [1915] 1 K. B. 531. **Refd.** *Hayes v. Rule* (1902), 87 L. T. 133; *Star Tea Co. v. Neale* (1909), 73 J. P. 511.

144. ———.]—To a purchaser who went into a shop & asked for half a pound of best fresh butter the seller sold butter which was found to be adulterated by the addition of water, & which was in fact milk blended butter containing an excess of water. There was hung in a conspicuous place in the shop a notice that all butter sold in the shop was milk blended butter, & the butter when handed to the purchaser was wrapped in a paper wrapper on which was printed a notice that the butter was choicest butter blended with milk, whereby the percentage of water in it was increased. Upon an information against the seller under 1875 Act, s. 6, for selling butter which was not of the nature, substance & quality of the butter demanded, the justices found that the sale was to the prejudice of the purchaser, but that the seller was protected by 1875 Act, s. 8, by reason of the notice in the shop, & by reason that the butter was wrapped in a printed notice disclosing the fact that the article was a mixture, but there was no finding by them as to whether the notice on the wrapper could or could not be seen by an ordinary purchaser:—**Held**: the notice on the wrapper was a sufficient notice by label within 1875 Act, s. 8, & was a good defence under that act, & the justices were right in dismissing the information.—**HAYES v. RULE** (1902), 87 L. T. 133; 66 J. P. 661; 18 T. L. R. 535; 46 Sol. Jo. 465; 20 Cox, C. C. 328, D. C.

Folld. *Batchelour v. Gee*, [1914] 3 K. B. 212. **Refd.** *Preston v. Grant* (1924), 88 J. P. 198.

145. ———.]—Applt., a dairyman, exhibited a notice in his shop, which could be read by any purchaser, that "all cream sold at this establishment contains a small proportion of boron preservative, not exceeding one half of 1 per cent., to keep it sweet & wholesome, which has been the recognised method of preservation for over twenty years." A purchaser asked for & bought at applt.'s shop some cream, which upon analysis was found to contain an amount of boron preservative slightly less than that stated in the notice. The purchaser had read the notice before being supplied with the cream. Upon an information against applt. under 1875 Act, s. 6, for having sold to the prejudice of the purchaser

spirit more than thirty-five degrees under proof not being "whisky" & the terms of the notice not giving

clear & unambiguous information to the purchaser of the character of the article with which he was

being supplied.—**BRANDLER v. KISSER, v. SOUTAR, WILLIAMSON v.**, [1923] S. C. (J.) 42. — **SCOT.**

FOOD AND DRUGS.

Sect. 3.—Offences: Sub-sect. 3, C. (b) iv. & D. (a).]

cream which was not of the nature, substance, & quality of the article demanded by the purchaser, the justices convicted him, finding that the cream was injurious to health:—*Held*: as the purchaser had notice that the cream was mixed with an ingredient, though he was not told the exact nature or effect of that ingredient, & as he chose to buy the cream so mixed, the sale was not to his prejudice within the meaning of s. 6, & the conviction was wrong.—*WILLIAMS v. FRIEND*, [1912] 2 K. B. 471; 81 L. J. K. B. 756; 107 L. T. 93; 76 J. P. 301; 28 T. L. R. 407; 10 L. G. R. 494; 23 Cox, C. C. 88.

Annotations:—*Reid*. Dearden v. Whiteley (1916), 85 L. J. K. B. 1420; Rodbourne v. Hudson (1924), 41 T. L. R. 132.

D. Nature, Substance, and Quality of Article demanded.

(a) In General.

See 1875 Act, s. 6.

146. Question of fact.]—Applt., a publican, was convicted under 1875 Act, s. 6, for "selling to the prejudice of the purchaser a pint of gin which was not of the nature, substance, & quality of the article demanded by such purchaser." A person asked for a pint of gin at applt.'s premises. Applt. said that he had gin at 2s. & 1s. 4d. per pint. The purchaser bought a pint at the latter price. On analysis the gin was found to contain 43.15 per cent. of water, that is, it was 43.15 below proof, but the mixture was not injurious to health. The magistrate found that there was no recognised standard of alcoholic strength for gin, but that it varied from proof to 20 under proof:—*Held*: whether the mixture in question was what a purchaser buying gin without any further description would reasonably expect to receive was a question of fact for the magistrate, & that there was sufficient evidence to justify the conviction.—*WEBB v. KNIGHT* (1877), 2 Q. B. D. 530; 46 L. J. M. C. 261; 36 L. T. 791; 41 J. P. 726; 26 W. R. 14, D. C.

Annotation:—*Reid*. Hunt v. Richardson, [1916] 2 K. B. 446.

147. ——— Right of court to take into consideration facts within own knowledge.]—Upon the hearing of a complaint under 1875 Act, s. 6, justices, applying their own special knowledge of the article alleged to be adulterated, & without hearing evidence in contradiction of the public analyst's certificate, considered that the case came within the proviso to the sect. Being doubtful, however, as to whether a technical offence had not been committed, but considering that, if it had, it was, in the absence of fraud, of too trifling a nature to merit a penalty, they discharged accused under Summary Jurisdiction Act, 1879 (c. 49), s. 16:—*Held*: (1) the justices need state no case, for though technically wrong in not hearing evidence in contradiction to the analyst's certificate, yet they were not bound to discard their own particular knowledge of & acquaintance with the subject-matter of the complaint, founded on practical experience; (2) fraud was no element of an offence under 1875 Act, s. 6, & had the justices entertained

the question of fraud they would have been wrong; but in determining whether they should act under sect. 16 of the Summary Jurisdiction Act, 1879 (c. 49), s. 16, they could take the fact of absence of fraud into their consideration.—*R. v. FIELD, ETC. JJ., Ex p. WHITE* (1895), 64 L. J. M. C. 158; 11 T. L. R. 240, D. C.

Annotations:—*Folld*. Shortt v. Robinson (1899), 68 L. J. Q. B. 352; Preston v. Reaper (1912), 107 L. T. 410. *Reid*. Hunt v. Richardson, [1916] 2 K. B. 446.

148. ———.]—Justices are not bound, upon the hearing of a complaint under 1875 Act, s. 6, to discard their own knowledge of the properties of the article alleged to be adulterated, although such knowledge be derived from a report upon the particular article by authorities at Somerset House, which report has been produced by deft. for the mere cross-examination of the analyst, & is not in evidence in the proceedings.—*SHORTT v. ROBINSON* (1899), 68 L. J. Q. B. 352; 80 L. T. 261; 63 J. P. 295, D. C.

Annotation:—*Reid*. Hunt v. Richardson, [1916] 2 K. B. 446.

149. ———.]—On Nov. 10, 1911, P. demanded of & purchased from R.'s son, as agent for R., half a pint of milk, which R.'s son took from a tin or churn. P. duly took a sample for analysis. Upon a summons for selling milk to the prejudice of P., the purchaser, the certificate of the public analyst was put in by P. which certified that in his opinion the sample analysed, which contained 7.48 per cent. of non-fatty solids, contained 12 per cent. of added water calculated on the limit of the Board of Agriculture, which is 8.5 per cent. of non-fatty solids. No change had taken place in the constitution of the article that could interfere with the analysis. No evidence was called by R. nor did he give evidence himself or require that the public analyst should be called as a witness. The tin or churn from which the milk was taken was not stirred prior to the milk purchased by P. being taken therefrom. The justices were of opinion from their own knowledge that the sample as taken by P. did not fairly represent the whole contents of the vessel containing the milk, & that the slight deficiency in the standard prescribed by the Sale of Milk Regulations, 1901, relating to milk might be due to causes other than abstraction of solids or the addition of water, & they felt that they were not justified in convicting on so small a percentage of water being shown in excess of the regulations, having regard to the fact that the article supplied to applt. was of good quality. They were further of opinion that the offence was in any event of so trivial a nature that they were justified in dismissing the information:—*Held*: on appeal, the justices were entitled to take their own knowledge into account in deciding whether the offence was trivial, & to dismiss the charge.—*PRESTON v. REDFERN* (1912), 107 L. T. 410; 76 J. P. 359; 28 T. L. R. 435; 10 L. G. R. 717; 23 Cox, C. C. 166.

Annotation:—*Reid*. Hunt v. Richardson, [1916] 2 K. B. 446.

150. ——— Absence of statutory standard.]—On an information under sect. 6 of 1875 Act, for unlawfully selling to the prejudice of a purchaser

PART II. SECT. 3, SUB-SECT. 3. **D. (a).**

146 i Question of fact.]—In the
of an a as brandy, where no

standard of purity has been fixed by regulation, the question whether the article supplied is of the nature, quality, & substance demanded is one of fact to be decided by the sheriff on

the evidence before him.—*WILSON & M'PHEE v. J.* (1903), 6 F. (Ct. of Sess.) 10; 41 Sc. L. R. 195; 11 L. T. 578, J.—*SCOT*.

PART II.—ADULTERATION AND IMPOVERISHMENT.

a certain article of food, margarine, not of the nature, substance & quality demanded by the said purchaser, the justices found as a fact that there was a sale to the prejudice of the purchaser, as they were of opinion that the article sold was not of the nature, substance & quality demanded, the evidence before them proving to their satisfaction that margarine as usually sold contained at least 85 per cent. of fat, & they convicted deft. It appeared that the margarine sold contained only 75·15 per cent. of fat:—*Held*: (1) as there is no statutory standard for margarine, the justices on such an information must fix for themselves a standard for margarine, based upon the evidence before them; (2) there was evidence before the justices on which they could come to the conclusion that margarine as usually sold contained at least 85 per cent. of fat.—*ROBERTS v. LEEHING* (1905), 69 J. P. 417; 3 L. G. R. 1031.

Annotation:—As to (1) *Appld.* *Hunt v. Richardson*, [1916] 2 K. B. 446.

151. "Nature" of article demanded—Article wholly different—Savin for saffron.—*Resp.*, a herbalist, was charged before a stipendiary, under 1875 Act, s. 6, with selling, to the prejudice of the purchaser, a certain drug which was not of the nature, substance, & quality of the article demanded. It was proved that the purchaser had asked for "saffron," & was supplied with "savin," in its natural condition, & not admixed or compounded with any other drug, article, or ingredient. The stipendiary dismissed the information, on the ground that it was no offence, under 1875 Act, to sell an article pure in itself but not the one demanded:—*Held*: he was wrong in so doing, & the case must be remitted for further hearing.—*KNIGHT v. BOWERS* (1885), 14 Q. B. D. 845; 54 L. J. M. C. 108; 53 L. T. 234; 49 J. P. 614; 33 W. R. 613; 1 T. L. R. 390; 15 Cox, C. C. 728, D. C.

Annotation:—*Appld.* *Hunt v. Richardson*, [1916] 2 K. B. 446.

152. ——— Tapioca for sago.—*Resp.* being asked to sell sago, delivered to applt. as purchaser pearl tapioca of a quality & description which, by the custom of the trade, was sold as sago. There was no appreciable difference in the value of the two articles, but the pearl tapioca being whiter looking, the public, as a rule, had for a considerable number of years demanded it in preference to the darker coloured sago by the name of sago. *Resp.* was summoned under 1875 Act, s. 6:—*Held*: the justices might find that such sale was not to the prejudice of the purchaser, & might, on that ground, dismiss the information.—*SANDYS v. RHODES* (1903), 67 J. P. 352.

Annotation:—*Refd.* *Hunt v. Richardson*, [1916] 2 K. B. 446.

153. ——— Sardines in cotton-seed oil for sardines in olive oil.—*WINTERBOTTOM v. ALLWOOD*, No. 50, *ante*.

154. "Quality" of article demanded—Commercial quality.—An information was preferred by *resp.* against applt. & another for unlawfully selling to the prejudice of the purchaser mixed butter & margarine which was not of the nature, substance, & quality of the article demanded by the purchaser, there being a proportion of 80 per cent. of foreign fat, 15½ per cent. of water, curd, & salt, & 4½ per cent. of butter contrary to 1875 Act. An agent of *resp.*, acting upon his instructions, went to applt.'s shop & asked an assistant for two ounces of butter at 1s. 2d. per lb. The assistant informed *resp.*'s agent that applt. did

not sell butter at the shop at the price of 1s. 2d. per lb., but that he did sell a mixture of butter & margarine at 1s. 2d., which was very good. *Resp.*'s agent stated to the assistant that she would have two ounces of the mixture, & the same was put up in a wrapper & supplied to her accordingly by the assistant upon payment of 1½d. At the date of the sale of the retail price of margarine was 6d., 8d., & 10d. per lb., & the retail price of butter was 1s. 2d. to 1s. 6d. per lb. The magistrate was of opinion that an offence had been committed on the ground that in view of the proportions of the several ingredients the mixture could be regarded only as a colourable one, & that in describing it as "very good" & selling it at the price named it was intended to deceive the purchaser by leading him to believe that it contained a substantial proportion of butter, whereas the analysis disclosing only a small percentage of butter fat showed that it contained no such substantial proportion. He accordingly convicted applt.:—*Held*: (1) the word "quality" in sect. 6 of 1875 Act meant commercial quality of the article sold & not merely its description; (2) regard must be had to sect. 8 of 1899 Act, which the magistrate had not before him, & which makes it unlawful to sell any margarine "the fat of which contains more than ten per cent. of butter fat." Therefore, when considering the amount of butter the purchaser of a mixture of margarine & butter had a right to expect, the law which makes it an offence to sell margarine mixed with more than 10 per cent. of butter must be taken into account, & it was impossible to hold that there was evidence in the present case of a colourable sale. The conviction must therefore be quashed. *ANNES v. GRIVELL*, [1915] 3 K. B. 685; 85 L. J. K. B. 121; 113 L. T. 995; 79 J. P. 558; 13 L. G. R. 1215; 25 Cox, C. C.

Annotation: *Refd.* *Hunt v. Richardson*, [1916] 2 K. B. 446.

155. ——— Effect of provision in contract as to quality.—*FEW v. ROBINSON*, No. 495, *post*.

——— *Compare* No. 250, *post*.

——— **No statutory standard.**—*See* No. 150, *ante*.

——— **Sale of article of low quality.**—*See* Nos. 164-166, *post*.

——— **Standard prescribed by British Pharmacopœia.**—*See* Nos. 158-161, *post*.

——— **Particular articles not of quality demanded.**—*See* Sub-sect. 3, D. (b), *post*.

156. Article "demanded"—What is a demand.—An inspector, having asked *resp.* for a sample from certain milk churns, was supplied with such sample, but the inspector made no request in terms to be supplied with milk. A sample having been given, it was found on analysis to be deficient in milk fat: *Held*: there was no sale to the prejudice of the purchaser within 1875 Act, s. 6.

The facts set out in the case show, I think, that the purchaser obtained what he demanded, i.e. a sample from the churn, & that his request for this sample did not amount to a request to be supplied with milk so as to support an information under 1875 Act, s. 6. There was a demand in one sense but not a demand under 1875 Act, s. 6 (*LORD ALVERSTONE, C.J.*).—*SANDYS v. JACKSON* (1905), 92 L. T. 616; 69 J. P. 171; 3 L. G. R. 285, D. C.

Sect. 3.—Offences: Sub sect. 3, D. (b); sub-sect. 4**(b) Particular Instances.**

Butter.—See Part V., Sect. 3, sub-sect. 2, *post*.

157. Demerara sugar.—Applt. went into resp.'s shop & asked to be supplied with a pound of Demerara sugar, & resp. sold to him a pound of sugar as & for Demerara sugar. The sugar was found to be cane sugar crystals & was not genuine Demerara sugar, but was in fact a crystallised cane sugar grown in Mauritius & coloured with an organic dye. It was proved that the commercial value of the sugar was equal to the best grade of West Indian cane sugar, & also that what the public expect & receive under the designation of Demerara sugar is a crystallised cane sugar of a yellow colour, without reference to the country or place of origin. It was admitted by applt. that the term "Demerara sugar" might properly be applied to similar sugar produced in the West Indian Islands, but not to sugar produced elsewhere. Upon a summons under 1875 Act, s. 6, the magistrate dismissed the information on the ground that the term "Demerara sugar" was a generic term applicable to any sugar of the substance, kind, & colour of the sugar in question wherever produced, & that therefore the sale was not to the prejudice of the purchaser:—*Held*: on the facts as found in the case the magistrate was right in holding that the sugar in question was "Demerara sugar," although it had not been produced in Demerara.—**ANDERSON v. BRITCHER** (1913), 110 L. T. 335; 78 J. P. 65; 30 T. L. R. 78; 13 L. G. R. 10; 24 Cox, C. C. 60, D. C.

Annotation:—**Consd.** Hunt v. Richardson, [1916] 2 K. B. 416.

158. Drug—Application of standard prescribed by British Pharmacopœia—Liniment of soap.—In a prosecution under 1875 Act, s. 6, for selling to the prejudice of the purchaser, an article which was not of the nature, substance, & quality of the article demanded, upon the ground that the article, being one mentioned in the British Pharmacopœia was not in accordance with the prescription in the Pharmacopœia, evidence tendered for deft. is admissible to show that there is a commercial standard of the article different from that prescribed by the British Pharmacopœia.

If it was the sale of some drug recognised by a special name in the British Pharmacopœia, a very strong *prima facie* case would be made out as to what that drug ought to contain. All we know of this evidence is that evidence on behalf of appls. was tendered to prove that there was a commercial standard for liniment of soap, different from that prescribed by the British Pharmacopœia. One does not exactly know what that means until we have the evidence tendered under it, but to rule that no evidence of the kind was admissible seems to me to go too far (**LORD ALVERSTONE, C.J.**).—**BOOTS CASH CHEMISTS (SOUTHERN), LTD. v. COWLING** (1903), 88 L. T. 539; 67 J. P. 195; 19 T. L. R. 370; 1 L. G. R. 885; 20 Cox, C. C. 420, D. C.

159. ——— Mercury ointment.—A purchaser went into a chemist's shop & asked to be supplied with "mercury ointment." Mercury ointment is one of the medicines contained in the British Pharmacopœia. The chemist supplied him with an ointment containing a less proportion of mercury than that prescribed by the formulary of the Pharmacopœia:—*Held*: (1) although the purchaser did not refer to the Pharmacopœia, he

must be taken to have demanded that the ointment should be compounded of the proportions therein prescribed, & upon a complaint under 1875 Act, s. 6, the vendor was rightly convicted of having sold a drug not being of the quality demanded by the purchaser; (2) the fact of the ointment being a compounded drug did not make the sale of it as above mentioned any the less an offence within 1875 Act, s. 6.—**DICKINS v. RANDERSON**, [1901] 1 K. B. 437; 70 L. J. K. B. 344; 84 L. T. 204; 65 J. P. 262; 17 T. L. R. 224; 45 Sol. Jo. 261; 19 Cox, C. C. 643, D. C.

Annotations:—*As to* (1) **Expld.** Boots Cash Chemists (Southern) v. Cowling (1903), 88 L. T. 539. **Refd.** Hudson v. Bridge (1903), 88 L. T. 550. *As to* (2) **Refd.** Boots Cash Chemists (Southern) v. Cowling (1903), 88 L. T. 539.

160. Tincture of opium.—Upon a complaint under 1875 Act, s. 6, for selling tincture of opium which was not "of the nature, substance, or quality" of the article demanded by the purchaser, it appeared that the drug, which was sold as "tincture of opium" by deft., was deficient in opium to the extent of one third, & in alcohol to the extent of nearly one half as compared with the standard prescribed by the British Pharmacopœia:—*Held*: deft. was liable to be convicted, although the purchaser had not specifically asked for tincture of opium "prepared according to the recipe in the British Pharmacopœia."—**WHITE v. BYWATER** (1887), 19 Q. B. D. 582; 51 J. P. 821; 36 W. R. 280; 3 T. L. R. 631, D. C.

Annotations:—**Expld.** Dickins v. Randerson, [1901] 1 K. B. 437. **Refd.** Hunt v. Richardson, [1916] 2 K. B. 446.

161. ——— Vinegar of squills.—Vinegar of squills prepared according to the British Pharmacopœia has as one of its constituents a certain proportion of acetic acid, but the British Pharmacopœia does not prescribe how much acetic acid should be present in the compounded drug. Even if properly kept, a change or decomposition takes place in the drug which reduced the quantity of acetic acid. The justices were of opinion that there is a standard for the quantity of acetic acid which should be present in vinegar of squills resulting from its preparation as directed by the British Pharmacopœia & that, having regard to the deficiency in acetic acid, howsoever arising, the drug sold was not composed of the ingredients in such proportions as that demanded by the purchaser & was to his prejudice:—*Held*: (1) the justices were wrong, as there was no evidence that the purchaser in asking for vinegar of squills demanded the proportion of acetic acid that would be present in new vinegar of squills, & the hypothetical standard set up by them could not be supported; (2) *semble*: vinegar of squills being liable to decomposition, the analyst ought to append a note to his certificate in the statutory form, stating whether any change had taken place in the constitution of the article that would interfere with the analysis.—**HUDSON v. BRIDGE** (1903), 88 L. T. 550; 67 J. P. 186; 19 T. L. R. 369; 47 Sol. Jo. 406; 1 L. G. R. 400; 20 Cox, C. C. 425, D. C.

162. Gin.—Applt. sold, as a bottle of gin, liquid composed of 26 per cent. alcohol, 70 per cent. water, & 4 per cent. sugar. Evidence was adduced that gin was sold by retailers at varying strength from proof to 20 per cent. under proof. This liquid was 44 per cent. under proof, but the analyst said he should call it "gin whose alcoholic strength was exceedingly low." Justices convicted applt. under 1875 Act, s. 6:—*Held*: the

facts justified the justices' finding that this liquid was not of the quality of gin, but the excess of water was a fraudulent increase of the measure of the article within the enacting part of 1875 Act, s. 6.—**PASHLER v. STEVENITT** (1876), 35 L. T. 862; 41 J. P. 136, D. C.

Annotations:—**Apprd. & Foll.** Webb v. Knight (1877), 2 Q. B. D. 530. **Dist.** Gage v. Elsey (1883), 31 W. R. 500. **Consd.** Hunt v. Richardson, [1916] 2 K. B. 446.

163. —.—.]—**WEBB v. KNIGHT**, No. 146, *ante*.

164. Green tea.]—Applt., a tea dealer, was convicted under 35 & 36 Vict. c. 74, s. 2, for selling as unadulterated "green tea" which was adulterated. A person asked for two ounces of "green tea" at applt.'s shop, for which he paid 5½d., the shopman stating that he was authorised by his employers to guarantee all their green teas of the value of 3s. per pound & upwards as genuine green teas. On analysis, the tea was proved to be painted or faced with gypsum & prussian blue for the purpose of colouring it. The tea was sold in the same state in which it comes from abroad. The tea which is imported from China as green tea, & generally known as such in the tea trade, is painted & faced in this manner; but this practice is not known to the public. Pure green tea, though not known generally in the trade as "green tea," is imported from Japan:—*Held*: the conviction was right.—**ROBERTS v. EGERTON** (1874), L. R. 9 Q. B. 494; 43 L. J. M. C. 135; 30 L. T. 633; 38 J. P. 485; 22 W. R. 797, D. C.

Annotations:—**Consd.** Dyke v. Gower (1891), 61 L. J. M. C. 70. **Refd.** Sherras v. De Rutzen, [1895] 1 Q. B. 918. **Mentd.** Hobbs v. Winchester Corpn., [1910] 2 K. B. 471.

165. Lardine.]—Resp. was summoned for selling lardine not of the nature, substance, & quality demanded. The certificate of the analyst stated that it was adulterated with 25 per cent. of water. It was proved lard contains no water, that lardine was a substitute for lard, that there was no statutory standard for lardine, but that out of thirty-four samples of lard substitutes recently analysed by the analyst, twenty-eight contained no water. The justices were of opinion that there being no statutory standard for lardine, & the only evidence before them of any commercial standard being the composition of the samples recently analysed by the analyst, they were not justified in holding that lardine must contain no water; nor, in the absence of evidence as to the percentage of water in such samples, did they consider the evidence sufficient to enable them to fix a percentage of water permissible, & to say that what resp. sold was not lardine:—*Held*: the justices had not properly considered the matter & the case must be remitted to them for them to determine whether in fact the lardine in question was adulterated or not.—**RUDD v. SKELTON CO-OPERATIVE SOCIETY, LTD.** (1911), 104 L. T. 919; 75 J. P. 326; 22 Cox, C. C. 469, D. C.

Margarine.]—See Part V., Sect. 3, sub-sect. 2, *post*.

166. Marmalade.]—To a person who asked for a pot of marmalade a grocer sold a pot of marmalade which was found to contain 13 per cent. of starch glucose. The glucose consisted of sugar, a gummy substance which had no sweetening properties & water. There was no legal standard for the making of marmalade, & manufacturers used various recipes, & for many years glucose had been used by many, though not by all, manufacturers in the making of it. The glucose to the extent used was not injurious to health, & it prevented the marmalade from crystallising & had a tendency to prevent mildewing & fermenting:—*Held*: there was no evidence that the article supplied was inferior to the article demanded or was adulterated, & no evidence, therefore, that the sale was a sale to the prejudice of the purchaser within 1875 Act, s. 6.—**SMITH v. WISDEN, ETC., SUSSEX, JJ.** (1901), 85 L. T. 760; 66 J. P. 150; 18 T. L. R. 92; 46 Sol. Jo. 86; 20 Cox, C. C. 135, D. C.

Milk.]—See Part V., Sect. 4, sub-sect. 3, *post*.

167. Mustard.]—A preparation was found to be a compound of mustard with about 35 per cent. of wheaten flour, & a small quantity of turmeric & cayenne pepper. In proceedings before the justices, they found that the article sold, though not pure mustard, was an article of the nature, substance & quality of mustard, & (*inter alia*) that the matters or ingredients added to the mustard were not injurious to health; & were required for the production or preparation of an article of commerce in a state fit for consumption:—*Held*: the finding that the article was of the nature, etc., of mustard could not be sustained; & the case must be remitted for the justices to explain what was meant by their last finding.

SANDYS v. MARKHAM (1877), 41 J. P. Jo. 52, D. C.

Annotations:—**Expld.** Hoyle v. Hitchman (1879), 4 Q. B. D. 233. **Refd.** Webb v. Knight (1877), 36 L. T. 791; Smith v. Wisden, etc., Sussex J.J. (1901), 85 L. T. 760.

168. —.—.]—**HORDER v. GRAINGER**, No. 117, *ante*.

169. Preserved peas.] **FRIEND v. MAPP**, No. 86, *ante*.

B-SECT. 4. SALE OF COMPOUNDED ARTICLES.

See 1875 Act, s. 7.

170. Offence under 1875 Act, s. 6.]—A sale to the prejudice of the purchaser of a compounded drug, which is not of the nature, substance & quality of the article demanded, is an offence under above sect., & proceedings for the recovery of a penalty may be taken under that sect.—**BEARDSLEY v. WALTON & CO.**, [1900] 2 Q. B. 1; 69 L. J. Q. B. 344; 82 L. T. 119; 64 J. P. 436;

PART II. SECT. 3, SUB-SECT. 3.— D. (b).

166 i. Marmalade.]—A complaint charging a contravention of Sale of Food & Drugs Act, 1875, s. 6, set forth that accused, in response to a request for a jar of marmalade, sold, to the prejudice of the purchaser, an article "which was not of the nature, substance & quality of marmalade, in respect it contained 14 per cent. or thereby starch, glucose, which is extraneous to marmalade, & was thus

adulterated":—*Held*: the complaint was irrelevant, in respect that as marmalade was a compounded article for which there was no fixed standard, it was necessary that the complaint should contain such a specification of the nature of marmalade, & of the effect of the introduction of glucose as would make it clear that the article sold was not of the nature, substance, & quality of marmalade.—**WILSON v. M'CUTCHEON** (1902), 5 F. (Ct. of Sess.) 6; 40 Sc. L. R. 31; 10 S. L. T. 301, J. —**SCOT**

m. Pepper.]—Accused was charged with having sold pepper which was not of the nature, substance or quality by the purchaser, the sold being a mixture of maize & pepper:—*Held*: the seller must that the admixture is in accord with law & that he is himself cted by law, & must provide a label setting out the proportion of the constituents of the mixture.—**It. v. GRANT**, [1917] O. P. D. 49. **S. AF.**

FOOD AND DRUGS.

Sect. 3.—Offences: Sub-sects. 4 & 5, A. & B.; sub-sect. 6. Sect. 4: Sub-sect. 1, A.]

16 T. L. R. 185; 44 Sol. Jo. 244; 19 Cox, C. C. 447, D. C.

*Annotation:—***Reid.** *Dickins v. Randerson*, [1901] 1 K. B. 437.

171. ———.]—**DICKINS v. RANDERSON**, No. 159, ante.

D.—ABSTRACTION AND OF ALTERED ARTICLES. A. In General.

See 1875 Act, s. 9.

172. Mens rea not essential element — Seller ignorant of alteration.]—By 1875 Act, s. 9, "No person shall, with the intent that same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, & no person shall sell any article so altered without making disclosure of the alteration under a penalty in each case not exceeding £20":—*Held*: a person selling the altered article could be convicted under that sect. although at the time he sold it he did not know of the alteration.—**PAIN v. BOUGHTWOOD** (1890), 24 Q. B. D. 353; 59 L. J. M. C. 45; 62 L. T. 284; 54 J. P. 469; 38 W. R. 428; 6 T. L. R. 167; 16 Cox, C. C. 747, D. C.

*Annotations:—***Folld.** *Dyke v. Gower*, [1892] 1 Q. B. 220; *Morris v. Corbett* (1892), 56 J. P. 649. **Reid.** *Brown v. Foot* (1892), 61 L. J. M. C. 110; *Hunt v. Richardson*, [1916] 2 K. B. 416.

173. ———.]—The servant of C., a dairyman, being short in his supply of milk, bought two gallons from another dairyman & mixed it with his own & sold same to customers. C. being summoned under 1875 Act, s. 9:—*Held*: though neither C. nor C.'s servant knew or had reason to suspect the milk was adulterated, this was no defence.—**MORRIS v. CORBETT** (1892), 56 J. P. 649, D. C.

174. ——— **Intent with which alteration made immaterial.]**—The prohibition in 1875 Act, s. 9, forbidding the sale of any article so altered as to injuriously affect its quality without disclosing the alteration, applies irrespective of the intent with which the alteration is made:—*Held*: a person selling milk by retail in such a manner that the later customers got milk very deficient in quality was guilty of an offence under the sect.—**DYKE v. GOWER**, [1892] 1 Q. B. 220; 61 L. J. M. C. 70; 65 L. T. 760; 56 J. P. 168; 8 T. L. R. 117; 17 Cox, C. C. 421, D. C.

*Annotations:—***Folld.** *Morris v. Corbett* (1892), 56 J. P. 649. **Reid.** *Spiers & Pond v. Bennett*, [1896] 2 Q. B. 65.

175. ———.]—Applts., a firm of refreshment

contractors, entered into a contract with a dairy co. for the supply to them of milk; the contract containing a warranty by the co. as to the purity of the milk to be supplied. Milk was delivered under the contract at a refreshment room of applts.; it was handed in a can to one of their servants, who poured a portion of it into a churn, which was placed on the counter for the purpose of the milk being sold to customers; it was so poured that a less proportion of cream was in the milk that went into the churn than in the milk which remained in the can. The respondent bought a glass of milk at the counter; the milk was drawn from the churn, & on analysis showed a deficiency of 17 per cent. of cream. Upon the glass in which the milk was served were engraved the words, "Not guaranteed as new or pure milk or with all its cream, see notices"; & upon the refreshment counter was a printed notice to the effect that all milk sold by applts. was purchased by them under a warranty of its purity & genuine quality; that they took all possible precautions to ensure its supply to their customers in proper condition, but were unable to guarantee it as new, pure, or with all its cream. & did not, therefore, sell it as such:—*Held* (1) assuming that the facts showed an abstraction from the milk, there had been a sufficient disclosure by applts. of the alteration to satisfy the requirements of 1875 Act, s. 9.

(2) In order to constitute the offence of selling an article in its altered state without disclosure of the alteration, it is unnecessary to show a *mens rea* on the part of the seller.—**SPIERS & POND v. BENNETT**, [1896] 2 Q. B. 65; 65 L. J. M. C. 144; 74 L. T. 697; 60 J. P. 437; 44 W. R. 510; 12 T. L. R. 380; 40 Sol. Jo. 479; 18 Cox, C. C. 332, D. C.

*Annotations:—**As to* (1) **Reid.** *Pearks, Gunston & Tee v. Houghton*, [1902] 1 K. B. 889; *Rodbourn v. Hudson* (1924), 41 T. L. R. 132.

Mens rea generally, *see* CRIMINAL LAW, Vol. XIV., pp. 31 *et seq.*

176. "Quality" of altered article — Effect of provision in contract as to quality.]—**FECITT v. WALSH**, No. 250, *post*.

————.]—*Compare* No. 495, *post*.

177. "Sell" — What constitutes sale of altered article — Daily delivery of article under contract — Several samples taken.]—**FECITT v. WALSH**, No. 250, *post*.

178. Proof of abstraction — Analyst's certificate — Reduction of percentage of fat due to addition of water.]—Applt. sold milk to resp. from a can, to which a label was attached stating that the milk was diluted & that no standard was guaranteed, & resp. purchased the milk with knowledge of this notice. Applt. was charged with selling to the prejudice of the purchaser milk not of the

PART II. SECT. 3, SUB-SECT. 5. — A.

n. Addition of harmless matter.]—Accused was convicted under Pure Food Act, s. 10, of selling adulterated ug. The analysts' certificate that the dripping contained an "artificial colouring matter," & the analyst in his evidence explained that the said colouring matter was a perfectly harmless dye known as "anuxato":—*Held*: the dripping was adulterated within the meaning of s. 5 by the addition of colouring matter although such matter was harmless, & not added to conceal inferiority.—

LAUGHAN, 11 S. R. N. S. W. 250; 28 N. W. W. N. 71. —**AUS.**

o. "Quality" of altered article — Where article in altered condition a well-known trade commodity.]—It is not an offence within Food & Drugs Act, 1875, s. 6, to sell an article of food from which some nutritious element, such as fat or oil, has been abstracted if the article in that altered condition is proved to be a well-known commodity in the trade, or to have been sold to the public for many years in that condition. It is immaterial whether the purchaser knows of the

altered condition if the article as sold to him is that which he desired to purchase. So where a purchaser asks for Indian meal for human food & is supplied with refined crushed Indian corn, which is locally known by a fancy name such as "Gem" or "White" Indian meal from which portion of the natural oil is abstracted in the course of manufacture, no offence is committed under the above section. **TRAYNOR, McNEILL v. CARSON** Co. (1916), 50 L. L. T. 76.—**IR.**

p. Where addition necessary in process of manufacture — Buttermilk.]

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nature, substance, & quality demanded, & the only evidence of adulteration was the analyst's certificate, which stated that the milk contained 18·5 per cent. of extraneous water, that milk should contain at least 3 per cent. of fat, while that analysed contained only 2·58 per cent., & it had therefore been deprived of 14 per cent. of its fat. The justices convicted applt.:—*Held*: as the reduction in the percentage of fat was the necessary result of the addition of water, there was no evidence of abstraction of fat, & the conviction must be quashed.—*DEARDEN v. WHITELEY* (1916), 85 L. J. K. B. 1420; 114 L. T. 702; 80 J. P. 215; 32 T. L. R. 260; 14 L. G. R. 502; 25 Cox, C. C. 356, D. C.

B. Disclosure of Alteration.

See 1875 Act, s. 9.

179. General rule—Sufficiency of notice question of fact.]—1875 Act, s. 9, enacts that “No person shall, with intent that same may be sold in its altered state, without notice abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, & no person shall sell any article so altered without making disclosure of the alteration” under a penalty in each case not exceeding £20:—*Held*: the question whether or not the alteration had been sufficiently disclosed was a question of fact.

On a demand for purchase of condensed milk, a label affixed round a tin of condensed milk, having printed thereon (*inter alia*) in red letters the words “This tin contains skimmed milk,” whereas the tin, in fact, contained separated milk from which 97 per cent. of the original fat had been abstracted, while it was proved as a fact that no more than 63 per cent. of the original fat could be extracted by the process of skimming, does not give proper & sufficient notice of the alteration in the milk.—*PETCHHEY v. TAYLOR*, (1898), 78 L. T. 501; 62 J. P. 360; 19 Cox, C. C. 38, D. C.

180. Verbal communication—That article was skimmed milk.]—P. was charged under 1875 Act, ss. 8, 9, with selling condensed milk, from which 80 per cent. of fat had been abstracted without making disclosure of the alteration. The purchaser was told it was skimmed milk, & pointed to a label on the tin, which, in smaller type, stated the milk to be skimmed. The justices held the disclosure insufficient, & convicted P.:—*Held*: the justices were wrong, & the disclosure was sufficient.—*PLATT v. TYLER, WRIGHT v. TYLER* (1894), 58 J. P. 71, D. C.

181. Written notice displayed in premises—That seller unable to guarantee purity of milk sold.]—*SPIERS & POND v. BENNETT*, No. 175,

182. Label—Small type.]—*ATTFIELD v. TYLER* (1893), 57 J. P. Jo. 357, D. C.

183. — Statement that article was skimmed milk.]—Resp. sold to applt. a tin of skimmed milk, which purported to be, & was sold as marked upon a label upon the tin, “Condensed Milk.” On another part of the label in smaller print, it stated that, “this tin contains skimmed milk.” As to whether there had been a sufficient disclosure

within 1875 Act, s. 9:—*Held*: the label on the tin was a disclosure of the contents of the tin, & the appeal was dismissed.—*JONES v. DAVIES* (1893), 69 L. T. 497; 57 J. P. 808; 9 T. L. R. 492; 17 Cox, C. C. 604, D. C.

Annotations:—*Folld.* *Platt v. Tyler, Wright v. Tyler* (1894), 58 J. P. 71. *Distd.* *Petchey v. Taylor* (1898), 78 L. T. 501.

— *PLATT v. TYLER, WRIGHT v. TYLER*, No. 180, *ante*.

185. — *PETCHHEY v. TAYLOR*, No. 179, *ante*.

— **Notice to purchaser of adulteration of article.]** *See* Sub-sect. 3, C. (b) ii., *ante*.

SUB-SECT.

OFFENCES.

186. Addition of water to milk—By servant—Whether malicious damage to master's property

Dilution to prevent loss to master.]—R., servant of H., a milk dealer, accidentally spilled some of his master's milk, & to prevent loss to his master, filled in water to make up the quantity, & sold the diluted milk to customers: *Held*: R. had not committed the offence of wilfully or maliciously damaging property of his master, contrary to Malicious Damage Act, 1861 (c. 97), s. 52. *HALL v. RICHARDSON* (1889), 54 J. P. 345; 6 T. L. R. 71, D. C.

Annotation: *N.F.* *Roper v. Knott*, [1898] 1 Q. B. 868.

187. — Dilution for profit of servant.]—A milk carrier who damages his employer's milk by adding water to it, with no intention of injuring his employer, but in order to make a profit for himself by increasing the bulk of the milk, is guilty of an offence under Malicious Damage Act, 1861 (c. 97), s. 52. *ROPER v. KNOTT*, [1898] 1 Q. B. 868; 67 L. J. Q. B. 574; 78 L. T. 504; 62 J. P. 375; 46 W. R. 636; 14 T. L. R. 383; 42 Sol. Jo. 469; 19 Cox, C. C. 69, D. C.

Malicious damage to property generally, *see* CRIMINAL LAW, Vol. XV., pp. 1020 *et seq.*

SECT. 4.—WARRANTY AS A DEFENCE.

SUB-SECT. 1.—WHAT AMOUNTS TO A WARRANTY.

A. In General.

See 1875 Act, s. 25.

188. Description on sale by description.]—*ROOK v. HOPLEY*, No. 194, *post*.

189. Words “Warrant” or “Warranty” not necessary.]—A firm of lard manufacturers on Dec. 17, 1892, entered into a written contract for the sale of lard to resp. in the following terms: “We have this day sold to you three tons Kilvert's Pure Lard for delivery to end of January, 1893.” On Dec. 23 a parcel of lard was consigned to resp. by the manufacturers & delivered to him under the contract. Resp. subsequently sold a portion of such parcel to applt. as & for lard. Upon analysis it turned out to be adulterated. Resp. had sold it *bonâ fide* & in the same state as it was

A person was convicted under Sale of Food & Drugs Act, 1875, s. 6, for selling buttermilk containing “30 per cent. of added water” to the prejudice of the purchaser. On appeal the ct.

quashed the conviction, on the ground that as the only charge was that of selling buttermilk with a certain quantity of added water & it had been proved that the addition of some water

was necessary in the process of manufacture, the case fell under the exception of sub-sect. 4.—*WARNOCK v. JOHNSTONE* (1881), 8 Il. (Cl. of Sess.) 55, J.—*SCOT*.

Sect. 4.—Warranty as a defence: Sub-sect. 1, A., B. & C.]

in when he bought it. On an information against resp. for having contrary to 1875 Act sold the lard not being of the nature, substance & quality demanded by applt.:—*Held*: the contract of Dec. 17 contained a sufficient written warranty of purity in respect of the specific parcel consigned on Dec. 23 to satisfy sect. 25 of the Act, & resp. was entitled to be discharged from the prosecution.

The contract does not in terms say that the purity of the lard is warranted, but in my judgment it is not necessary that the word "warranted" should be actually used. To my mind it is enough if the language of the document imports a warranty & shows an intention on the part of the vendor to warrant (CHARLES, J.).—*Laidlow v. Wilson*, [1894] 1 Q. B. 74; 63 L. J. M. C. 35; 58 J. P. 58; 42 W. R. 78; 10 T. L. R. 18 38 Sol. Jo. 12; 10 R. 6, D. C.

Annotations:—*Distd.* Jorns v. Van Tromp (1895), 64 L. J. M. C. 171; Robertson v. Harris, [1900] 2 Q. B. 117. *Fold.* Elliot v. Pileh r., [1901] 2 K. B. 817. *Consd.* Irving v. Callow Park Dairy Co., Bacon v. Callow Park Dairy Co. (1902), 87 L. T. 70. *Apld.* Watts v. Stevens, [1906] 2 K. B. 323. *Refd.* Hawkins v. Williams (1895), 59 J. P. 533.

190. Must form part of contract between seller & original vendor—Express individual representation necessary.]—A grocer sold ground ginger adulterated with ninety per cent. of exhausted or spent ginger. He had purchased it as "ground ginger" in canisters, & had no reason to believe it otherwise than genuine either when he purchased it or retailed it. He had received from his vendor an invoice in which it was described as "ground ginger," & each canister bore a printed label "Warranted genuine pure ground ginger":—*Held*: neither invoice nor label, together or separately, constituted a warranty within sect. 25 of 1875 Act, which would avail as a defence to a prosecution under the Act. To constitute a warranty under sect. 25 there must be some express individual representation in writing, not necessarily express with reference to the Act, but an essential term in the bargain, by the original vendor to the retail dealer, forming part of the contract to sell.—*Jorns v. Van Tromp* (1895), 64 L. J. M. C. 171; *sub nom.* Jorns v. Von Tromp, 72 L. T. 499; 59 J. P. 216; 15 R. 392; *sub nom.* Irons v. Van Tromp, 11 T. L. R. 320; 18 Cox, C. C. 132, D. C.

—*Consd.* Irving v. Callow Park Dairy Co., Bacon v. Same (1902), 87 L. T. 70; Watts v. Stevens, [1906] 2 K. B. 323; Lewis v. Weatheritt (1909), 100 L. T. 367. *Apld.* Jeynes v. Hindle, [1921] 2 K. B. 581. *Consd.* Dewey v. Faulkner, [1923] 1 K. B. 315.

191. —.—The written warranty mentioned in 1875 Act, s. 25, in order to protect the seller of an article not of the nature, substance & quality demanded by the purchaser, must have formed part of the contract under which the seller purchased the article from his vendor, as having been given either when the contract was made, or, if afterwards, then in pursuance of a term in the contract that it should be given. By an oral contract a pharmaceutical chemist bought from the manufacturers through their traveller a dozen bottles of quinine wine to be made according to the British Pharmacopœia. He afterwards received from them a written invoice for the wine in which it was described as quinine wine so made. The wine was delivered to him a day or two later. The cork of each bottle was sealed with a capsule, & on a label pasted round the paper covering the bottle was

this printed notice: "Made according to the British Pharmacopœia, . . . we wish to state that our orange quinine wine contains no salicylic acid or other similar material, introduced for keeping purposes or in lieu of deficiency of alcohol, but is pure orange wine made by fermentation & matured by age. . . ." Subsequently, the chemist sold to an inspector a bottle of the wine which on analysis was found not to be quinine wine of the British Pharmacopœia. The chemist was charged with having sold to the prejudice of the purchaser a drug, to wit the said bottle of quinine wine, which was not of the nature, substance & quality demanded by the purchaser; & he relied upon the label & invoice as constituting a written warranty under sect. 25. The information having been dismissed:—*Held*: the notice &/or invoice, assuming that on their construction they contained a warranty that the article sold was quinine wine of the British Pharmacopœia, did not constitute a "written warranty" to that effect within the meaning of the section, seeing that they did not form part of the contract under which the chemist had bought the article, as they had neither been given when the contract was made, nor afterwards in pursuance of any stipulation in the contract that they should be given.

Semble: the label & invoice did not on their true construction contain a warranty that the article sold was quinine wine of the British Pharmacopœia (AVORY, J.).—*Jeynes v. Hindle*, [1921] 2 K. B. 581; 90 L. J. K. B. 603; 124 L. T. 670; 85 J. P. 121; 37 T. L. R. 454; 65 Sol. Jo. 397; 19 L. G. R. 231; 26 Cox, C. C. 709, D. C.

Annotation:—*Consd.* Dewey v. Faulkner, [1923] 1 K. B. 315.

192. Must be in writing.]—In order that a warranty may be relied upon as a defence under 1875 Act, s. 25, such warranty must have been given to the person raising that defence from his immediate vendor, & must be given in writing.

Qu.: whether the benefit of a written warranty given by the farmer to the middleman can be transferred by a contract in writing between the middleman & his purchaser, so as to be a defence under sect. 25.—*Hargreaves v. Spackman* (1907), 98 L. T. 41; 72 J. P. 52; 24 T. L. R. 173; 52 Sol. Jo. 132; 6 L. G. R. 145; 21 Cox, C. C. 541, D. C.

In reference to goods not in existence when warranty given.]—*See* Nos. 205-213, *post*.

193. Contract to give written warranty—Whether writing necessary.]—The C. P. D. Co., Ltd., by a contract in writing agreed to buy pure new milk with all its cream, each churn to bear a written warranty. To each churn was attached a label: "Warranted pure new milk with all its cream delivered under contract." The co. also verbally agreed to buy milk, & that a written warranty should be given with each consignment in the form of a label. To a churn delivered under that agreement was attached a label "Warranted pure new milk with all its cream."

Prosecutions having been instituted against the co. under sect. 6 of 1875 Act, notice was given on their behalf under sect. 20 of 1899 Act, & copies of the labels were inclosed. It was found by the magistrate that all the requirements of sect. 25 of 1875 Act had been complied with, & he discharged the co. from the prosecution for selling milk not of the nature, substance, & quality demanded by the purchaser, such milk being

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delivered in pursuance of these contracts :—*Held* : the magistrate was right.

Semble : a contract to give a written warranty need not be in writing.—*IRVING v. CALLOW PARK DAIRY CO., LTD., BACON v. SAME* (1902), 87 L. T. 70 ; 66 J. P. 804 ; 18 T. L. R. 573 ; 20 Cox, C. C. 295, D. C.

Annotations :—*Consd.* Farthing v. Parkinson (1904), 90 L. T. 783 ; Watts v. Stevens, [1906] 2 K. B. 323 ; Hargraves v. Spackman (1907), 52 Sol. Jo. 132. *Appld.* Lewis v. Weatheritt (1909), 100 L. T. 367. *Distd.* Jeynes v. Hindle, [1921] 2 K. B. 581. *Refd.* Evans v. Weatheritt, [1907] 2 K. B. 80.

B. Invoices and Labels.

194. Invoice.]—On a prosecution under 1875 Act, for selling as lard a substance which was lard adulterated with upwards of 15 per cent. of water, deft. proved that he sold the substance in the same condition as it was in when he bought it, & that when he purchased it he received an invoice in which it was described as lard :—*Held* : the invoice was not a written warranty within sect. 25, so as to discharge deft.

Description upon a sale by written description does not amount to a written warranty within the meaning of the section (POLLOCK, B.).—*ROOK v. HOPLEY* (1878), 3 Ex. D. 209 ; 47 L. J. M. C. 118 ; 38 L. T. 649 ; 42 J. P. 551 ; 26 W. R. 663, D. C.

Annotations :—*Distd.* Laidlaw v. Wilson, [1891] 1 Q. B. 74. *Consd.* Jorns v. Von Tromp (1895), 72 L. T. 499 ; Dewey v. Faulkner, [1923] 1 K. B. 315.

195. —.]—*JIRNS v. VAN TROMP*, No. 190, *ante*.

196. —.]—Upon a sale of butter to resp. the invoice, dated the day of the sale, contained the words "guaranteed pure," followed by the initials of the vendor whose full name was upon the invoice. Some of this butter was subsequently sold to applt. by a servant of resp. in resp.'s shop, & on analysis was found to contain an admixture of 17 per cent. of foreign fat. Resp.'s manager was summoned for an offence under 1875 Act, s. 6. At the hearing the name of resp. was, by his consent, substituted for that of his manager, but against the consent of the prosecutor. Resp. relied on the invoice as evidence of a written warranty within sect. 25 of the same Act, & the justices dismissed the information under that sect. :—*Held* : there was evidence upon which the justices could find a written warranty, & the substitution of resp. for original deft. with his consent did not necessarily invalidate the proceeding.—*HAWKINS v. WILLIAMS* (1895), 59 J. P. 533 ; 11 T. L. R. 425, D. C.

Annotation :—*Consd.* Jeynes v. Hindle, [1921] 2 K. B. 581.

197. —.]—*JEYNES v. HINDLE*, No. 191, *ante*.

198. Label.]—Applts. were convicted of having sold milk to resp. not of the nature, substance, & quality demanded. They proved that they had bought the milk under a written contract with the

producer, by which they were to be supplied with a certain quantity daily for six months. The contract contained the following clause, " & the vendor hereby warrants each & every supply of milk delivered, or in course of delivery, or to be delivered by him under this contract, to be pure, genuine, & new milk, unadulterated, & with all its cream on." The milk was delivered at a London terminus in cans, to each of which a label was attached stating that it contained such & such a quantity of "warranted genuine new milk with all its cream on" :—*Held* : there was a sufficient warranty on the part of the producer to entitle applts. to the protection afforded them by sect. 25 of 1875 Act, & the conviction must be quashed.—*FARMERS & CLEVELAND DAIRY CO., LTD. v. STEVENSON* (1900), 60 L. J. M. C. 70 ; 63 L. T. 776 ; 55 J. P. 407 ; 17 Cox, C. C. 201, D. C.

Annotations :—*Distd.* Hotchin v. Hindmarsh, [1891] 2 Q. B. 181 ; Jorns v. Van Tromp (1895), 64 L. J. M. C. 171. *Consd.* Elliot v. Pilcher, [1901] 2 K. B. 817 ; Watts v. Stevens, [1906] 2 K. B. 323 ; Lewis v. Weatheritt (1909), 100 L. T. 367.

199. —.]—S. sold lard to E. which was adulterated with 8 per cent. beef fat, & was charged under 1875 Act. The defence was that it was bought from the manufacturer in skins, which were stamped with the words "warranted pure" :—*Held* : no sufficient warranty to satisfy sect. 25.—*ELDER v. SMITHSON* (1893), 57 J. P. 809 ; 10 T. L. R. 68 ; 38 Sol. Jo. 155, D. C.

200. —.]—Applt. bought a cask of vinegar from G. & Co. The cask had on it a printed label bearing the words "Vinegar warranted unadulterated - G. & Co." ; & the vinegar was invoiced to applt. as "G.'s vinegar" :—*Held* : there was a sufficient written warranty to entitle applt. to the protection afforded her by sect. 25 of 1875 Act.—*LINDSAY v. ROOK* (1891), 63 L. J. M. C. 231 ; 58 J. P. 735 ; 10 T. L. R. 613 ; 10 R. 526, D. C.

Annotation :—*Refd.* Jeynes v. Hindle, [1921] 2 K. B. 581.

201. —.]—*JIRNS v. VAN TROMP*, No. 190, *ante*.

202. —.]—*IRVING v. CALLOW PARK CO., LTD., BACON v. SAME*, No. 193, *ante*.

203. —.]—*JEYNES v. HINDLE*, No. 191, *ante*.

204. —.]—*DEWEY v. FAULKNER*, No. 217, *post*.

C. Terms of Written Contract.

205. For future delivery of goods—Whether warranty connected with subsequent deliveries—Contract for sale of "good & pure milk."]—Upon the hearing of an information against applt. for having, contrary to the provisions of the 1875 Act, sold, on April 12, 1883, certain milk to the resp. which was not of the nature, substance, & quality demanded by him, as it contained a percentage of water, applt. proved that he had

Held : there was no such "written warranty" from the person from whom the defendant had bought the pepper as is required by s. 29 of the Act.—*R. v. MILLER* (1904), 21 S. C. 190 ; 14 C. T. R. 303.—*S. AF.*

PART II. SECT. 4, SUB-SECT. 1.—C.

g. For future delivery of goods—Whether warranty connected with subsequent deliveries—Contract to supply milk in certain quantities.]—A written agreement by a vendor to supply milk in certain quantities to a

PART II. SECT. 4, SUB-SECT. 1.—B.

198 i. Label.]—Resps. had sold iodine much below the standard required by Sale of Food & Drugs Act, 1908, but claimed that they had purchased the same in reliance on a written warranty or other written statement as to the nature of the article purchased, signed by or on behalf of the persons from whom they purchased the same. They relied on the printed label on the glass container as sufficient to afford them protection :—*Held* : the language of the labels imported a

warranty ; & indicated an intention on the vendors' part to guarantee that article sold as what it purported to be by the label.—*WILSON v. WILES, WILSON v. SHAW*, [1921] N. Z. L. R. 798.—*N.Z.*

198 ii. —.]—Deft. under a prosecution for a contravention of Act 5 of 1890, s. 6, in selling pepper with which ground olive stone had been mixed, proved that he had bought the pepper from L., of Cape Town, & that on the tins was a label of the manufacturer's warranting the pepper to be genuine :—

Sect. 4.—Warranty as a defence: Sub-sect. 1, C.]

purchased the article in question under a written contract made with F. on Mar. 24, 1883, whereby F. agreed to sell to applt. eighty-six gallons of good & pure milk, each & every day, for six months, "the said milk to be delivered twice daily":—*Held*: this contract did not constitute a written warranty within the meaning of sect. 25 in respect of the specific article sold by applt. to resp. on April 12; & therefore applt. was not entitled to be discharged from the prosecution.—**HARRIS v. MAY** (1883), 12 Q. B. D. 97; 53 L. J. M. C. 39; 48 J. P. 261; 32 W. R. 595, D. C.

Annotations:—**Distd.** Laidlaw v. Wilson, [1894] 1 Q. B. 74. **Appld.** Robertson v. Harris, [1900] 2 Q. B. 117. **N.F.** Elliot v. Pilcher, [1901] 2 K. B. 817. **Dbtd.** Irving v. Callow Park Dairy Co., Bacon v. Same (1902), 87 L. T. 70. **Folld.** Watts v. Stevens, [1906] 2 K. B. 323. **Consd.** Evans v. Weatheritt, [1907] 2 K. B. 80. **Refd.** Hotchin v. Hindmarsh, [1891] 2 Q. B. 181; Jorns v. Van Tromp (1895), 61 L. J. M. C. 171; Draper v. Newnham (1910), 102 L. T. 280.

206. ——— **Each supply to be pure & unadulterated.**—**FARMERS & CLEVELAND DAIRY CO., LTD. v. STEVENSON**, No. 198, *ante*.

207. ——— **"The milk to be pure new milk."**—Upon the hearing of an information against resp. for having, contrary to the provisions of the 1875 Act, sold on Dec. 15, 1899, certain milk to applt. which was not of the nature, substance, & quality demanded of him by applt. the resp. relied on an agreement in writing dated Jan. 20, 1899, by which a farmer agreed to sell to resp. 1,000 gallons of milk weekly, "the milk to be pure new milk": *Held*: even if the agreement amounted to a warranty within the meaning of sect. 25, there must be some evidence in writing to show that the particular milk sold to applt. was purchased with that warranty, & in the absence of that evidence the agreement afforded no defence to resp.—**ROBERTSON v. HARRIS**, [1900] 2 Q. B. 117; 69 L. J. Q. B. 526; 82 L. T. 536; 61 J. P. 565; 48 W. R. 571; 16 T. L. R. 313; 14 Sol. Jo. 394; 19 Cox, C. C. 495, D. C.

—**N.F.** Elliot v. Pilcher, [1901] 2 K. B. 817. **Folld.** Watts v. Stevens, [1906] 2 K. B. 323.

208. ——— **Warranty with respect to "all milk" to be supplied.**—(1) In a prosecution under 1875 Act, for adulterating milk, where deft. relies on sect. 25 as a defence, it is sufficient if, in order to prove that he bought the milk in question with a written warranty, he prove that he had contracted with dairymen to supply him with milk daily; that they gave him a written warranty with respect to all milk which they should so supply, & that the milk in question was sold & supplied to him under that contract & warranty. He need not prove a specific written warranty with respect to each delivery; nor need there be evidence in writing to connect the milk in question with the warranty on which he relies.

(2) Sect. 25 has no application to offences created by sects. 3, 4, & the first part of sect. 9.—**ELLIOT v. PILCHER**, [1901] 2 K. B. 817; 70 L. J. K. B. 795; 85 L. T. 50; 65 J. P. 743; 17 T. L. R. 579; 20 Cox, C. C. 18, D. C.

Annotations:—As to (1) **N.F.** Watts v. Stevens, [1906] 2 K. B. 323. **Consd.** Evans v. Weatheritt, [1907] 2 K. B. 80.

does not, in the event of
tion of the latter under H
Act, 1890, s. 43, amount to a war-
ranty of such milk entitling the pur-

chaser to his discharge under s. 71 of
the Act.—**FORD v. URQUHART** (No. 1)
(1896), 21 V. L. R. 688.—**AUS.**

r. ———.]—A producer gave

209. ———.]—By a contract in writing, applt. agreed to purchase from a co. "the whole of the milk required for his dairy" for twelve months from Oct. 1, 1905, & the contract contained a warranty that all milk to be delivered by the co. to applt. should be pure. In June, 1906, milk was delivered to applt. by the co. under the contract accompanied by a delivery note, which showed that the milk came from the co., but which did not in terms refer to the contract. Some of the milk was sold by applt. & was found upon analysis to have had 28 per cent. of milk fat abstracted from it. On an information against applt. for having sold the milk contrary to the provisions of 1875 Act, he relied on the warranty contained in the contract as a defence under sect. 25 of the Act:—*Held*: as the warranty was by the contract expressly applied to all milk sold by the co. to applt. during the specified period, the contract itself was sufficient evidence in writing to connect the particular consignment of milk with the warranty, & sect. 25 had been satisfied.—**EVANS v. WEATHERITT**, [1907] 2 K. B. 80; 76 L. J. K. B. 628; 96 L. T. 641; 71 J. P. 228; 23 T. L. R. 424; 5 L. G. R. 608; 21 Cox, C. C. 415, D. C.

—**Folld.** Draper v. Newnham (1910), 102 L. T. 280. **Refd.** Lewis v. Weatheritt (1909), 73 J. P. 161.

210. ———.]—Resp. had for several years been supplied by a farmer under a verbal contract with all the milk required by him in his milk vending business, & in Sept. 1908, the farmer gave to resp. the following letter in writing: "I hereby guarantee & warrant that all milk supplied by me to you is of the nature, quality, & substance demanded by law. & I give this warranty for the purposes of the Sale of Foods & Drugs Act, 1899." Both intended this to be a continuing warranty. Resp. sold milk supplied by the farmer under the warranty, which milk contained added water, & on being summoned under 1875 Act, s. 6, he set up the defence under sect. 25 that he purchased the milk with a written warranty. There was no written warranty other than the letter, & there was no evidence in writing to connect the milk sold with the letter:—*Held*: as the letter referred to all milk supplied to resp. it was in itself sufficient evidence in writing to connect the warranty with the milk sold, & therefore there was a written warranty within sect. 25.—**DRAPER v. NEWNHAM** (1910), 102 L. T. 280; 74 J. P. 124; 8 L. G. R. 144, D. C.

Annotation:—**Refd.** Thomas v. Houghton, [1911] 2 K. B. 959.

211. ——— **Warranty with respect to "the milk supplied."**—In Aug. 1905, a farmer contracted to supply resp. with milk, & gave to resp. a letter stating that he guaranteed that the milk supplied by him to resp. was perfectly pure & with all its cream. In Dec. 1905, milk was consigned to resp. by the farmer & delivered to him under the contract, & resp. subsequently sold a pint of that milk to applt. as & for new milk, which upon analysis was found to contain 16 per cent. of added water. On an information against resp. for having, contrary to 1875 Act, sold the milk not being of the nature, substance, & quality demanded by applt. resp. relied on the warranty contained in the letter as a defence

to a retail vendor a document addressed to him & signed by the producer in the following form:—"A Remedial Guarantee re Milk—I do

under sect. 25 :—*Held* : a warranty relating to goods not in existence when the warranty is given may be a good warranty within sect. 25 ; but in the absence of any evidence in writing connecting the particular milk sold to applt. with the warranty, the warranty afforded no defence to resp.—*WATTS v. STEVENS*, [1906] 2 K. B. 323 ; 75 L. J. K. B. 828 ; 95 L. T. 200 ; 70 J. P. 418 ; 22 T. L. R. 622 ; 4 L. G. R. 821, D. C.

Annotations :—*Distd.* *Evans v. Weatheritt*, [1907] 2 K. B. 80 ; *Draper v. Newnham* (1910), 102 L. T. 280. *Refd.* *Rees v. Davis* (1908), 72 J. P. 375 ; *Lewis v. Weatheritt* (1909), 25 T. L. R. 226.

212. — Agreement to supply article “in same condition as received & as warranted by” seller’s vendor.—Applt. was summoned under 1875 Act, for selling to the prejudice of the purchaser milk not of the nature, substance, & quality demanded. Applt. set up a warranty contained in a contract by which his vendor, E., agreed to supply to applt. the milk supplied to E. by one B. in the same condition as received & as warranted by him, pure new unskimmed milk, & in a label which was attached to the particular milk in question & was addressed to E. & which had on it the words, “Warranted pure new & unskimmed milk.” Applt. as agent for E. received at the railway station the particular milk in question, which had been consigned from B. to E. :—*Held* : whether the label was or was not a sufficient warranty within 1875 Act, such a warranty was contained in the contract between E. & applt. & the label constituted a sufficient connection between the particular consignment & the warranty, & therefore applt. could not be convicted.—*REES v. DAVIS* (1908), 72 J. P. 375 ; 24 T. L. R. 735 ; 6 L. G. R. 1038, D. C.

Annotation :—*Refd.* *Lewis v. Weatheritt* (1909), 100 L. T.

213. — Deliveries after expiration of contract.—Written contract for the sale of warranted pure new milk having expired, the seller continued to supply milk to the purchaser. Both during the period of the written contract & subsequently a label was attached to each churn containing the words, “Pure new milk,” the names of both seller & purchaser, the quantity, & the date :—*Held* : the label was a sufficient written warranty within 1875 Act, s. 25, in respect of milk so delivered after the expiration of the written contract.—*LEWIS v. WEATHERITT* (1909), 100 L. T. 367 ; 73 J. P. 164 ; 25 T. L. R. 226 ; 7 L. G. R. 502 ; 21 Cox, C. C. 789, D. C.

214. Disclaimer of responsibility after delivery.—The addition of the words “but without accepting any responsibility after delivery” do not affect a warranty so as to make it unavailable as a defence under 1875 Act, s. 25.—*WILSON v. PLAYLE* (1903), 88 L. T. 554 ; 67 J. P. 263 ; 1 L. G. R. 870 ; 20 Cox, C. C. 433, D. C.

Annotation :—*Folld.* *Plowright v. Burrell*, [1913] 2 K. B. 362.

215. —Applt. being charged under 1875 Act with selling milk that was not of the nature, substance, & quality of the article demanded by the purchaser, proved that the milk had been bought by him from a co. under a written agreement & had been sold by him in the same state as when it was purchased. The agreement pro-

vided that “the co. hereby warrants each & every consignment of milk delivered under this contract to be pure genuine new milk with all its cream according to the conditions of the Food & Drugs Act,” & that “no responsibility is taken by the co. after delivery other than under the Food & Drugs Act,” & that for all other purposes the buyer must satisfy himself at the time of delivery that the milk was pure, & that he should not be entitled to make any claim against the co. for damages in respect of milk accepted by him :—*Held* : the agreement constituted a good warranty within 1875 Act, s. 25, & applt. was, therefore, entitled to be discharged from the prosecution.—*Plowright v. Burrell*, [1913] 2 K. B. 362 ; 82 L. J. K. B. 571 ; 108 L. T. 1006 ; 77 J. P. 245 ; 29 T. L. R. 398 ; 11 L. G. R. 157 ; 23 Cox, C. C. 438, D. C.

216. Article bought by sellers “under warranty of purity” & “sellers guarantee it as such.”—Resp. having been summoned under 1875 Act, s. 6, for selling milk which was adulterated by added water, relied upon the defence given by sect. 25 that he had purchased the milk under a written warranty, & proved that he had purchased the milk from a dairy company under an agreement which stated that the dairy company “purchase all milk sold by them under a warranty of its purity from the farmers, & agree to put the same on rail, thoroughly well cooled over a refrigerator, & guarantee it as such up to the time of delivery at the above address” :—*Held* : the words “& guarantee it as such” in the agreement ought to be construed as referring to the warranty of purity given by the farmers, & so construed, the agreement amounted to a written warranty upon which resp. was entitled to rely under sect. 25. *JACKLING v. CARTER* (1912), 107 L. T. 21 ; 76 J. P. 292 ; 10 L. G. R. 632 ; 23 Cox, C. C. 51, D. C.

217. Contract for supply of “new milk.”—By a memorandum of agreement made between a dairy co. & resp., the former agreed to sell & the latter to purchase certain quantities of “new milk” at specified prices to be delivered at resp.’s station. Nothing was said in the memorandum that any warranty would accompany the milk, but attached to each of the churns in which the milk was delivered to resp. was a label with the words, “guaranteed pure unskimmed milk with all its cream.” On a prosecution of resp. under 1875 Act, s. 9, for having sold some of the milk from which ten per cent. of the original fat had been abstracted so as to affect injuriously its quality, substance, or nature, & without making disclosure of the alteration, resp. relied as a defence under sect. 25 on a written warranty, which he alleged was contained in (1) the said memorandum of agreement & (2) the said written label :—*Held* : (1) the written label did not form part of the contract between the dairy co. & resp., as there was nothing to connect it with the memorandum of agreement, & therefore the two documents could not be read together as constituting a written warranty ; & (2) the provision in the memorandum of agreement for the supply of “new milk” did not constitute a written warranty within sect. 25, as the words “new milk” did not warrant that the milk would be genuine milk.—*DEWEY v. PAULKNER*, [1923] 1 K. B. 315 ; 92 L. J. K. B. 318 ;

hereby guarantee to supply you with milk under the same conditions as the extrix. & exors. of the late A. are doing, & guarantee the milk to be pure & all

that is required by Pure Food & Health Acts” :—*Held* : the document did not amount to a “written warranty” of the nature, substance, & quality of the

milk demanded within Health Act, 1890, s. 71.—*O’CONNOR v. McKIMMIE*, [1909] V. L. R. 166. —AUS.

FOOD AND DRUGS.

Sect. 4.—Warranty as a defence: Sub-sect. 1, C.; l. 2, A.]

128 L. T. 602; 87 J. P. 45; 39 T. L. R. 130; 67 Sol. Jo. 316; 21 L. G. R. 96; 27 Cox, C. C. 388, D. C.

SUB-SECT. 2.—WHEN AVAILABLE.

A. In General.

See 1875 Act, s. 25; 1899 Act, s. 20.

218. In respect of what offences — Offences under 1875 Act, ss. 3, 4 & 9.]—ELLIOT v. PILCHER, No. 208, ante.

— **Importance of article insufficiently marked.]—See No. 386, post.**

219. “No reason to believe that article was otherwise.”]—B., a refreshment contractor, had a written contract to be supplied with pure milk. The milk was delivered to B., at 10.30 a.m., & the lactometer showed standard milk. Part of it, when sold at 7.30 p.m., was found to contain 35 per cent. of added water. The magistrate dismissed the summons, holding that B. had no reason to believe the milk had been tampered with:—*Held*: the magistrate was wrong, & he ought to have found that the milk, when sold, was in the same state as when it was delivered to the seller, & case remitted to find that fact.

It is not enough that resp. had no reason to believe the state of the milk had been changed while in resp.'s premises. The burden is on him to prove that it was not changed (COLLINS, J.).—JONES v. BERTRAM (1891), 58 J. P. 478; 10 T. L. R. 285, D. C.

Annotation:—Consd. Pugh v. Williams (1917), 86 L. J. K. B. 1107.

220. ——— Effect of label.]—On an information before justices, under 1875 Act, s. 6, for selling an article of food not of the nature, substance, & quality demanded, defts. relied on a written warranty from their vendor. The article demanded was blackberry jelly, & there was a label on the jar in which it was sold with the words, “Finest Quality Blackberry Jelly. Prepared from the choicest fruit of the season & fruit juice.” The analyst certified that the sample contained at least 2 per cent. of apple pulp, & he stated in evidence that he believed that the sample consisted of two-thirds apple & one-third blackberry. Evidence was given for defts. that the jelly was sold as it was purchased, & that they had no reason to believe it to be otherwise than as demanded. The justices, however, found that defts. were aware that the contents of the jar were not of the nature, substance, & quality demanded, & that they had reason to believe that the article

was otherwise than as demanded when they sold it:—*Held*: except for the label there was no evidence of defts.' knowledge of the contents of the jar, & the label was not sufficient evidence to support the finding of the justices that defts. had reason to believe that article was otherwise than as demanded; & therefore the conviction must be quashed, although had the justices found merely that they were not satisfied as to defts.' belief that the article was in accordance with the warranty the conviction might have been supported.—BLAYDON CO-OPERATIVE SOCIETY v. YOUNG (1916), 86 L. J. K. B. 417; 115 L. T. 827; 80 J. P. 451; 61 Sol. Jo. 57; 14 L. G. R. 1149; 25 Cox, C. C. 580, D. C.

221. Article “sold in same state as when seller” purchased it—Onus of proof.]—JONES v. BERTRAM, No. 219, ante.

— — —.]—See, also, Nos. 226, 227, post.

222. ——— Failure to test article.]—Applt. who was a local foreman in the service of a co. sold milk on their behalf which was found upon analysis to contain twelve per cent. of added water. The milk in question had been consigned by one T. by railway in two cans, each of which bore a label with the words, “Warranted genuine new milk with all its cream on.” There was also a written agreement between T. & the co. whereby T. agreed to supply the co. with genuine good milk of the best quality with all its cream on. The applt. stated that the milk in question was served by him in the same state as he got it from the cans, but admitted that he had not tested it, though the milk had travelled a distance of ninety miles & a lactometer had been supplied to him for that purpose. Upon the above facts the justices convicted applt. under 1875 Act, s. 6:—*Held*: the conviction was right, inasmuch as applt., though a servant, was a seller of the milk; also, sect. 25 which exempts a purchaser in certain cases, had no application; & even if it had, applt. had not brought himself within its provisions.—HOTCHIN v. HINDMARSH, [1891] 2 Q. B. 181; 60 L. J. M. C. 146; 65 L. T. 149; 55 J. P. 775; 39 W. R. 607; 7 T. L. R. 513, D. C.

—*Reid*. Brown v. Foot (1892), 61 L. J. M. C. 110. *Mentd.* Caldwell v. Bethell, [1913] 1 K. B. 119.

223. ——— Effect of subsequent alteration.]—JONES v. BERTRAM, No. 219, ante.

224. ——— Not amounting to adulteration.]—A purchaser of milk with a written warranty, who has added a preservative to such milk, cannot rely upon 1875 Act, s. 25, even although the addition of such preservative is not complained of as an adulteration.—HENNEN v. LONG (1904), 90 L. T. 387; 68 J. P. 237; 2 L. G. R. 437; 20 Cox, C. C. 608, D. C.

—.]—See, also, Nos. 225–227, post.

PART II. SECT. 4, SUB-SECT. 2.—A.

219 A. “No reason to believe that article was otherwise.”]—Resp. purchased milk from H. under a written warranty, whereby H. had agreed to supply daily a certain quantity of milk to resp. & had warranted that all milk should be pure & unadulterated new milk with all its cream & should conform to the standard fixed by the Regulations made under Food & Drugs Act, 1908, & that such warranty should apply to every morning & afternoon instalment of milk supplied by H. to the vendor. The milk when sold to

the applt. was in the same condition as when he bought it from H. & he had no reason to believe that it was otherwise than standard milk:—*Held*: the warranty in the agreement was a warranty within Food & Drugs Act, 1908, s. 57, & afforded a good defence.—MITTON v. JEFFRIES, [1923] S. A. S. R. 133.—AUS.

s. Article sold in same state as when purchased.]—Whether all reasonable precautions taken—Question of fact.]—Where a person charged with selling an adulterated article of food proves that he took a written war-

ranty specially supplied to him with the article by a reputable vendor, & had no reason to suspect anything wrong with the same & sold it in the same state as he received it, *prima facie* he had taken all reasonable precautions against committing an offence against the Health Acts but in every case it is a question of fact for the magistrates to decide whether reasonable precautions have been taken.—RIDER v. DUNN, [1908] V. L. R. 377.—AUS.

t. ———.]—The evidence given in support of a complaint framed on the

225. — Delivery to seller at railway station.]

Resp., who kept a dairy at E., having been summoned under 1875 Act, s. 6 for selling milk which was deficient in fat, set up the defence under 1875 Act, s. 25 that she had purchased the milk as the same as that demanded of her by the purchaser, & with a written warranty to that effect, & that she had sold it in the same state as when she purchased it. She had entered into a written contract for the purchase of "sixteen gallons of pure new milk with all its cream, delivered daily, carriage paid, to W. station," & while this contract was in force a number of churns of milk arrived at W. station consigned to resp. from a station in Derbyshire, & were labelled, "warranted pure new milk with all its cream, pursuant to contract." The churns remained on the platform at W. station for nearly an hour, when they were taken away by resp. to her dairy. On the same morning part of the milk was sold, which was found to be deficient in fat. It was proved that the milk when sold by resp. was in the same state as when she received it at W. station, but there was no evidence as to whether it was in the same state as when it was delivered by the seller at the station from which it was sent, or when taken from the train on its arrival at W. :—*Held*: (1) the place of delivery of the milk to resp. was at W. station, & not at the station from which it was sent; (2) the purchase took place when she received the milk in her van at W. station; & (3) as she had proved that she sold the milk in the same state as she had received it at that station, she was thereby discharged from the prosecution under 1875 Act, s. 25.—*SANDERS v. SADLER* (1906), 95 L. T. 872; 71 J. P. 3; 23 T. L. R. 11; 5 L. G. R. 240; 21 Cox, C. C. 316, D. C.

Annotations:—As to (2) *Refd.* *Elder v. Bishop Auckland Co-op. Soc.* (1917), 86 L. J. K. B. 1412. As to (3) *Distd.* *Pugh v. Williams* (1917), 86 L. J. K. B. 1407. *Refd.* *Hargreaves v. Spackman* (1907), 52 Sol. Jo. 132.

226. — Onus of proof.]—Resp. was charged, under 1875 Act, s. 6 with selling milk not of the nature, substance, & quality demanded. It was proved that the milk was deficient in fat. Resp. had purchased the milk under a contract in writing, by which a farmer agreed to sell & deliver a quantity of milk, fresh & with all its cream, daily at K. station; but the responsibility of the farmer with regard to the quality, & condition of the milk was to cease upon the arrival of the milk at the station. The milk in question arrived at the station, & was fetched away by resp. after the milk had been at the station for a substantial interval of time. Resp. called no evidence to prove that the milk had not been tampered with during that interval. Resp. relied upon the warranty as defence to the charge:—*Held*: resp. was not entitled to rely upon the warranty as a defence to the charge, as he had not satisfied one of the conditions of sect. 25 & proved that he sold the milk in the same state as when he purchased it.—*PUGH v. WILLIAMS* (1917), 86 L. J. K. B. 1407;

wording of Health Act, 1900, s. 97, was of such a nature, that it was sufficient to establish a *prima facie* case that deft. had committed an offence:—*Held*: deft. was entitled in these circumstances to avail himself of the defence that he had purchased the food, with a written warranty & had sold it in the same state as it was supplied to him.—*MOYLE v. LANMIGAN*, [1909] S. R. Q. 195.—*AUS.*

How established.]—

The defence of "all reasonable precautions," is not established by proof that deft. purchased the article from a reputable firm; that he paid the highest market price for it; that he sold it in the state in which it was when he bought it; that he believed it to be pure because during a period of recent years a number of samples of the same class of article, purchased from the same seller, had been taken from deft.'s premises for analysis by health officers, without resulting complaint.

17 L. T. 191; 81 J. P. 159; 15 L. G. R. 573; 25 Cox, C. C. 768, D. C.

Annotations:—*Fold.* *Elder v. Bishop Auckland Co-op. Soc.* (1917), 86 L. J. K. B. 1412. *Mentd.* *Buckingham v. Duck* (1918), 120 L. T. 81.

227. — — — — —.]—*Resps.*, retailers, purchased milk from a dairy farmer under a contract, by which the latter agreed "to supply . . . milk, carriage paid," with a warranty of quality. The milk was delivered to the proper railway station at 5.13 a.m. & was fetched away by *resps.* at 8 a.m. the same morning by their servant. He poured the contents of the can into two smaller cans, & then took them round for distribution among *resps.*' customers. He had no authority to sell milk to anybody except members of *resp.* society who previously ordered a supply. While so delivering the milk the servant sold a small quantity to a non-member, the agent of applt. an inspector of weights & measures, which was deficient in quality & not of the nature, substance & quality demanded. When charged under 1875 Act, s. 6, *resps.* gave due notice under 1899 Act, s. 20 (1) that they intended to rely on the above warranty by virtue of 1875 Act, s. 25. The magistrate found that *resps.* purchased the milk as the same in nature, substance, & quality as that demanded by applt. & that they sold it in the same state as when they received it from the railway co. & had no reason to believe at the time of the sale to applt. that the milk was otherwise than of the nature, substance & quality demanded. No evidence was offered by *resps.* before the magistrates dealing with the period which elapsed between the arrival of the milk at the station & its being fetched by *resps.*:—*Held*: (1) on the construction of the contract, the milk was purchased by *resps.* within the meaning of 1875 Act when delivered at the railway station, & consequently the burden of showing what happened afterwards to the milk was on them, which burden they had not discharged & therefore the defence given by 1875 Act, s. 25 was not substantiated; (2) in selling to applt. *resps.*' servant had not acted without their authority, but had only misused the actual authority to sell which they had given him, & therefore *resp.* had sold the milk to applt. within 1875 Act, s. 6.—*ELDER v. BISHOP AUCKLAND CO-OPERATIVE SOCIETY, LTD.* (1917), 86 L. J. K. B. 1412; 117 L. T. 281; 81 J. P. 202; 33 T. L. R. 401; 61 Sol. Jo. 593; 15 L. G. R. 579; 26 Cox, C. C. 1, D. C.

Annotation:—As to (2) *Refd.* *Buckingham v. Duck* (1918), 120 L. T. 81.

228. To whom available -- Servant.]—*HOTCHIN v. HINDMARSH*, No. 222, *ante*.

— — — — —.]—*See, now*, 1890 Act, s. 20.

229. — Immediate purchaser.]—*JORNS v. VAN TROMP*, No. 190, *ante*.

230. — — — — —.]—*HARGREAVES v. SPACKMAN*, No. 192, *ante*.

Seemle. the above defence would have been . . . and if it had been also proved that any of the samples mentioned had been analysed anywhere . . . about the time of the purchase by deft. now in question.

A written warranty from the . . . is not essential in order to the defence of "all reasonable precautions" nor is such a warranty by itself conclusive.—*MCCALLOCH v. FROST & WINDSOR*, [1914] V. L. R. 448.—*AUS.*

Sect. 4.—Warranty as a defence: Sub-sect. 2, A. & B. (a) & (b); sub-sect. 3. Sect. 5: Sub-sect. 1, A.]

231. ——— Immediate seller affirming warranty of seller's vendor.]—REES v. DAVIS, No. 212, *ante*.

232. ——— ——— ———.]—JACKLING v. CARTER, No. 216,

B. Notice of Defence.

(a) To Purchaser.

See 1875 Act, s. 25; 1899 Act, s. 20.

233. Sufficiency of notice—"Copy of warranty" —Copy of label.]—IRVING v. CALLOW PARK DAIRY CO., LTD., BACON v. SAME, No. 193, *ante*.

234. ——— ——— ——— Original warranty indorsed with supplementary warranty.]—An information having been laid by resp. against applt. under 1875 Act, s. 6, applt.'s solrs. sent on Nov. 2, to resp. the following notice: "We beg to give you formal notice that our client purchased the same butter with a written warranty from G. L. The following is a copy of the warranty in question: 'We guarantee all butters sold by us to be absolutely pure; guaranteed pure butter within the 3rd & 7th sects. of the Margarine Act, 1877.' Deft. intends to rely on the foregoing as a defence to this summons."

On Aug. 4, applt. had purchased the butter of the wholesale house, & on the invoice was stated: "We guarantee all butters sold by us to be absolutely pure." Applt. was dissatisfied with this, & when going to the wholesale house the following week, & after the butter was delivered, took the invoice to the wholesale house, who put on it: "Guaranteed pure butter in accordance with the 3rd & 7th sections of the Margarine Act, 1887. In case of samples being taken for analysis, show this warranty to the inspector":—*Held*: the notice of Nov. 2, was a good notice of a defence under sect. 20 of 1899 Act.—FARTHING v. PARKINSON (1904), 90 L. T. 783; 68 J. P. 353; 2 L. G. R. 989; 20 Cox, C. C. 661, D. C.

235. Time for giving notice — "Within seven days sent"—Notice posted within seven days—Received by purchaser after expiration of seven days.]—In the absence of any words in 1899 Act, s. 20, sub-s. 1, indicating that the word "sent" is used with any other than its ordinary meaning of "dispatched" it must be construed as bearing that meaning, & if a copy of the warranty with the written notice is posted to the purchaser within seven days from the issue of the summons, it is "sent" in compliance with the requirement of the sub-sect., although it does not reach him till after the expiration of the seven days.—RETAIL DAIRY CO., LTD. v. CLARKE, [1912] 2 K. B. 388; 81 L. J. K. B. 845; 106 L. T. 848; 76 J. P. 282; 28 T. L. R. 361; 10 L. G. R. 517; 23 Cox, C. C. 6, D. C.

Mentd. Price v. Webb, [1913] 2 K. B. 367.

(b) To Warrantor.

See 1875 Act, s. 25; 1899 Act, s. 20.

236. Time for giving notice — Need not be sent within seven days after service of summons.]—The words, in 1899 Act, s. 20, sub-s. 1, "within seven days after service of the summons" do not apply to the notice to be sent to the warrantor, but merely apply to the notice to be sent to the purchaser, & that as regards the notice to the warrantor it is

sufficient if it has been sent before the magistrate comes to determine whether the warranty is a good defence. *Semble*: the ct. were not bound to grant an adjournment of the hearing in order to enable deft. to give notice to the warrantor of his intention to rely on the warranty as a defence.—MARCUS v. CROOK, [1914] 3 K. B. 173; 83 L. J. K. B. 1376; 111 L. T. 461; 78 J. P. 430; 30 T. L. R. 538; 12 L. G. R. 923; 24 Cox, C. C. 328, D. C.

SUB-SECT. 3.—GIVING FALSE WARRANTY.

See 1875 Act, s. 27; 1899 Act, s. 20 (5) (6).

237. Who may be liable—Company.]—A joint stock co. incorporated under Cos. Act can be convicted of an offence under 1899 Act, s. 20 (6).—CHUTER v. FREETH & POCKOCK, LTD., [1911] 2 K. B. 832; 80 L. J. K. B. 1322; 105 L. T. 238; 75 J. P. 430; 27 T. L. R. 467; 9 L. G. R. 1055; 22 Cox, C. C. 573, D. C.

*Annotations:—***Appld.** R. v. Ascanio Puck & Paice (1912), 76 J. P. 487. **Consd.** Mousell v. L. & N. W. Ry. [1917] 2 K. B. 836.

238. Venue of prosecution — Warranty not given within jurisdiction of court.]—An information was preferred in the Clerkenwell police ct. by an inspector of nuisances for the district, charging deft. with having, contrary to 1875 Act, s. 27, given a false warranty in writing with respect to milk sold & delivered by him to a dairy co. The sale, delivery, & giving of the warranty had all taken place outside the limits of the jurisdiction of the Clerkenwell police ct.; but the inspector had, with a view to a prosecution against the dairy co. under 1875 Act, s. 6, obtained a sample of the milk in the course of its delivery by them, within the jurisdiction of that ct., to purchasers from them, & had submitted the sample to the public analyst of the district, who certified that it contained a percentage of added water:—*Held*: a metropolitan police magistrate sitting at the Clerkenwell police court had no jurisdiction under 1875 Act, to hear & determine the information against deft.

It seems to me not open to question that the words "when the analyst, having analysed any article," at the commencement of the sect., [1875 Act, s. 70], must be interpreted to mean the official analyst appointed under s. 10 as analyst of all food & drugs sold within the district for which he is appointed, & the inspector of nuisances appointed for any district or place can only require the analyst, if there be one, for that district to analyse the suspected samples & give his certificate under sect. 13. We take it, therefore, that an inspector of nuisances could neither insist upon procuring a sample in a district for which he is not appointed, nor could an analyst not appointed to act for such district give any valid & effectual certificate of the result of his analysis under sect. 13 (HAWKINS, J.).—R. v. SMITH, [1896] 1 Q. B. 596; 65 L. J. M. C. 104; 74 L. T. 318; 60 J. P. 372; 44 W. R. 492; 12 T. L. R. 301; 40 Sol. Jo. 389; 18 Cox, C. C. 307, D. C.

*Annotations:—***Consd.** Manners v. Tyler, [1902] 1 K. B. 901. **Refd.** Hull v. Horsnell (1904), 92 L. T. 81.

See, now, 1899 Act, s. 20 (5).

239. Successive warranties.]—Proceedings for giving a false warranty in respect of an article of food cannot be taken, under 1899 Act, s. 20 (5), before a ct. having jurisdiction in the

place where the article in question was purchased for analysis, if the warranty was not given within the jurisdiction of that ct. unless it was given to the person from whom the article in question was purchased for analysis. The sect does not contemplate or provide for a series of successive warranties.—*MANNERS v. TYLER*, [1902] 1 K. B. 901; 71 L. J. K. B. 585; 86 L. T. 716; 66 J. P. 806; 50 W. R. 604; 46 Sol. Jo. 501; 20 Cox, C. C. 222, D. C.

240. — Place where warranty received.]—*GRIMBLE & CO. v. PRESTON*, No. 310, *post*.

241. Limit of time for proceedings — Whether twenty-eight days or reasonable time — Proceedings against original seller of perishable article—1879 Act, s. 10.]—On a purchase of milk for test purposes the vendor was charged with an offence against 1875 Act, s. 6, but the charge was dismissed on proof that it was sold to the vendor with a written warranty. Thereupon a summons was issued against the warrantor for giving a false warranty contrary to sect. 27, but this summons was not served upon the warrantor within twenty-eight days of the purchase of the milk for test purposes:—*Held*: under 1879 Act, s. 10, the milk not having been purchased of the person charged with giving the false warranty for test purposes, it was only necessary that the summons should have been served upon him within a reasonable time.—*COOK v. WHITE*, [1896] 1 Q. B. 281 65 L. J. M. C. 46; 74 L. T. 53; 60 J. 41 W. R. 409; 12 T. L. R. 192; 40 Sol. Jo. 317 18

Annotation:—*Apld.* *Whitaker v. Pomfret*, [1902] 1 K. B. 66

See, now, 1899 Act, s. 19.

242. — Six months.]—Proceedings under 1899 Act, s. 20 (6), against the original vendor of an article of food or drug for giving a false warranty in writing in respect of it to a purchaser, must be commenced within six calendar months from the date of the giving of the false warranty.—*WHITAKER v. POMFRET BROTHERS*, [1902] 1 K. B. 661; 71 L. J. K. B. 353; 86 L. T. 420; 66 J. P. 408; 50 W. R. 393; 18 T. L. R. 355 20 Cox, C. C. 180, D. C.

Annotation:—*Refd.* *Evans v. Weatheritt* (1907) 76 L. J. K. B. 628.

243. — Continuing warranty.—On Aug. 9, 1910, applts. a firm of wholesale milk dealers, agreed to supply to a firm of retailers all the milk which they might require at one of their branches, & on the same date applts. gave a written warranty as to the quality of all the milk which might thereafter be supplied by them to the retailers. On Jan. 17, 1911, applts. supplied milk under the contract which was not in accordance with the warranty, & on Feb. 15, 1911, an information was laid charging applts. with an offence under 1899 Act, s. 20 (6):—*Held*: the six months within which the information had to be laid ran from Jan. 17, 1911, & the proceedings were, therefore, commenced in time.—*THOMAS, LTD. v. HOUGHTON*, [1911] 2 K. B. 959; 81 L. J. K. B. 21; 105 L. T. 825; 75 J. P. 523; 9 L. G. R. 1142; 22 Cox, C. C. 628.

244. What defences available — No reason to believe that warranty false.]—Applt. was charged under 1875 Act, s. 27, with giving a false warranty in writing to a purchaser in respect of an article

of food sold by applt. When applt. sold the article he did not know, & had no reason to believe, that the warranty was false:—*Held*: he was not liable to be convicted.—*DERBYSHIRE v. HOULISTON*, [1897] 1 Q. B. 772; 66 L. J. Q. B. 569; 76 L. T. 624; 61 J. P. 374; 45 W. R. 527; 13 T. L. R. 377; 41 Sol. Jo. 491; 18 Cox, C. C. 609, D. C.

245. — Reason to believe that warranty true — Abstraction in transit.]—Resp. a farmer at S., entered into a contract to supply to a retail purveyor at A. station, new milk with all its cream, with a written warranty to that effect. On arrival it was found that the milk had had abstracted 16 per cent. of its fat, & upon the retailer being summoned under sect. 9 of 1875 Act, he showed that it was part of a consignment received at A. station from resp. with the warranty.

Resp. having been summoned under 1899 Act, s. 20 (6), for having given a false warranty, while admitting the abstraction of fat between S. & A. stations, proved to the magistrate's satisfaction that at & from the handing over of the milk to the railway co. at S. to the delivery at A. he had reason to believe the statements in the warranty were true. The magistrate thereupon dismissed the summons:—*Held*: the magistrate was right. — *OATLEY v. LEMON* (1905), 92 L. T. 200; 69 J. P. 163; 3 L. G. R. 315; 20 Cox, C. C. 791, D. C.

246. — Sale by seller of article warranted by sellers' vendor.]—Appls. who were wholesale dealers in milk, were summoned for giving a false warranty contrary to 1899 Act, s. 20 (6). Appls. had given a written warranty to J. & a sample of the milk sold by J. was found to be deficient in milk fat. The milk from which the sample was taken was supplied to applts. under a warranty from the farmer who supplied it, & the particular consignment also bore a ticket warranting the milk to be pure milk with all its cream. No sample of this consignment was taken by applts. & nothing was done to it before it was sent to J. Appls. had always found that the milk supplied by the farmer was up to warranty. Various precautions were taken by applts. to ensure the purity of the milk supplied to them by farmers, & they had taken samples of thirty-five consignments on the day in question, but no sample of the milk supplied by this particular farmer. The justices convicted applts. & the conviction was affirmed by quarter sessions: *Held*: under Jud. Act, 1894 (c. 16), the High Ct. had power to draw the proper inference from the facts stated in the case, & the justices ought to have come to the conclusion on the facts that applts. had reason to believe that the statements contained in the warranty were true, & therefore the conviction must be quashed.—*DAIRY SUPPLY CO., LTD. v. HOUGHTON* (1911), 106 L. T. 220; 76 J. P. 43; 28 T. L. R. 94; 10 L. G. R. 208; 22 Cox, C. C. 4, D. C.

c.

SECT. 5.—PROCEEDINGS AGAINST OFFENDERS.

SUB-SECT. 1. INSTITUTION OF PROCEEDINGS.

A. In General.

See 1875 Act, s. 20.

247. Institution — Service of summons.]

PART II. SECT. 5, SUB-SECT. 1.—A. against Pure Food Act, 1908, may be
b. *Institution — Authority to prosecute.*—A prosecution for an offence instituted by any person under the general authority given by Fines & Penalties Act, 1901, s. 4, the right to prosecute not having been expressly given by Pure Food Act, 1908,

FOOD AND DRUGS.

Sect. 5.—Proceedings against offenders: Sub-sect.

prosecution under the Sale of Food & Drugs Acts

An information was laid on Sept. 17 against deft. co., registered under Co. Acts, for an alleged offence in respect of certain drugs purchased on Aug. 22 preceding, & on the same day a summons was issued. On the summons coming on for hearing on Oct. 17 objection was taken & upheld that the summons had not been properly served, not having been served at the registered office of the co. On Oct. 30 a fresh summons was issued purporting to be issued pursuant to the information of Sept. 17. This summons was duly served at the registered office of the co. but after the expiration of twenty-eight days from Aug. 22 :—*Held* : the prosecution was not instituted within twenty-eight days from the time of the purchase of the drugs as required by 1899 Act, s. 19.—*COWLING v. TAYLOR'S DRUG CO., LTD.* (1901), 66 J. P. 11.

248. — Laying of information — & issue of summons.]—A prosecution is instituted within the period required by 1899 Act, s. 19 (1), if the information is laid & the summons issued within twenty-eight days from the purchase of the article [by an inspector] in respect of the sale of which the prosecution is instituted; & service of the summons is not necessary within the twenty-eight days in order to comply with the requirement of the sect.—*BEARDSLEY v. GIDDINGS*, [1904] 1 K. B. 847; 73 L. J. K. B. 378; 90 L. T. 651; 68 J. P. 222; 53 W. R. 78; 20 T. L. R. 315; 48 Sol. Jo. 352; 2 L. G. R. 719; 20 Cox, C. C. 645, D. C.

Annotations :—*Consd.* *Brooks v. Bagshaw*, [1901] 2 K. B. 798. *Reid. Re Vexatious Actions Act, 1896, Re Boaler*, [1914] 1 K. B. 122.

249. —]—An information was laid & a summons issued thereon within the twenty-eight days, but, the summons not having been served within the time prescribed by 1899 Act, s. 19 (2), it was allowed to drop, &, after the expiration of the twenty-eight days, a fresh summons was applied for on the same information & issued :—*Held* : there having been no adjudication on the merits of the first summons, a second summons could be issued on the information; & it was immaterial that the second summons was issued after the expiration of the twenty-eight days, the information, which was the institution of the prosecution, having been laid within that time.—*BROOKS v. BAGSHAW*, [1904] 2 K. B. 798; 73 L. J. K. B. 839; 91 L. T. 535; 68 J. P. 514; 53 W. R. 13; 20 T. L. R. 655; 48 Sol. Jo. 623; 2 L. G. R. 1007; 20 Cox, C. C. 727, D. C.

Annotations :—*Appld.* *Williams v. Letheren*, [1919] 2 K. B. 262. *Reid. Re Vexatious Actions Act, 1896, Re Boaler*, [1914] 1 K. B. 122.

250. Several samples taken—Separate informations in respect of each sample.]—A. contracted to supply a workhouse with milk to contain a certain percentage of cream; to be tested on delivery &

a reduction to be made in the price in respect of any deficiency in cream; & samples to be taken from each of the cans in which the daily supply was delivered. Samples were taken from five cans under 1879 Act, s. 3, & a large deficiency of cream found in two samples :—*Held* : (1) the procuring of each sample was a separate transaction, & A. was rightly convicted in a separate penalty in respect of each sample which was deficient in cream; (2) the fact that A.'s contract with the workhouse provided for a reduction in price if the percentage of cream was below a certain amount did not affect the question whether an offence had been committed; (3) evidence as to the samples from the other cans was rightly rejected.—*FECITT v. WALSH*, [1891] 2 Q. B. 304; 60 L. J. M. C. 143; 65 L. T. 82; 55 J. P. 726; 39 W. R. 525; 17 Cox, C. C. 322, D. C.

251. Procedure section repealed—Offence before repeal—Proceedings after repeal—Governed by repealing Act.]—*BATT v. MATTINSON*, No. 264, *post*.

B. Conditions Precedent.

252. Notification of intention to have article analysed.]—A police constable, by the direction of the inspector of weights & measures, bought gin from the barmaid of an inn with the intention of submitting it to analysis. He then told her that he was a police constable, & that he had purchased the gin for the purpose of analysis, but did not add "by the public analyst." The inspector afterwards had the gin analysed by the public analyst, & obtained his certificate that it was diluted, & the innkeeper was prosecuted under 1875 Act, ss. 20, 21, & summarily convicted of an offence against 1875 Act, s. 6 :—*Held* : the notification required by 1875 Act, s. 14 was a condition precedent to a prosecution under the Act, & the conviction must be quashed.—*BARNES v. CHIPP* (1878), 3 Ex. D. 176; 47 L. J. M. C. 85; 38 L. T. 570; 26 W. R. 635.

Annotations :—*Consd.* *Whecker v. Webb* (1887), 51 J. P. 661; *Monro v. Central Creamery Co.* (1912), 106 L. T. 114. *Reid.* *Sandys v. Small* (1878), 26 W. R. 814; *Enniskillen Union Grdns. v. Hilliard* (1884), 15 Cox, C. C. 613.

253. — Sample taken in course of delivery.]—(1) It is not necessary, where a sample of milk in course of delivery is procured for analysis under 1879 Act, s. 3, for the officer procuring such sample to notify to the seller or his agent his intention of having the sample analysed, or to deliver to the seller or his agent a portion of the sample in accordance with the provisions of 1875 Act, s. 14.

(2) A railway porter delivering milk at the place of delivery is not the seller's agent under the principal Act [1875 Act].—*ROUCH v. HALL* (1880), 6 Q. B. D. 17; 50 L. J. M. C. 6; 44 L. T. 183; 45 J. P. 220; 29 W. R. 304.

Annotations :—*As to* (1) *Appld.* *Rolfe v. Thompson*, [1892] 2 Q. B. 196. *Monro v. Central Creamery Co.*, [1912] 1 K. B. 578.

254. Article not purchased for test pur-

to any officer or person by name or designation.—*BEDINGFIELD v. KEOGH* (1912), 13 C. L. R. 601.—*AUS.*

J.—Sale of Food & Drugs Act, confers on the Local Government Board & the Board of Agriculture & the corresponding Boards in Scotland & Ireland powers in default of action by the Local Authority to institute proceedings at the instance of their

officers against persons infringing Sale of Food & Drugs Acts, 1875 & 1899, & prescribes procedure to be followed in such prosecution :—*Held* : the exercise of these powers was optional & not obligatory; the officers of these Boards were entitled to institute proceedings as private individuals in the method prescribed by Sale of Food & Drugs Act, 1875; & they were not limited in prosecution at their instance to the procedure prescribed by the

Act of 1899.—*FALCONER v. WHYTE*, [1908] S. C. (J.) 40; 45 Sc. L. R. 610; 15 S. L. T. 1038.—*SCOT.*

PART II. SECT. 5, SUB-SECT. 1.—B.

d. Notification of intention to have article analysed—Sample taken at place of delivery—Purchase by public officer.]—A public officer obtaining a sample of goods at the place of delivery to the purchaser, is under no obligation to notify to the seller or the seller's

poses—Purchase by private purchaser.]—PARSONS v. BIRMINGHAM DAIRY CO., No. 31, *ante*.

255. ———.] —BUCKLER v. WILSON, No. 32, *ante*.

256. ——— Admission by seller of offence.]—The notification required by 1875 Act, s. 14, to be given by an inspector after the completion of a purchase of his intention to have the article purchased analysed by the public analyst is a condition precedent to a prosecution under the Act & cannot be dispensed with although there is a contemporaneous admission by the seller of an offence against the Act. An analysis of the article purchased is also in similar circumstances a condition precedent to a prosecution.—SMART & SON v. WATTS, [1895] 1 Q. B. 219; 64 L. J. M. C. 89; 71 L. T. 768; 59 J. P. 54; 43 W. R. 379; 11 T. L. R. 144; 39 Sol. Jo. 135; 18 Cox, C. C. 62; 15 R. 154, D. C.

Annotations:—*Reid*. R. v. Smith, [1896] 1 Q. B. 596; *Grimble v. Preston* (1913), 30 T. L. R. 119; *Girling v. Child* (1921), 124 L. T. 700.

—— Prosecution under 1907 Act.] —See No. 460, *post*.

——.]—See, generally, Sect. 2, sub-sect. 3, A., *ante*.

257. Sealing sample.]—On the hearing of a complaint charging applt. with selling milk in an altered condition contrary to 1875 Act, s. 9, it having been proved by the analysis of the public analyst, who was not required by applt. to be called as a witness, that the milk was deficient in butter fat, applt. required that the sample of the milk, which had been retained by the purchaser in accordance with 1875 Act, s. 14, should be produced & sent to the Comrs. of Inland Revenue for analysis under 1899 Act, s. 21. The sample, which had been placed in a bottle, was produced, but the cork of the bottle having become loose, the sample was in consequence in such a condition as to make a satisfactory analysis impossible. Applt. was convicted:—*Held*: it was not a condition precedent to a conviction that the retained sample should have been analysed; but in order to support the conviction there must be a finding of fact by the magistrate that the sample had been sealed or fastened up in such manner as its nature would permit, as provided by 1875 Act, s. 14, & the case was therefore remitted to the magistrate.—SUCKLING v. PARKER, [1906] 1 K. B. 527; 75 L. J. K. B. 302; 94 L. T. 552; 70 J. P. 209; 54 W. R. 438; 22 T. L. R. 357; 50 Sol. Jo. 326; 4 L. G. R. 531; 21 Cox, C. C. 145, D. C.

Annotation:—*Consd.* Winterbottom v. Allwood, [1915] 2 K. B. 608.

agent his intention to have the sample analysed, or to offer to divide the sample into three in order to give one part to the seller or his agent.—MORTON v. FRYE (1896), 2 Adam, 174; 21 R. (Ct. of Sess.) 9; 34 Sc. L. R. 55; 4 S. L. T. 133, J.—SCOT.

257 i. Sealing sample.]—*Held*: it was not necessary that the samples delivered to the vendor & retained by the purchaser should be so sealed as to be preserved in a condition capable of effective analysis.—CHALMERS v. M'MEEKING, [1921] S. C. (J.) 54; 58 Sc. L. R. 227.—SCOT.

e. Analysis of sample—By Board of Public Health.]—Where on the hearing of an information under Health Acts deft. requests that part of the article taken for analysis should be

sent to the Board of Public Health under Pure Food Act, 1905, s. 23, the justices must comply, before they can convict deft. If compliance with the request is impossible by reason of none of the parts of the article taken being in existence deft. should be discharged.—GUNNER v. PAYNE, [1908] V. L. R. 363.—AUS.

264 i. Service of copy of certificate with summons.]—P., a retail dealer in milk, had been successfully prosecuted for selling adulterated milk, which she had innocently purchased from B., a wholesale dealer. She then prosecuted B. giving in evidence the certificate of analysis which had been used in the prosecution against herself, but not any certificate of analysis made on her own behalf. No copy of any cer-

258. ———.] —WINTERBOTTOM v. ALLWOOD, No. 50, *ante*.

——.]—See, generally, Sect. 2, sub-sect. 3, C., *ante*.

259. Delivery of sample—To seller.]—ROUCH v. HALL, No. 253, *ante*.

——.]—See, generally, Sect. 2, sub-sect. 3, D., *ante*.

260. Analysis of sample—Admission of offence by seller.]—SMART & SON v. WATTS, No. 256, *ante*.

261. ——— By Commissioners of Inland Revenue.] —SUCKLING v. PARKER, No. 257, *ante*.

262. Certificate of analyst.]—The certificate was a condition precedent to the prosecution, & the certificate being informal having regard to the form set out in the schedule to [1875] Act, the conviction must be quashed (*per Cur.*).—PEARCE v. BARSTOW (1880), 41 J. P. 699.

Annotation:—*Reid*. R. v. Smith, [1896] 1 Q. B. 596.

263. ———.]—SMART & SON v. WATTS, No. 256, *ante*.

——.]—See, generally, Sect. 2, sub-sect. 1, B., *ante*.

264. Service of copy of certificate with summons.]—Where an Act creating an offence is kept in force, & the sect. providing procedure is only repealed, & other procedure is provided by the repealing Act, although an offence is committed while the repealed sect. is in force, if proceedings are not taken after the repeal takes effect, they are governed by the requirements of the repealing Act.

The non-fulfilment of the requirements of 1899 Act, s. 19, is not a matter capable of amendment under Summary Jurisdiction Act, 1848 (c. 43).—BATT v. MATINSON (1900), 82 1 T. 800; 64 J. P. 615; 16 T. L. R. 398; 19 Cox, C. C. 532.

Annotation:—*Consd.* Grimble v. Preston, [1914] 1 K. B. 270.

265. ———.]—GRIMBLE & CO. v. PRESTON, No. 310, *post*.

266. ———.]—An information was preferred against applt. for having sold milk which was deficient in natural fat & also contained a certain percentage of added water. When the case came on for hearing the magistrate was informed that no certificate of analysis had been served with the summons in accordance with 1899 Act, s. 19 (2), whereupon he dismissed the summons. No evidence as to the facts was given. A second summons was then taken out in respect of the

certificate of analysis was served on B. with the summons:—*Held*: the conviction could not be sustained.—R. v. MAHONY, [1909] 2 T. L. R. 490; 43 L. T. 263.—IR.

1. Division of sample into three parts.]—A complaint was made (deft. under Health Acts, ss. 91 & 111, for selling food. The portion of sample retained by the Inspector, with the rest of a small part, which had been destroyed in the process of analysis, produced in ct. & offered for independent analysis. The Inspector taking the sample for analysis had divided it into two parts:—*Held*: the magistrate ought to have dismissed the complaint.—PERMB v. TRITTON, *Ex p. TRITTON*, [1914] S. R. Q. 239. AUS.

2. Production of sample.]—It is

Sect. 5.—Proceedings against offenders: Sub-sect. 1, B.; sub-sects. 2, 3 & 4, A. & B.]

same alleged offence, & with it was served a copy of the analyst's certificate:—*Held*: applt. had been in peril of being convicted on the first summons & therefore was entitled to plead *autrefois acquit* to the second summons.—*HAYNES v. DAVIS*, [1915] 1 K. B. 332; 81 L. J. K. B. 441; 112 L. T. 417; 79 J. P. 187; 13 L. G. R. 497; 24 Cox, C. C. 533, D. C.

267. ———.] — An information was laid against applt. under 1899 Act, s. 20 (6), for having, in respect of certain milk sold by her, given to the purchaser a false warranty in writing. A summons was issued upon the information, & was served upon applt., but no copy of the analyst's certificate was served therewith under sect. 19 (2), & that summons was thus affected by an irregularity. The justices adjourned that summons to a future day, & in the meantime a second summons was issued upon the same information & was duly served upon applt. together with a copy of the analyst's certificate. Both the summonses then came before the justices, who heard the second summons first & convicted applt. upon that summons. The first summons was then withdrawn by the prosecution. On a case stated by the justices:—*Held*: (1) the justices had jurisdiction to issue & to hear & determine the second summons notwithstanding that the first summons was still pending; (2) applt. was not entitled to succeed upon a plea of *autrefois acquit* to the second summons.—*WILLIAMS v. LETHEREN*, [1919] 2 K. B. 262; 88 L. J. K. B. 944; 121 L. T. 115; 83 J. P. 159; 35 T. L. R. 378; Sol. Jo. 535; 17 L. G. R. 338; 26 Cox, C. C. 41, D. C.

SUB-SECT. 2.—JURISDICTION OF COURT.

See 1875 Act, s. 20; 1899 Act, s. 20.

268. County justices — Offence committed in borough without separate court of quarter sessions.]—*BUCKLER v. WILSON*, No. 32, *ante*.

269. ——— Purchase in one petty sessional division — Jurisdiction of justices sitting in another division.]—*R. v. BEACONTREE JJ.*, *R. v. WRIGHT*, No. 284, *post*.

Offence committed outside jurisdiction — Giving false warranty.]—See Nos. 238, 239, *ante*; No. 310, *post*.

Issue of summons invalid.] — See No. 287, *post*.

To hear second summons — First summons pending.]— See No. 267, *ante*.

a condition precedent to a conviction for a contravention of Sale of Food & Drugs Act, 1875, s. 6, that the prosecutor shall produce, on the motion of the accused, the sample of the article in question directed to be retained & sent, on the motion of either party, to Somerset House for analysis, & that the accidental loss of the sample will not relieve the prosecutor from compliance with this condition.—*HUTCHINSON v. STEVENSON* (1902), 1 F. (Ct. of Sess.) 69; 39 Sc. L. R. 789; 10 S. L. T. 91, J.—**SCOT**.

PART II. SECT. 5, SUB-SECT. 2.

h. Factory Defendant & offence committed outside jurisdiction.]—Defl. was

tried at B. before the police magistrate for the county of Hastings & convicted, for supplying milk from which the cream or strippings had been taken or kept back. The factory was in Hastings, but deft. resided & the milk was supplied in the county of Lennox & Addington:—*Held*: the police magistrate for Hastings had no jurisdiction to try the offence.—*R. v. DOWLING* (1889), 17 O. R. 698.—**CAN**.

k. To convert into charge triable summarily.—On original information.—It is not competent for magistrates, where the information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one

SUB-SECT. 3.—PARTIES.

270. Prosecutor—Inspector—Not actual purchaser.]—*HORDER v. SCOTT*, No. 53, *ante*.

271. ———.]—*STACE v. SMITH*, No. 9, *ante*.

272. ———.]—*GARFORTH v. ESAM*, No. 10, *ante*.

273. ———.]—*FARLEY v. HIGGINBOTHAM* (1898), 42 Sol. Jo. 309, D. C.

274. ———.]—*TYLER v. DAIRY SUPPLY CO., LTD.*, No. 12, *ante*.

275. ——— Of non-quarter sessions borough.]—An inspector of nuisances of a non-quarter sessions borough under the direction of the town council of the borough bought a sample of milk from resp. &, in consequence of the analysis made by the county analyst, on the instructions of the town council preferred an information under 1875 Act, s. 6:—*Held*: the proceedings were rightly taken by the inspector of nuisances.—*WORTHINGTON v. KYME* (1905), 93 L. T. 516; 69 J. P. 390; 51 W. R. 185; 49 Sol. Jo. 713; 3 L. G. R. 1098; 21 Cox, C. C. 37, D. C.

276. ——— Constable.]—*HALE v. COLE*, No. 315, *post*.

277. ——— Private individual.]—*HARRIS v. WILLIAMS*, No. 13, *ante*.

——— Proof of authority of prosecutor.]— See Nos. 315, 316, *post*.

Defendant—Master.]— See Sect. 3, sub-sect. 3, B. (c), *ante*.

278. ——— Servant.]—*HOTCHIN v. HINDMARSH*, No. 222, *ante*.

279. ——— Company.]—*PEARKS, GUNSTON & TEE, LTD. v. WARD*, *HENNEN v. SOUTHERN COUNTIES DAIRIES CO.*, No. 101, *ante*.

280. ———.]—*CHUTER v. FREETH & POCKOCK, LTD.*, No. 237, *ante*.

281. ———.]—*BOOTH v. HELLAWELL*, No. 102, *ante*.

282. ——— Accessory.]—An accessory before the fact to a misdemeanour, which includes offences punishable on summary conviction, is for the purpose of conviction to be regarded as a principal offender.

Applts., wholesale dealers, were charged with aiding & abetting G., a customer whom they had supplied with an article of food, in the offence under the Sale of Food & Drugs Acts, to which the latter pleaded guilty, of selling that article to

which they have jurisdiction to try summarily, & to so try it, on the original information.—*R. v. DUNGEY* (1901), 21 C. L. T. 435; 2 O. L. R. 223.—**CAN**.

PART II. SECT. 5, SUB-SECT. 3.

1. Prosecutor — Whether corporation of a burgh may prosecute.]—*Held*: the word "person" as used in Sale of Food & Drugs Act, 1875, s. 33 (1), did not include the corpn. of a burgh & such a corpn. had no title to prosecute for a contravention of the Act.—*COLQUHOUN v. DUMBARTON MAGISTRATES*, [1907] S. C. (J.) 57; 44 Sc. L. R. 165; 14 S. L. T. 847.—**SCOT**.

resp., it being adulterated, but sold by G. as received from applts. It had been purchased by resp. from G. for test purposes, & by 1899 Act, s. 19, a "prosecution under" those Acts in the above circumstances could not be instituted after the expiration of twenty-eight days after the purchase. The proceedings against applts. had been instituted more than twenty-eight days after :—*Held*: as applts. were accessories to G.'s offence, which was a misdemeanour, they were to be regarded as principals, & as such were entitled to the benefit of 1899 Act, s. 19, & accordingly, the proceedings against them were out of time.—*GOULD & CO. v. HOUGHTON*, [1921] 1 K. B. 509; 90 L. J. K. B. 369; 124 L. T. 566; 85 P. 37 T. L. R. 291; 65 Sol. Jo. 344; 19 G. R. 85 26 Cox, C. C. 693, D. C.

SUB-SECT. 1.—THE SUMMONS.

A. Issue.

See 1875 Act, s. 20; 1879 Act, s. 10; 1899 Act, s. 19.

283. By whom issued—Justice not hearing complaint.—A complaint having been made to two justices of a borough against applt. for an offence under 1875 Act, & 1879 Act, a summons was signed & issued by another justice, who had not heard the complaint, & was served on applt. Applt. thereupon appeared before the stipendiary magistrate of the borough, but objected that the summons was invalid & the magistrate had no jurisdiction to hear the case. The magistrate being of opinion that the defect, if any, in the summons was cured by the appearance of applt. heard the case & convicted him :—*Held*: (1) the summons, having been signed & issued by a justice who had not heard the complaint, was invalid; (2) the defect was not cured by the appearance of applt. as he appeared under protest; (3) the provisions of 1879 Act, s. 10, were imperative, & not merely directory, & as no summons had been duly served in accordance with them the magistrate had no jurisdiction & the conviction was wrong.—*DIXON v. WELLS* (1890), 25 Q. B. D. 249; 59 L. J. M. C. 116; 62 L. T. 812; 54 J. P. 725; 38 W. R. 606; 6 T. L. R. 322; 17 Cox, C. C. 48, D. C.

Annotations:—As to (2) *Reid*. Whiffen & Bligh v. Malling, Kent, Licensing JJ. (1891), 66 L. T. 333. As to (3) *Reid*. R. v. Garrett-Pegge, *Ex p.* Brown, [1911] 1 K. B. 880.

284. — County justice—Not acting for division in which offence committed.—Where the article has been delivered to a purchaser at a place situated in one petty sessional division of a county, the proceedings may be taken in another petty sessional division of the county before justices who usually sit & act in & for that other division.—*R. v. BEACONTREE J.J.*, *R. v. WRIGHT*, [1915] 3 K. B. 388; 84 L. J. K. B. 2230; 31 T. L. R. 509; *sub nom.* *R. v. BEACONTREE J.J.*, *Ex p.* MIDDLETON, *R. v. WRIGHT*, *Ex p.* HORSNELL, 113 L. T. 727; 79 J. P. 461; 13 L. G. R. 1094; 25 Cox, C. C. 89, D. C.

285. Time of issue—Article purchased for test purposes—Whether within twenty-eight days.—*BEARDSLEY v. GIDDINGS*, No. 248, *ante*.

286. — — — — — Brooks v. 1 No. 249, *ante*.

Giving false warranty.—See Nos. 241-243, *ante*.

— **Prosecution under 1907 Act.**—See No. 460, *post*.

287. Issue of second summons—First summons pending.—*WILLIAMS v. LETHEREN*, No. 267, *ante*.

See 1875 Act, s. 20; 1879 Act, s. 10; 1899 Act, s. 19.

288. Place of service—Service on company.—*COWLING v. TAYLOR'S DRUG CO., LTD.*, No. 217, *ante*.

289. — — — — ——Applts. were a limited co. incorporated under the Cos. Acts & having a registered office in London. They carried on business in various parts of the country as grocers & provision merchants. A summons was issued against them for an offence under 1875 Act, in a provincial town & served on the manager of their shop in that town. A solr. appeared on behalf of the co. before the justices to argue that the service was bad & then withdrew from the case :—*Held* (1) the service was bad & every summons on a registered co. must be served in accordance with the Cos. Act, 1862 (c. 89), s. 62, by being left at or sent to the registered office of the co.; (2) applts. had not waived any irregularity in the service of the summons by instructing a solr. to appear on their behalf to argue solely such irregularity.—*PEARKS, GUNSTON & TEE, LTD. v. RICHARDSON*, [1902] 1 K. B. 91; 71 L. J. K. B. 18; 85 L. T. 616; 66 J. P. 119; 50 W. R. 286; 18 T. L. R. 78; 46 Sol. Jo. 87; 20 Cox, C. C. 96, D. C.

Annotation:—Generally, *Mentd.* Smithies v. Bridge, [1902] 2 K. B. 13.

290. — "Place of abode" Shop Shop-keeper resident elsewhere.—"Place of abode" in summary Jurisdiction Act, 1848 (c. 43), s. 1, does not include a shop where the person sought to be served does not reside.

A shopkeeper informed an inspector under Sale of Food & Drugs Act on the purchase of a sample that the shop was his private address & he lived there. As a fact he resided elsewhere, & summonses were served by a police officer on the wife of the tenant of one of the flats in the building of which the shop formed the ground floor. The shopkeeper had no knowledge of any proceedings until after he had been convicted :—*Held*: the service was bad; & the shopkeeper was not estopped from setting up such bad service, as there was no evidence that he made the statement to the inspector for the purpose of avoiding service.—*R. v. LILLEY*, *Ex p.* TAYLOR (1910), 104 L. T. 77; 75 J. P. 95.

Annotations:—*Reid*. *R. v. Rhodes*, *Ex p.* McVittie, *R. v. Mullin*, *Ex p.* McVittie (1915), 85 L. J. K. B. 830; *R. v. Braithwaite*, [1918] 2 K. B. 319.

291. Time of service—Article purchased for test purposes—Whether within twenty-eight days.—*DIXON v. WELLS*, No. 283, *ante*.

PART II. SECT. 5, SUB-SECT. 4.—B.

291 i. Time of service—Article purchased for test purposes—Whether within

—On Sept. 13 between 12.15 & 12.30 p.m. an article of food was purchased from resp. for test
On Oct. 11 at 4 p.m. a

under Sale of Food & Drugs Acts in respect of the above sale was served on resp. :—*Held*: the prosecution had been instituted within the

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292. ————.]—**COWLING v. TAYLOR'S DRUG CO., LTD.,** No. 247, *ante*.

293. ————.]—**BEARDSLEY v. GIDDINGS,** No. 248, *ante*.

294. ————.]—**Prosecution against accessory.]—GOULD & Co. v. HOUGHTON,** No. 282, *ante*.

295. ————.]—**Article not purchased for test purposes.]—BUCKLER v. WILSON,** No. 32, *ante*.

———.]—**Giving false warranty.]—See** No. 241, *ante*.

296. ————.]—**Fourteen clear days before return day.]—By 1899 Act, s. 19, sub-s. 2, it is provided that "In any prosecution under the Acts the summons . . . shall not be made returnable in less time than fourteen days from the day on which it is served:—Held: fourteen clear days must elapse between the date of service & that of return.—MCQUEEN v. JACKSON, [1903] 2 K. B. 163; 72 L. J. K. B. 606; 88 L. T. 871; 67 J. P. 353; 1 L. G. R. 601; 20 Cox, C. C. 499**

Service with summons of copy of analyst's certificate.]—See Nos. 264, 266, 267, *ante*; No. 310, *post*.

297. Irregularity—Whether defendant estopped from alleging—Waiver—Appearance under protest.]—DIXON v. WEISS, No. 283, *ante*.

298. ————.]—**PEARKS, GUNSTON & TEE, LTD. v. RICHARDSON,** No. 289, *ante*.

299. ————.]—**Delay in taking objection.]—GRIMBLE & Co. v. PRESTON,** No. 310, *post*.

300. ————.]—**Misstatement as to place of abode.]—R. v. LALLEY, Ex p. TAYLOR,** No. 290, *ante*.

C. Form and Contents.

See 1899 Act, s. 19 (2).

301. Particulars—Necessity for.]—A summons under 1875 Act, s. 6, following the words of the sect. charged a milkman with selling to the prejudice of the purchaser a pint of milk not of the nature, substance, & quality demanded, & gave no further particulars:—Held: the summons was defective for want of particulars. Deft. was entitled under 1879 Act, s. 10, to information as to the defect in milk.—BARNES v. RIDER (1892), 62 L. J. M. C. 25; 68 L. T. 447; 57 J. P. 473; 17 Cox, C. C. 623; 5 R. 42, D. C.
Annotation:—Consd. Neal v. Devenish, [1894] 1 Q. B. 544.

302. ————.]—**Sufficiency of—Question for justices.]—Where a summons does not give particulars**

period of "28 days from the time of the purchase."—**HORAN v. POWER** (1916), 50 L. L. T. 61.—**IR.**

291 II. ————.]—**Milk was purchased by a sanitary inspector at 9 a.m. on Nov. 4. A complaint in respect of such sale was served on the seller at 7.30 p.m. on Dec. 2, the twenty-eighth day from the day of purchase:—Held: the day on which the purchase took place was not to be taken into computation in calculating the statutory period, & the complaint had been served timeously.—FRANK v. MORRIS (1897), 24 R. (Ct. of Sess.) 50; 34 Sc. L. R. 527; 4 S. L. T. J.—**SCOT.****

m. days before return

day.]—*Held: Food & Drugs Amendment Act, 1879, s. 10, applies to Scotland, & applt. was entitled to seven days inducitur. Having been brought prematurely into ct., accused was not bound to accept an offer of adjournment.—DUNLOP v. GORDIE (1895), 1 Adam, 554.—**SCOT.***

PART II. SECT. 5, SUB-SECT. 4.—C.

n. *Name of prosecutor.]—Where a summons libelling a contravention of Food & Drugs Acts, being in the form given in Burgh Police Act, 1892, did not give the name of the prosecutor, & no notice was given to accused of any intention to adopt any other form of procedure than that laid down in the statutes creating the*

of adulteration, & deft. makes this objection, the justices must decide whether the particulars are sufficient.—R. v. WAKEFIELD (1890), 54 J. P. Jo. 148, D. C.

Annotation:—Folld. Neal v. Devenish, [1894] 1 Q. B. 544.

303. ————.]—**The omission from a summons of the particulars required by 1879 Act, s. 10, does not deprive the justices of jurisdiction; but if the justices are satisfied that deft. is prejudiced thereby, he is entitled to an adjournment of the hearing.—NEAL v. DEVENISH, [1894] 1 Q. B. 544; 63 L. J. M. C. 78; 70 L. T. 628; 58 J. P. 246; 10 T. L. R. 313; 10 R. 578, D. C.**

Annotations:—Distd. Batt v. Mattinson (1900), 82 L. T. 800. Refd. Grimble v. Preston (1913), 83 L. J. K. B. 347.

304. ————.]—**No particulars of adulteration.]—R. v. WAKEFIELD,** No. 302, *ante*.

305. ————.]—**NEAL v. DEVENISH,** No. 303, *ante*.

306. ————.]—**Particulars insufficient—Right of defendant to adjournment.]—NEAL v. DEVENISH,** No. 303, *ante*.

SUB-SECT. 5.—THE HEARING.

A. Powers of Court

307. To hear & determine second summons—First summons pending.]—WILLIAMS v. LETHEREN, No. 267, *ante*.

308. Amendment—Variance between offence charged & offence proved.]—A consigner of milk having been summoned under 1875 Act, s. 6, the evidence against him disclosed an offence under sect. 3 of Amendment Act, 1879:—Held: the variance was curable by Summary Jurisdiction Act, 1848 (c. 43), s. 1, & applt. was rightly convicted.—HIETT v. WARD (1894), 70 L. T. 374; 58 J. P. 461; 10 T. L. R. 284; 17 Cox, C. C. 736; 10 R. 406, D. C.

309. ————.]—**Non-compliance with formalities—Failure to serve copy of certificate with summons.]—BATT v. MATTINSON,** No. 264, *ante*.

310. ————.]—**Appls. who were vinegar brewers in London, delivered to F. at N. a quantity of vinegar, & F. received by post at N. an invoice sent by applts. from London containing the words "guaranteed pure malt vinegar." A part of the vinegar was purchased for analysis from F. as malt vinegar, & the analyst's certificate showed that at least 30 per cent. was vinegar not derived from malted barley or cereals & containing only .024 per cent. of phosphoric acid. F. was summoned under 1875 Act, s. 6, but**

offence, the proceedings were inept.—**BURNS v. WILLIAMSON (1897), 2 Adam, 308.—SCOT.**

PART II. SECT. 5, SUB-SECT. 5.—A.

o. *When regulations ambiguous.]—Provincial Board of Health Regulations, s. 20, governing the sale of milk not being clear as to what was intended to be prohibited, or what allowed, the ct. refused to interfere with a judgment quashing a conviction thereunder.—R. v. GARVIN (1909), 14 B. C. R. 260.—**CAN.***

p. *To order independent analysis of sample.]—A person was charged before a burgh police magistrate with selling as pure & unadulterated, milk*

the prosecution against him was withdrawn. Appls. were then summoned for giving to F. a false warranty in writing. A copy of the analyst's certificate was not served upon appls. with the summons, as required by sect. 19 (2). At the hearing before the ct. of summary jurisdiction at N. appls. appeared by their solr., who did not at the commencement of the case take the objection that a copy of the analyst's certificate had not been served with the summons, but cross-examined the witnesses for the prosecution & took the objection afterwards. The justices had obtained from Somerset House an analysis of part of the sample which showed that the vinegar was a mixture of malt vinegar with vinegar not derived from malt, the latter being at least one-third of the whole. The justices having convicted appls. :—*Held* : (1) the warranty was given at the place where it reached the purchaser F. namely, at N., & the justices at N. had jurisdiction to adjudicate ; (2) the provision as to the service of the copy of the analyst's certificate with the summons was procedure & could be waived, & the omission to serve it with the summons was in fact waived by appls. not having taken the objection at the commencement of the hearing ; (3) there was sufficient evidence on which the justices could find that the warranty was false.—GRIMBLE & CO. v. PRESTON, [1914] 1 K. B. 270 ; 83 L. J. K. B. 347 ; 110 L. T. 115 ; 78 J. P. 72 ; 30 T. L. R. 119 ; 12 L. G. R. 382 ; 24 Cox, C. C. 1, D. C.

Annotation :—As to (2) *Consd.* Haynes v. Davis, [1915] 1 K. B. 332.

311. Adjournment—Insufficient particulars.] — NEAL v. DEVENISH, No. 303, *ante*.

312. — Omission to serve copy of certificate with summons.]—GRIMBLE & CO. v. PRESTON, No. 310, *ante*.

B. Defences.

313. Autrefois acquit.]—HAYNES v. DAVIS, No. 266, *ante*.

314. —.]—WILLIAMS v. LETHEREN, No. 267, *ante*.

—.]—*See, generally*, CRIMINAL LAW, Vol. XIV., pp. 336 *et*

which was not so. There being no public analyst in the burgh, some of the milk had been sent by the police officials to an analytical chemist, who reported unfavourably :—*Held* : it was within the discretion of the magistrate to refuse a motion for accused, that a portion of the milk should be handed to another analytical chemist, whose fee accused was willing to pay, for an independent analysis, & that his judgment on this point was not subject to review.—BAIN v. MACKAY (1875), 2 R. (Ct. of Sess.) 32 ; 12 Sc. L. R. 490, J.—SCOT.

PART II. SECT. 5, SUB-SECT. 5.—C.

a. Adulteration & impoverishment—Analyst's certificate—Admissibility.]—A certificate of an analyst under Public Health Act is admissible under Evidence Act, s. 15, without proof that it is in the form prescribed by the Public Health Act.—*Ex p.* RIGBY (1905), 5 R. N. S. W. 317.—AUS.

Sufficiency.]—On a prosecution for selling food which is not of the nature, substance or quality demanded by the purchaser, where the certificate of an analyst is admitted

in evidence, it is not necessary for the prosecutor to prove that the analyst divided the food submitted to him by the purchaser into two parts. — HUGHES v. STEEL (1908), 5 C. L. R. 755.—AUS.

s. Uncontradicted evidence of witness for prosecution—Whether justices may disregard.]—Upon the hearing of an information for selling milk which was adulterated, deft.'s driver, from whom the milk was purchased, being called as a witness for the prosecution, gave evidence that he had added water to the milk without the knowledge or authority of deft. The justices disbelieved that evidence, & also deft.'s evidence to the like effect :—*Held* : the justices were not entitled to disregard the driver's evidence.—LENNOX v. GALLAGHAN, [1915] V. L. R. 161.—AUS.

— *Whether analysis necessary.*—To prove an offence under Health Act (Consolidated), s. 91, analysis is not an essential, or even a reasonable, mode of proof in every prosecution where a penalty is sought for selling adulterated food, etc., in contravention of the Health Act, but

Notice or disclosure to purchaser.]—*See* Sect. 3, sub-sect. 3, C. (b), & sub-sect. 5, B., *ante*.

Warranty.]—*See* Sect. 4, sub-sect. 2, *ante*.

To prosecution for giving false warranty.]—*See* Sect. 4, sub-sect. 3, *ante*.

C. Evidence.

See 1875 Act, ss. 21, 24.

315. Of authority of prosecutor—Constable.]—Where a constable prosecutes for adulteration of food, it is not necessary to prove as a condition precedent, that he was directed by the local authority appointing him such constable to prosecute. —HALE v. COLE (1891), 55 J. P. 376, D. C.

Annotation :—*Expld.* Holt v. Morris (1893), 57 J. P. 411.

316. — Inspector.]—Applt. an inspector appointed under Sale of Food & Drugs Acts, laid an information against resp. under 1875 Act, s. 6. At the hearing of the information applt. in his evidence stated that his name was "Alexander Ross, an inspector under the Food & Drugs Act," & put in evidence the certificate of the public analyst which was addressed "To Inspector A. Ross." He was not cross-examined or asked to produce his appointment as inspector. When applt.'s case was closed, resp. submitted that it was necessary that applt. should prove that he was a duly authorised officer, & that, as he had not produced his appointment, the information should be dismissed. Applt. asked for an adjournment to enable him to produce his appointment. The justices were of opinion that it was necessary for applt. formally to prove his appointment as inspector, & that, having failed to do so, he could not be allowed, after having closed his case, to call further evidence, & they dismissed the information :—*Held* : it was not necessary for applt. formally to prove that he was an inspector by producing his appointment, & as he had given *prima facie* evidence that he was an inspector, the decision of the justices was wrong.

Semble : it was not necessary for the applt. to prove that he was an inspector. — Ross v. HELM, [1913] 3 K. B. 462 ; 82 L. J. K. B. 1322 ; 107 L. T. 829 ; 77 J. P. 13 ; 11 L. G. R. 36 ; 23 Cox, C. C. 248, D. C.

such offence may be proved by other satisfactory evidence. — PLUMER v. TRILL (1915), 20 C. L. R. 108.—AUS.

— *Milk containing preservative—Proof of actual mixing.]*—Deft., who was a vendor of milk, was found in the possession of milk containing borie acid. There was no direct evidence of actual mixing either by the dairy-owner who had supplied deft. with the milk in question, or by deft. himself, or his employees :—*Held* : proof of actual mixing by deft. was necessary in order to justify a conviction.—WOODS v. BROWN (1907), 26 N. Z. L. R. 1312.—N.Z.

b. — Opinion of Somerset House officers.]—*Held* : the references under Sale of Food & Drugs Act, 1875, s. 22, to Somerset House officers is for the purpose of obtaining the opinion of their analysts merely & that therefore their opinion as to what is minimum fat found in new milk cannot be as evidence.—DARGIE v. (1884), 11 R. (Ct. of Sess.) L. R. 536, J.—SCOT.

c. Evidence of accused servants.]—*Held* : the

Sect. 5.—Proceedings against offenders: Sub-sect. 5, C. & D.; sub-sects. 6 & 7. Part III. 1 & 2: Sub-sect. 1, A., B., C. & D.

Adulteration & impoverishment — Analyst's certificate.]—See Nos. 75-78, 178, ante.

—— **Standard of quality.]—See Sect. 3, sub-sect. 3, D., ante.**

317. — Admissibility of evidence in reference to samples not subject of informations.]—FECHT v. WALSH, No. 250, ante.

318. In mitigation of sentence.] — BROWN v. FOOT, No. 104, ante.

319. Admission - Effect of.]—SMART & SON v. WATTS, No. 256, ante.

D.

320. Trivial offence — Dismissal of R. v. FIELD, ETC., JJ., Ex p. WHITE, No. 147, ante.

321. — — —.]—PRESTON v. REDFERN, No. 149, ante.

SUB-SECT. 6.—APPEALS.

See 1875 Act, s. 23.

Whether appeal lies — From conviction for offence under 1899 Act, s. 1.]—See No. 387, post.

SUB-SECT. 7.—PENALTIES.

Application.]—See 1875 Act, s. 26.

—— **Penalty recovered under Margarine Act, 1887 (c. 29).]—See No. 473, post.**

Part III.—Sale of Unwholesome Food.

SECT. 1.—COMMON LAW OFFENCES.

See CRIMINAL LAW, Vol. XIV., p. 36, Nos. 60-62; Vol. XV., pp. 761, 996, Nos. 8183-8186, 11, 146.

SECT. 2. — STATUTORY OFFENCES.

NOTE.—In this Part, Public Health Act, 1875 (c. 55); Public Health Acts Amendment Act, 1890 (c. 59); Public Health (London) Act, 1891 (c. 76); Public Health Act, 1896 (c. 19), & Public Health (Regulations as to Food) Act, 1907 (c. 32), are referred to as P. H. Act, 1875; P. H. Act, 1890; P. H. Act, 1891; P. H. Act, 1896, & P. H. Act, 1907, respectively.

B-SECT. 1. — OUTSIDE LONDON.

A. Inspection of Articles of Food.

See P. H. Act, 1875, s. 116; P. H. Act, 1890, s. 23.

322. Reasonable time for — Sunday.] — a butcher, at his residence half a mile from his shop, on a Sunday afternoon, was requested to go himself, or send some one with the key, to admit the inspector of nuisances to his shop, in order that some meat there might be examined. Applt. refused, & was convicted of preventing, obstructing, or impeding the inspector:— *Held*: although Sunday afternoon might, in some circumstances, be a reasonable time for the examination of meat, applt. had committed no offence.—

onus of proof imposed by Sale of Milk Regulations, 1901, on a person accused of selling milk which was not genuine had been sufficiently discharged by the evidence of accused himself & his servants that the milk had not been tampered with: & it was not necessary for him to have corroboration of a neutral witness.—LAMONT v. ROBERT, [1911] S. C. (J.) 21; 6 Adam, 328.—SCOT.

PART II. SECT. 5, SUB-SECT. 7.

d. For second offence — Necessity for conviction of first offence.]—Where the Statute fixes one penalty for a first offence & another for a second offence the accused must have been convicted of the first offence before the commission of the second in order to justify a conviction & penalty as for a second offence.—O'CONNOR v. BINI, [1908] V. L. R. 567.—AUS.

SMALL v. BICKLEY (1875), 32 L. T. 726; 10 J. P. 119, D. C.

323. Refusal to permit entry on premises on Sunday — Obstruction of officer.] — SMALL v. BICKLEY, No. 322, ante.

Place for.]—See Nos. 339-343, post.

B. Seizure of Inspected Articles of Food.

See P. H. Act, 1875, s. 116; P. H. Act, 1890, s. 28.

324. Article sold & in purchaser's possession.] —Resp., a butcher, exposed for sale part of a cow which had died of disease, & sold the meat to a customer, who took it home for food, & some days afterwards at the request of applt., an inspector of nuisances handed it over to him, & it was condemned by a justice as unfit for the food of man:— *Held*: the meat was not "so seized" & condemned as is prescribed by sects. 116, 117, of P. H. Act, 1875, & therefore resp. was not liable, as the person to whom the same "did belong at the time of the exposure for sale," to a penalty under sect. 117.—VINTER v. HIND (1882), 10 Q. B. D. 63; 52 L. J. M. C. 93; 48 L. T. 359; 47 J. P. 373; 31 W. R. 198, D. C.

Annotations:—Expld. & Distd. Mallinson v. Carr, [1891] 1 Q. B. 48. Consd. R. v. Dennis, [1894] 2 Q. B. 458; Salt v. Tomlinson, [1911] 2 K. B. 391; Hewett v. Hattersley, [1912] 3 K. B. 35; Bothamley v. Jolly, [1915] 3 K. B. 425. Refd. Re Bater & Birkenhead Corpn. (1893), 41 W. R. 513; Billing v. Prebble (1896), 66 L. J. Q. B. 180; Grivell v. Malpas, [1906] 2 K. B. 32. Mentd. Waye v. Thompson (1885), 15 Q. B. D. 342.

325. — — —.]—WILLIAMS v. NARBERTH SANITARY AUTHORITY (1882), Times, Dec. 7, D. C.

326. — — — Effect of P. H. Act, 1890, s. 28.]—

PART III. SECT. 2, SUB-SECT. 1. — A.

a. No power of municipality to charge fees for inspection.]—GERMISTON MUNICIPALITY v. RAND COLD STORAGE CO., LTD. (1913), T. P. D. 530.—S. AF.
f. "Meat intended for food of man" — Burden of proving the contrary—Cattle Slaughtering and Diseased Animals and Meat Act, 1902.]—ALEXANDER v. MENARY (1921), 29 C. L. R. 371.—AUS.

Applt. sold at her shop to a customer a piece of meat for human food. The meat was unsound & unfit for food at the time of sale. The customer took the meat away with her. On the following day it was seized at the customer's house by an inspector of nuisances. The meat was subsequently condemned by a justice :—*Held* : although the meat had not been seized while on applt.'s premises, applt. was liable to be convicted of an offence in respect of the sale of the meat under P. H. Act, 1890, s. 28.—*SALT v. TOMLINSON*, [1911] 2 K. B. 391 ; 80 L. J. K. B. 897 ; 105 L. T. 31 ; 75 J. P. 398 ; 27 T. L. R. 427 ; 9 L. G. R. 822 ; 22 Cox. C. C. 479, D. C.

Annotations :—*Consd.* *Hewett v. Hattersley*, [1912] 3 K. B. 35 ; *Bothamley v. Jolly*, [1915] 3 K. B. 425.

327. Difference between article seized & article sold—Sale of bullock—Seizure of meat.]—*BOTHAMLEY v. JOLLY*, No. 335, *post*.

Place for.]—*See* Nos. 339-343, *post*.

C. Condemnation of Seized Articles of Food.

See P. H. Act, 1875, s. 117 ; P. H. Act, 1890, s. 28.

328. Time for—Unreasonable delay.]—Where unsound meat was seized by the inspector of nuisances at 8 p.m., & he then went in search of a justice, but did not find one till next morning at 10.15 a.m., when an order to condemn the meat was made :—*Held* : there was no unreasonable delay, & the justices were wrong in dismissing on that ground an information for having unsound meat for sale within the meaning of P. H. Act, 1875, ss. 116, 117.—*BURTON v. BRADLEY* (1886), 51 J. P. 118, D. C.

329. Difference between article condemned & article sold—Sale of bullock—Condemnation of meat.]—*BOTHAMLEY v. JOLLY*, No. 335, *post*.

330. Rights of owner—To notice before condemnation.]—Meat might be taken before a justice under P. H. Act, 1875, ss. 116, 117, & condemned without any summons or notice to the person to whom it belonged, & such person having been subsequently to the destruction of the meat summoned & convicted of an offence under the above sects. such conviction was good.—*WHITE v. REDFERN* (1879), 5 Q. B. D. 15 ; 41 L. T. 524 ; 44 J. P. 87 ; *sub nom.* *R. v. WHITE*, 49 L. J. M. C. 19 ; 28 W. R. 168, D. C.

Annotations :—*Consd.* *Vinter v. Hind* (1882), 10 Q. B. D. 63 ; *Waye v. Thompson* (1885), 15 Q. B. D. 342 ; *Thomas v. Van Os*, [1900] 2 Q. B. 448. *Refd.* *Re Bater & Williamson & Birkenhead Corpn.* (1893), 62 L. J. M. C. 107 ; *Blaker v. Tillstone*, [1894] 1 Q. B. 345 ; *Ex p. Francis*, [1903] 1 K. B. 275 ; *Dodd v. Pearson* (1911), 9 L. G. R. 646. *Mentd.* *R. v. Handsley* (1881), 8 Q. B. D. 383 ; *R. v. Davey, etc.*, JJ. (1899), 80 L. T. 798.

331. To give evidence before condemnation.]—(1) The owner of meat seized as unsound brought before a justice for condemnation under P. H. Act, 1875, ss. 116, 117, is not entitled as of

right to attend & give evidence in defence of the meat ; but the justice may, if he thinks fit, hear evidence tendered by the owner ; & (2) if the justice after so doing refuses to condemn the meat, although the owner is not entitled to refuse to take it back, the compensation to which the owner will be entitled under s. 308 will include the costs reasonably incurred in resisting the condemnation of the meat.—*Re BATER & BIRKENHEAD CORPN.*, [1893] 2 Q. B. 77 ; 62 L. J. M. C. 107 ; 69 L. T. 220 ; 41 W. R. 513 ; 9 T. L. R. 179 ; 37 Sol. Jo. 525 ; 4 R. 438 ; *sub nom.* *BATER v. BIRKENHEAD CORPN.*, 58 J. P. 7, C. A.

Annotations :—*As to* (1) *Refd.* *Walshaw v. Brighouse Corpn.*, [1899] 2 Q. B. 286. *As to* (2) *Consd.* *Walshaw v. Brighouse Corpn.*, [1899] 2 Q. B. 286 ; *Hobbs v. Winchester Corpn.* (1910), 102 L. T. 811 ; *Refd.* *Barnett v. Eccles Corpn.*, [1900] 2 Q. B. 423.

— **To compensation.]—***See* Sect. 2, sub-sect. 1, *F.*, *post*.

D. Offences.

See P. H. Act, 1875, ss. 116, 117 ; P. H. Act, 1890, s. 28.

332. Article “exposed for sale” — Whether actual exposure necessary.] A person sending bad meat to market cannot be convicted unless the meat has been actually exposed for sale ; mere ownership of the meat is not sufficient. — *BARLOW v. TERRETT*, [1891] 2 Q. B. 107 ; 60 L. J. M. C. 104 ; 65 L. T. 148 ; 55 J. P. 632 ; 39 W. R. 610, D. C.

Annotation :—*Consd.* *Firth v. McPhail*, [1905] 2 K. B. 300.

333. ———.] A person having in his possession unsound meat intended for human food can be convicted under P. H. Act, 1875, s. 117, notwithstanding that he has not exposed the meat for sale.—*MALLINSON v. CARR*, [1891] 1 Q. B. 48 ; 60 L. J. M. C. 34 ; 63 L. T. 159 ; 55 J. P. 102 ; 39 W. R. 270 ; 17 Cox. C. C. 220, D. C.

As to—*Distd.* *Wieland v. Butler Hogan* (1904), 73 L. J. K. B. 513. *Consd.* *Hobbs v. Winchester Corpn.*, [1910] 2 K. B. 171. *Refd.* *Firth v. McPhail* (1905), 3 L. G. R. 478 ; *Robertson v. Melroy* (1907), 72 J. P. Jo. 27 ; *Bothamley v. Jolly*, [1915] 3 K. B. 425.

334. ——— Necessity for intention to sell.]—A person cannot be convicted under P. H. Act, 1875, ss. 116, 117, unless the unsound meat is for the purpose of sale.—*RENDELL v. HEMINGWAY* (1898), 14 T. L. R. 456, D. C.

335. ———.] A person who has sold diseased meat intended for human food cannot be convicted of an offence, under P. H. Act, 1890, s. 28, for having sold it unless he has exposed it for sale. Applt., without having exposed it for sale, sold a diseased live bullock to a butcher, knowing that he intended to use it for human food. The butcher, having killed the bullock, divided the carcase, less the parts usually severed & removed, into two halves, & hung it up in his slaughter-house ; the carcase was there seized by the medical

PART III. SECT. 2, SUB-SECT. 1.—C.

g. Warrant to destroy condemned carcase—Petition for—Penalties & expenses of seizure.]—*Held* : it was competent to present a petition for a warrant to destroy a carcase which had been seized by a sanitary inspector, & after obtaining the warrant to present a second petition against the same person for penalties & the expenses of the seizure.—*GIBSON v. AYR TOWN COUNCIL* (1892), 20 R. (Ct. of Sess.) 47 ; 30 Sc. L. R. 311, J. —*SCOT*.

PART III. SECT. 2, SUB-SECT. 1.—D.

334 i. Article “exposed to sale” — Whether actual exposure necessary—Necessity for intention to sell.]—*Held* : “exposed for sale” in Public Health Act, 1918 (N. B.), s. 28, does not convey the idea of intention on the part of the owner of the goods to part with them. It matters not whether the goods be exposed for sale by the rightful owner, or by anybody else with or without his knowledge & consent, or whether it be legally or illegally exposed for sale, so long as it is in fact

exposed for sale by
WARREN v. McLEAN, [1923] 4
260 ; 50 N. B. R. 426. — *CAN*.

h. ——— “Animal” —
of.] The word “animal” in
No. 36, s. 47, by which it is an offence
to sell, or consign, or expose for sale
any diseased animal, means a living,
& not a dead animal.—*Ex p. LOMAX*
(1906), 6 S. R. N. S. W. 705. — *AUS*.

Mens rea — *Whether*
of disease
that an animal is

Sect. 2.—Statutory offences: Sub-sect. 1, D.]

officer of health & was condemned by a justice:—*Held*: applts. could not be convicted of an offence under P. H. Act, 1890, s. 28, for having sold the bullock because there had been no exposure for sale by them, & further, because the article of food which had been seized & condemned was not the article which had been sold by them.—**BOTHAMLEY v. JOLLY**, [1915] 3 K. B. 425; 84 L. J. K. B. 2223; 113 L. T. 999; 79 J. P. 548; 81 T. L. R. 626; 14 L. G. R. 109; 25 Cox, C. C. 199, D. C.

Annotation:—*Reid*. **Webb v. Baker** (1916), 115 L. T. 630.

336. — Exposure for purpose of completion of agreement to sell.—By P. H. Act, 1875, s. 117, a justice is empowered to order the destruction of unsound meat, etc. which, having been exposed for sale & intended for the food of man, has been seized by the sanitary authority; “& the person to whom the same belongs or did belong at the time of exposure for sale” is made liable to a penalty:—*Held*: the expression “exposure for sale” includes an exposure for the purpose of completing an agreement to sell previously entered into.—**OLLETT v. JORDAN**, [1918] 2 K. B. 41; 87 L. J. K. B. 934; 119 L. T. 50; 82 J. P. 221; 62 Sol. Jo. 636; 16 L. G. R. 487; 26 Cox, C. C. 275, D. C.

337. — Each exposure an offence.—Three defts. were convicted under sect. 63 of Public Health Act, 1848 (c. 63), by four separate convictions for exposing for sale four pieces of butcher’s meat, being unfit for the food of man, & a penalty of 20s. with a certain sum for costs, was inflicted in each case upon each deft.

Each exposure of a piece of bad meat is a separate offence (*MELLOR, J.*).—*Re HARTLEY* (1862), 31 L. J. M. C. 232; *sub nom.* *R. v. HARTLEY, Re Over Darwen, Lancashire Local Board of Health*, 26 J. P. 438.

Annotation:—*Consd.* *Milnes v. Bale, Milnes v. Lea* (1875), L. R. 10 C. P. 591.

338. — Aiding & abetting — Negligence of veterinary surgeon in examination of exposed article.—Negligence on the part of a veterinary surgeon in making an examination & giving a certificate that meat which is in fact unsound is sound & healthy is not of itself sufficient to justify a conviction against the veterinary surgeon for aiding & abetting the exposing of the unsound meat for sale although such negligence in fact causes the exposure of the meat.—**CALOW v. TILSTONE** (1900), 83 L. T. 411; 64 J. P. 823; 19 Cox, C. C. 576, D. C.

339. Article “deposited in any place” — “Place” — Slaughterhouse yard.—Two carcasses of cows, unfit for food, were found in a yard at the back of a butcher’s house, there being a slaughterhouse on one side of the yard:—*Held*: the yard was a “place” within the meaning of Nuisances Removal Act, 1863 (c. 177), ss. 2, 3.—**YOUNG v. GRATTRIDGE** (1868), L. R. 4 Q. B. 166; 38 L. J. M. C. 67; 33 J. P. 260.

340. — Moving cart.—Unsound meat intended for the food of man was being carried in

a cart along a road from a knacker’s yard, where it had been partially prepared for sale, to a slaughterhouse, where it was to be further prepared for sale. While on its way to the slaughterhouse it was seized by an inspector of nuisances under P. H. Act, 1875, s. 116:—*Held*: the meat was deposited in a place for the purpose of preparation for sale within the meaning of that sect.—**WILLIAMS v. ALLEN**, [1916] 1 K. B. 425; 85 L. J. K. B. 822; 114 L. T. 1205; 80 J. P. 55; 14 L. G. R. 366; 25 Cox, C. C. 425, D. C.

341. — “For purpose of sale” — Deposit on another’s premises.—A person who has deposited, on premises other than his own, for the purpose of sale, diseased meat belonging to him & intended for the food of man, does not thereby commit any of the offences in respect of dealing with diseased meat which are specified in P. H. Act, 1890, s. 28 (1).—**FIRTH v. MCPHAIL**, [1905] 2 K. B. 300; 74 L. J. K. B. 458; 92 L. T. 567; 69 J. P. 203; 21 T. L. R. 403; 3 L. G. R. 478; 20 Cox, C. C. 821, D. C.

Annotations:—*Consd.* **Bothamley v. Jolly**, [1915] 3 K. B. 425. *Reid*. **Robertson v. McIlroy** (1907), 72 J. P. Jo. 27; **Hobbs v. Winchester Corpn.**, [1910] 2 K. B. 471.

342. — Deposit in shop after return of article by purchaser.—**ROBERTON v. MCILROY, LTD.** (1907), 72 J. P. Jo. 27.

343. — Deposit for distribution.—Resp. was the secretary of a co. entrusted with the distribution of meat under the Ministry of Food. The co. had nothing to do with the selection of the carcasses, which were allotted to them for distribution among the local butchers, & the meat never became their property, their duty being to collect the purchase-money & forward it to the Ministry of Food, from whom they received a commission. Two carcasses forming part of a consignment to the co. & intended for the food of man were seized on their premises & condemned as unsound. The justices dismissed an information under P. H. Act, 1875, ss. 116, 117, & P. H. Act, 1890, s. 28, against resp. for having the meat in his possession:—*Held*: the distribution by the co. was part of the sale of the meat, & the carcasses having been deposited for distribution, had been deposited “for the purpose of sale” within the meaning of the Acts, & the case should go back to the justices with a direction to convict.—**OLLETT v. HENRY**, [1919] 2 K. B. 88; 88 L. J. K. B. 998; 121 L. T. 86; 83 J. P. 165; 17 L. G. R. 349; 26 Cox, C. C. 401, D. C.

344. — “For purpose of preparation for sale.”—**WHITE v. REDFERN**, No. 330, *ante*.

345. — “Intended for food of man.”—**WIELAND v. BUTLER-HOGAN**, No. 353, *post*.

346. “Possession” of unsound food — General rule — “Possession” construed in popular sense.—By a contract made between applt. & poor law guardians applt. undertook to supply goods to, & deliver them at, a workhouse. The goods were, as regards quality to be such as the guardians approved. Rejected goods were to be removed by, & at the expense of, applt. within seven days after notice to him of their rejection. In purported fulfilment of an order given by the guardians

is necessary to constitute an offence against Health Act, 1898 (S. A.), s. 109.—**MASTER BUTCHERS, LTD. v. LAUGHTON & COOMBS, LTD.** (1915), 19 C. L. R. 319.—**AUS.**

k. — — — — —.—**DICKSON v. PRETORIA MUNICIPALITY** (1906), T. S. 878.—**S. AF.**

l. — — — — —.—**R. v.** [1918] E. D. L. 313.—**S. AF.**

m. Article “deposited in any place” — “Place” — Moving cart.—A quantity of diseased meat was seized while being removed in a cart to a manufactory for the preparation of

under the contract applt. delivered at the work-house a quantity of rabbits which were intended for the food of man, but which were in fact unsound & unfit for the food of man. The guardians gave immediate notice of rejection to applt. & on the same day the rabbits were seized by an inspector of nuisances & duly condemned & ordered to be destroyed. Applt. was convicted under P. H. Act, 1875, s. 117, for having unlawfully deposited for the purpose of sale rabbits which were intended for the food of man & which when in his possession had been lawfully seized & condemned:—*Held*: without deciding whether the rabbits had been deposited by applt. for the purpose of sale, the conviction must be quashed inasmuch as the rabbits at the time of their seizure were not in his possession within sect. 117. The word "possession" must be construed in a popular & not in a narrow sense.—*WEBB v. BAKER*, [1916] 2 K. B. 753; 86 L. J. K. B. 36; 115 L. T. 630; 80 J. P. 449; 61 Sol. Jo. 72; 14 L. G. R. 1158; 25 Cox, C. C. 547, D. C.

347. — "Person to whom food" did belong.] — *VINTER v. HIND*, No. 324, *ante*.

348. — — —.] — Applt. was an under-bailiff on the estate of N., a large landowner, & it was his duty to receive instructions from, & obey the orders of the head bailiff. Two cows belonging to N. were slaughtered, as they were affected by disease; applt. was not present when the cows were slaughtered, but on the same day he was told by the head bailiff to send the meat to P. & to go there himself to meet it. Applt. went to P. on the following day, & saw a butcher named B., & on the next day, the head bailiff, having been told that the meat had not been sent off, directed applt. to take the meat to P. station & consign it to the butcher. The transit of the meat to P. station was superintended by applt. who took charge of it. It was then sent by train in applt.'s own name to the butcher at P. applt. sending a telegram to the butcher, "Two carcasses of meat addressed to you; make best of it." The butcher replied that the meat, which was then lying at P. station, was no use to him. Applt. then sent a telegram to the station-master: "Ask consignee to do the best he can. If he can't dispose of it, ask him to bury it, & charge sender expenses." The meat was seized while lying at the station, & condemned as unsound. Upon these facts applt. was convicted, under P. H. Act, 1875, s. 117, of exposing unsound meat for sale, as being the person "to whom the same belonged":—*Held*: there was no evidence whatever upon the facts, to show that applt. was the person "to whom the meat belonged."—*NEWTON v. MONKCOM* (1888), 58 L. T. 231; 52 J. P. 4 T. L. R. 205; 16 Cox, C. C. 382, D. C.

preserved meat:—*Held*: a cart upon which diseased meat is being carried, for the purpose of preparation with a view to sale as human food, is "a place" within 26 & 27 Vict. c. 117, s. 2.—*WEBB v. DALY* (1870), 18 W. R. 631.—*IR*.

349 i. "Possession" of unsound food — *Whether exposure for sale necessary.*] — If unsound meat, unfit for human food, is found in a butcher's slaughterhouse, being dressed & prepared for sale as human food, & is seized, condemned by a magistrate, & ordered to be destroyed, the butcher is liable to a penalty under Public Health Act, 1878, ss. 132 & 133, although it is neither alleged in the summons nor

proved that such meat was exposed or conveyed for sale.—*CORK RURAL DISTRICT COUNCIL v. WALSH*, *CORK RURAL DISTRICT COUNCIL v. DESMOND*, [1908] 2 I. R. 234.—*IR*.

n. — *Mens rea* — *Knowledge of corporation.*] — Where an employé of a co. had opened & exposed for sale diseased meat, but there was no evidence that it was the duty of such employé to open & inspect such meat, & the manager of the co. was, without negligence, ignorant of the state of the meat:—*Held*: the co. could not be considered to have had knowledge of the state of the meat.—*R. v. PANTON*, *Ex p. FARMER'S PRODUCE CO., LTD.* (1888), 14 V. L. R. 836.—*AUS*.

349. — *Whether exposure for sale necessary.*] — *MALLINSON v. CARR*, No. 333, *ante*.

350. — *Mens rea* — *Whether personal knowledge of unsoundness necessary.*] — On a summons under P. H. Act, 1875, s. 117, charging a person with having unsound meat on his premises for sale, it is not necessary to show that deft. had personal knowledge of the condition of the meat.—*BLAKER v. TILLSTONE*, [1894] 1 Q. B. 345; 63 L. J. M. C. 72; 70 L. T. 31; 58 J. P. 184; 42 W. R. 253; 10 T. L. R. 178; 38 Sol. Jo. 10 R. 94, D. C.

Annotations:—*Consd.* *Firth v. McPhail*, [1905] 2 K. B. 300. *Refd.* *Hobbs v. Winchester Corpn.*, [1910] 2 K. B. 471.

351. — — —.] — To constitute the offence created by P. H. Act, 1875, s. 117, *rea* need not be shown. Meat belonging to & intended for the food of man was seized & condemned under P. H. Act, 1875, ss. 116, 117, as unsound. In respect of this pltf. was prosecuted under s. 117, but the summons was dismissed. Pltf. thereupon made a claim for compensation under P. H. Act, 1875, s. 308, & as the claim was not admitted it was referred to arbn. The arbitrator by his award found (a) a portion of the meat was unsound, but pltf. was not aware of this; (b) the unsoundness & unfitness of the meat for the food of man could not have been discovered by any examination which pltf. or his servants could reasonably have been expected to make; & (c) pltf. had been damaged by the cost of defending himself in the prosecution & also in his trade & business & reputation by reason of the prosecution:—*Held*: as pltf. had himself been in default he was not entitled to recover compensation.—*HOBBS v. WINCHESTER CORPN.*, [1910] 2 K. B. 471; 79 L. J. K. B. 1123; 102 L. T. 841; 74 J. P. 413; 26 T. L. R. 557; 8 L. G. R. 1072, C. A.

Annotation — *Refd.* *Bothamley v. Jolly*, [1915] 3 K. B. 425.

352. — — — *Necessity for intention to sell.*] — *RENDELL v. HEMINGWAY*, No. 334, *ante*.

353. — — — *"Intended for food of man."*] — On a Monday morning, shortly after twelve o'clock at noon, an inspector of nuisances visited the shop where applt. carried on the business of a butcher. The shop contained a safe which the inspector found closed. It was opened by him & found to contain some meat which showed signs of decomposition. Business was carried on at applt.'s shop up to midnight on the previous Saturday, when all the meat remaining unsold was placed in the safe, & was then sound & fit for the food of man. On the Monday in question the safe had not been opened after midnight on the previous Saturday until the inspector's visit, a period of thirty-six hours. In the ordinary course

o. — *Diseased meat* — *Sale of each piece a separate offence.*] — A butcher was convicted of having in his possession for the purpose of sale ten pieces of diseased meat. The pieces were all portions of the same animal:—*Held*: each piece of meat was a separate article within the meaning of the Act & the sale of each was a separate offence. *KENNELL v. BELL*, [1910] 8 C. (J.) 13; 47 Sol. L. R. 160; 6 Adam, 192.—*SCOT*.

— *What amounts to* — — —.] — An auctioneer was convicted for a contravention of Municipal & Police Act, s. 261, by having meat as or for human food in

Sect. 2.—Statutory offences: Sub-sect. 1, D., E.
F.; sub-sect. 2, A. & B.

of applt.'s business all the meat contained in the safe would have been examined before setting it out for sale, & any part found to have been unsound would have been removed:—*Held*: there was no evidence that the meat was deposited on applt.'s premises for the purpose of sale & intended for the food of man.—*WIELAND v. BUTLER*—73 L. J. K. B. 513; 90 L. T. 588; 53 W. R. 63; 20 T. L. R. 397; 2 L. G. R. 1074; 20 Cox, 1. C.

v. McPhail, [1905] 2 K. B. 300.
v. McIlroy (1907), 72 J. P. Jo. 27; Hobbs
Winchester Corpn., [1910] 2 K. B. 471.

354. —.]—Meat supplied for the use of a regiment was delivered at their barracks & rejected as unsound. It was subsequently found by the inspector of nuisances in a waggon on the premises of a slaughterer, & was condemned by a justice. Applt. had after the seizure admitted his ownership of the meat to the inspector & had said to him that it was perfectly fit for food. Applt. had also requested the medical officer of health to keep the meat for further examination on his behalf, & had told that officer that if it had not been seized he was prepared to sell it:—*Held*: there was sufficient evidence to justify the justices in finding that the meat was in the possession of applt. when it was seized, & in convicting him under P. H. Act, 1875, s. 117.—*BULL v. LORD* (1908), 9 L. G. R. 829, D. C.

E. Proceedings against Offenders.

See P. H. Act, 1875, ss. 116, 117, 253, 259.

355. Institution of proceedings—Conditions precedent—Consent of Attorney-General.—A prosecution under P. H. Act, 1875, s. 117 is a proceeding to recover a penalty within the meaning of s. 253, & therefore the consent in writing of the A.-G. is necessary where the prosecution is instituted by a person other than a party aggrieved or the local authority, there being no express provision in s. 117 authorising any person other than the above to prosecute.—*DODD v. PEARSON*, [1911] 2 K. B. 383; 80 L. J. K. B. 927; 105 L. T. 108; 75 J. P. 343; 27 T. L. R. 376; 9 L. G. R. 646; 22 Cox, C. C. 526, D. C.

356. — By local authority—Authority of clerk or officer to prosecute—Time for giving authority.]—The authority required by P. H. Act, 1875, s. 259, must be given by the local authority to their officer or member before proceedings are instituted, & cannot be given subsequently by the local authority passing a resolution purporting to

his possession of an unsound & unwholesome description:—*Held*: it is not necessary for a conviction that the person in possession of meat "as or for human food" of an unsound description should personally know that it is in his possession.—*DICKSON v. LINTON* (1888), 2 White, 51.—*SCOT*.
q. — — ——*CAIRNS v. LINTON* (1889), 2 White, 228.—*SCOT*.

PART III. SECT. 2, SUB-SECT. 1.—E.

Institution of
Time limit for information.—The Animals & Meat (Amendment) Act, 1910, No. 8, s. 2, provides that an information under Principal Act, 1902, No. 36, s. 47, for selling a diseased animal, must be laid within six weeks

after the time when the animal was sold. On Aug. 12, K. agreed to sell his dairy herd to McK., delivery to be made Sept. 9, & a deposit was paid by McK. Possession was taken by McK. on Sept. 9. One of the cows proved to be diseased. McK. laid an information under s. 47 on Oct. 16:—*Held*: the sale took place on Sept. 9, & the information was laid within the proper time.—*McKEOWN v. KNOWLES* (1919), 19 S. R. N. S. W. 46; 36 N. S. W. W. N. 33.—*AUS*.

s. Hearing—Evidence—Proof that article condemned by court.—Before a person can be found guilty under 55 Viet. No. 17, s. 7, of having in his possession meat unfit for food of man it must be shown that the meat has

419; 88 L. J. K. B.
 T. 346; 83 J. P. 50; 17 L. G. R.

222, D. C.

357. Summons—By whom issued—Magistrate other than magistrate condemning article.—Where, under Towns Improvement Clauses Act, 1847 (c. 34), s. 131, a magistrate condemns meat brought before him as unfit for human food, a summons in respect thereof may be issued by another magistrate, though the magistrate who adjudicates upon the summons must be the magistrate who condemned the meat.—*R. v. THOMAS* (1901), 18 T. L. R. 71, D. C.

Annotation:—*Mentd.* *R. v. Part* (1906), 70 J. P. 398.

358. Hearing—Who may adjudicate—Not justice by whom prosecution directed.—In the borough of W. the sanitary committee of the town council, who were the local authority under P. H. Act, 1875, passed a resolution directing the town clerk to prosecute S. for exposing for sale meat unfit for human food, contrary to the provisions of the Act, & at the hearing of an information laid in pursuance of this resolution S. was convicted before four justices of the borough, who imposed a penalty upon him. One of the justices was a member of the sanitary committee, & had been present at the meeting at which the resolution was passed:—*Held*: P. H. Act, 1875, s. 258, did not remove the disqualification which attached to the justice by reason of his having acted as a member of the sanitary committee in directing the prosecution.—*R. v. LEE* (1882), 9 Q. B. D. 394; 47 J. P. 118; 30 W. R. 750, D. C.

Annotations:—*Reid.* *R. v. Henley*, [1892] 1 Q. B. 504.
Mentd. *R. v. Spedding JJ.* (1885), 2 T. L. R. 163.

359. — — — Must be magistrate who condemned article.]—*R. v. THOMAS*, No. 357, *ante*.

360. — — — Defences—Autrefois acquit.]—B., was charged with exposing on his premises certain meat unfit for human food, & the summons was dismissed on proof that he was not aware of the meat being there, as what occurred was done during his absence. A second summons charging the same facts, & offence was heard, & B. was convicted, though he produced a certificate of dismissal of the previous summons:—*Held*: as B. might have been convicted of the same offence under the first summons the second charge & conviction were bad, & conviction quashed accordingly.—*R. v. BLOUNT* (1879), 43 J. P. 383, D. C.

361. — — — Evidence—Soundness of article at time of condemnation.]—When unwholesome meat has been condemned by a justice, & proceedings are afterwards taken under P. H. Act, 1875, s. 117,

been condemned by the ct.—*Ex p. BARTLETT* (1896), 17 N. S. W. L. R. 108; 12 N. S. W. W. N. 111.—*AUS*.

t. Validity of bye-law—Introducing ultra vires provision—Charge for examination & stamping of carcasses.—A municipal regulation framed under Ord. 10 of 1912, s. 194, contained valid provisions in regard to the introduction into the municipality of slaughtered carcasses & in regard to the slaughtering of animals & the examination & stamping of carcasses for human food by a municipal official. It also contained a provision imposing a charge for the examination & stamping of the carcasses. No meat could be examined or stamped under the municipal regulation except upon payment of the charge imposed for the purpose:—

against the owner of the meat, evidence may be given by him as to the state of the meat at the time of condemnation.—*WAYE v. THOMPSON* (1885), 15 Q. B. D. 342; 54 L. J. M. C. 140; 53 L. T. 358; 49 J. P. 693; 33 W. R. 733; 1 T. L. R. 529; 15 Cox, C. C. 785, D. C.

Annotation:—*Refd. Re Bater & Birkenhead Corpn.*, [1893] 1 Q. B. 679.

F. Compensation.

See P. H. Act, 1875, s. 308.

362. Liability of local authority—For wrongful acts of servants—Destruction of food without order of justice.—An assistant inspector of nuisances, acting under the directions of the medical officer of health of the borough, seized a certain quantity of unsound meat exposed for sale & intended for the food of man, & caused the same to be destroyed without an order of a justice:—*Held*: the seizure & subsequent destruction were improper & the corp'n. of the borough were liable to damages for the wrongful acts of their servants.—*ORMEROD v. ROCHDALE CORPN.* (1898), 62 J. P. 153; 4 L. G. R. 65, n.

363. — Claimant "himself in default"—What amounts to default.—*HOBBS v. WINCHESTER CORPN.*, No. 351, *ante*.

What amounts to default generally, *see* Sect. 2, sub-sect. 1, D., *ante*.

364. Measure of compensation—General rule.—Upon an arbn. under P. H. Act, 1875, s. 308, all that is to be considered by the arbitrator is whether the person claiming compensation has suffered damage & the amount of such damage.

The costs of successfully defending a prosecution for exposing for sale unsound meat, which meat is the subject of the claim for compensation, cannot be recovered as damages.—*Re DAVIES & RHONDDA URBAN DISTRICT COUNCIL* (1899), 80 L. T. 696, D. C.

Annotation:—*Refd. Hobbs v. Winchester Corpn.*, [1910] 2 K. B. 46.

365. — Costs—Of resisting condemnation—Refusal to take article back.—*Re BATER & BIRKENHEAD CORPN.*, No. 331, *ante*.

366. — Of defending prosecution.
Re DAVIES & RHONDDA URBAN DISTRICT COUNCIL, No. 364, *ante*.

367. — — — — —.—Meat belonging to pltf. & alleged to be unwholesome was seized by the inspector of nuisances of deft. corp'n. & condemned by a magistrate. The owner was proceeded against, but the summons was dismissed by the justice for a defect in form, & no order was made as to costs. On an arbn. under P. H. Act, 1875, the arbitrator found that the meat was sound, & awarded pltf. compensation. In an action on the award:—*Held*: the finding of the arbitrator as to the soundness of the meat was conclusive; the corp'n. were liable to pay to pltf. full compensation for the damage sustained by reason of the acts of the officer of the corp'n.; & such full compensation included the costs to which pltf. was put in opposing the summons.—*WALSHAW v. BRIGHOUSE CORPN.*, [1899] 2 Q. B. 286; 68 L. J. Q. B. 828;

Held: as the imposition of the charge was *ultra vires*, a conviction on a prosecution for having brought slaughtered meat into the municipality contrary to the regulation could not be sustained.—*R. v. DAWOOD* (1915), C. P. D. 841.—S. AF.

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81 L. T. 2; 47 W. R. 600; 15 T. L. R. 403; 43 Sol. Jo. 568, C. A.

Annotations:—*Consd. Hobbs v. Winchester Corpn.*, [1910] 2 K. B. 471. *Refd. Barnett v. Eccles Corpn.*, [1900] 2 Q. B. 423. *Mentd. May v. Mills* (1914), 30 T. L. R. 287.

368. — — — — —.—*HOBBS v. WINCHESTER CORPN.*, No. 351, *ante*.

369. — Sum for general damage—To trade & reputation.—*HOBBS v. WINCHESTER CORPN.*, No. 351, *ante*.

SUB-SECT. 2. — IN LONDON.

A. Condemnation of Seized Articles of Food.

See P. H. Act, 1891, s. 47.

370. Whether condition precedent to prosecution—"So condemned"—P. H. Act, 1891, s. 47 (2).—By the above sub-sect., "if it appears to any justice that any animal or article which has been seized or is liable to be seized under this sect. is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same . . . ; & the person . . . on whose premises the same was found, shall be liable on summary conviction to a fine not exceeding fifty pounds for every animal, or article, or if the article consists of fruit, vegetables, corn, bread, or flour, for every parcel thereof so condemned, or, at the discretion of the ct., without the infliction of a fine, to imprisonment for a term of not more than six months, with or without hard labour":—*Held*: the words "so condemned" must be read as "so liable to be condemned," & therefore condemnation by a justice of the peace of an animal or article which has been seized or is liable to be seized under the sect. is not a condition precedent to a summary conviction for an offence under the sub-sect.—*HEWETT v. HATTERSLEY*, [1912] 3 K. B. 35; 81 L. J. K. B. 878; 107 L. T. 228; 76 J. P. 369; 28 T. L. R. 433; 10 L. G. R. 620; 23 Cox, C. C. 121, D. C.

371. Jurisdiction of magistrate—To inquire whether article intended for food of man.—Where proceedings are taken before a magistrate under P. H. Act, 1891 (c. 76), s. 47, for the condemnation as diseased, or unsound, or unwholesome, or unfit for the food of man, of an article seized by a medical officer of health or sanitary inspector under the provisions of that sect., the magistrate has no jurisdiction to inquire whether the article was intended for the food of man, but is bound to order its destruction upon being satisfied that it is in fact diseased, or unsound, or unwholesome, or unfit for the food of man.—*THOMAS v. VAN OS*, [1900] 2 Q. B. 448; 69 L. J. Q. B. 665; 82 L. T. 845; 64 J. P. 582; 49 W. R. 57; 16 T. L. R. 388; 19 Cox, C. C. 542, D. C.

Annotation:—*Refd. Hobbs v. Winchester Corpn.* (1910), 79 L. J. K. B. 578.

B. Offences.

See P. H. Act, 1891, s. 47.

372. Under P. H. Act, 1891, s. 47 (2)—Scope of sub-section—"Person to whom" article "belongs"—Sale by commission agent to retail

PART III. SECT. 2, SUB-SECT. 1.—F.
u. *What included in term*
Whether trade loss.—The expi
"damage" & "full compensation" in
Public Health (Ireland) Act, 1878,
s. 274, do not include trade loss caused
to the owner of an article intended for

the food of man by reason of the
ty of proceedings brought by a
y authority to have such article
of food condemned as unsound.—
Re SMITH & BELFAST CORPN., [1910],
2 L. R. 285; 44 L. L. T. 123.—IR.

Sect. 2.—Statutory offences: Sub-sect. 2, B., C. & D. Part IV.]

dealer.]—Resp., a meat salesman, to whom meat had been consigned to sell on commission, sold a portion of it to H. While the meat was on H.'s premises it was seized & condemned by a magistrate under the above Act, as being diseased & unfit for the food of man. Resp. was summoned under the above sub-sect. of the Act, & it was proved that the meat was unsound at the time of the sale to H. The ct. dismissed the summons:—*Held*: the summons was rightly dismissed, & a summons ought to have been drawn under sub-sect. 3.—*BILLING v. PREBBLE* (1896), 66 L. J. Q. B. 180; 61 J. P. 86; 45 W. R. 187; 13 T. L. R. 115; 41 Sol. Jo. 170, D. C.

Annotations:—**Consd.** *Bothamley v. Jolly*, [1915] 3 K. B. 425. **Refd.** *Grivell v. Malpas*, [1906] 2 K. B. 32.

373. Under P. H. Act, 1891, s. 47 (3) — Scope of sub-section.]—*BILLING v. PREBBLE*, No. 372, *ante*.

374. — — — — —.]—Resp., a wholesale dealer, sold to a retail pork butcher a quantity of pigs' plucks, one of which was unsound, unwholesome, & unfit for the food of man. The unsound pluck was seized in the purchaser's shop by applt., a sanitary inspector, who obtained an order for its destruction. In proceedings against resp. under the above sub-sect., for selling an article liable to be seized & condemned under sect. 47, the magistrate found that the unsound pluck was not exposed for sale, & would not have been sold or offered for sale by the retail shopkeeper until the sanitary inspector had passed it, & he accordingly, without calling upon resp., dismissed the summons, holding that no offence had been committed under the sub-sect.:—*Held*: the magistrate was wrong in stopping the case; a *prima facie* case had been made out against resp. calling for an answer; & the case must go back to the magistrate to be proceeded with.

The sub-sect. is intended to deal with the case of the vendor of an article intended for the food of man, which in fact at the time it is sold by him is in such a condition that it is liable to be seized, that is, in the condition of being unsound & unfit for the food of man.

The words "any article liable to be seized" in sub-sect. 3 mean an article *prima facie* liable to be seized by reason of its condition (*CHANNELL, J.*).—*GRIVELL v. MALPAS*, [1906] 2 K. B. 32; 75 L. J. K. B. 647; 95 L. T. 123; 70 J. P. 334; 22 T. L. R. 514; 4 L. G. R. 668; 21 Cox, C. C. 220, D. C.

Annotations:—**Consd.** *Hewett v. Hattersley*, [1912] 3 K. B. 35; *R. v. Ascanio Puck & Paice* (1912), 76 J. P. 487.

375. — — — — — "Article liable to be seized" — After possession by purchaser.]—(1) By the above sub-sect., where it is shown that any article liable to be seized under the sect., & found in the possession of any person, was purchased by him for the food of man, & when purchased was in such a condition as to be liable to be seized & condemned under the sect., the seller is liable to a penalty unless he proves that, when he sold the article, he did not know, & had no reason to believe, that it was in such a condition:—*Held*: the vendor can only be convicted under the sub-sect. where the article is liable to be seized after it has got into the possession of the purchaser.

(2) Deft., a fruit broker, was charged under the above sub-sect. He had sold walnuts which turned out to be unsound. A printed notice was

posted up in his shop, to the effect that the walnuts were sold on the condition that, if any of the contents of the bags should prove unsound, the buyer should sort them & destroy the unsound walnuts. The jury were directed to find deft. guilty, if he sold the walnuts when unfit for the food of man, unless he proved that he did not know, & had no reason to believe, that they were so, & were told that deft. could not contract himself out of liability by agreeing that the buyer should sort out & destroy the bad nuts, & that they must disregard the printed notice.

It is the sale or exposure of it [an article of food] with the intention that it shall be used for human food, which is an essential element to the rendering the possession of it illegal. . . . The burden of proof that such intention did not exist is, by sect. 47, cast upon the person charged with an offence. . . . The non-existence of such a criminal intention is a fact to be established by evidence, & may be proved in a variety of ways: among others, for instance, a *bond fide* contract with the purchasers subject to a condition that an article unfit for human food, should not be so used, or disposed of to be so used by others, would be evidence to negative such intention (*HAWKINS, J.*).—*R. v. DENNIS*, [1894] 2 Q. B. 458; 63 L. J. M. C. 153; 71 L. T. 437; 58 J. P. 622; 42 W. R. 586; 10 T. L. R. 498; 38 Sol. Jo. 513; 18 Cox, C. C. 21; 10 R. 316, C. C. R.

Annotations:—*As to* (1) **Consd.** *Grivell v. Malpas*, [1906] 2 K. B. 32. **Refd.** *Billing v. Prebble* (1896), 66 L. J. Q. B. 180; *Hewett v. Hattersley*, [1912] 3 K. B. 35; *R. v. Ascanio Puck & Paice* (1912), 76 J. P. 487.

376. Article in fact unfit for food—Not intended for food or exposed for sale.]—*GRIVELL v. MALPAS*, No. 374, *ante*.

377. — — — — — Article voluntarily given up by purchaser.]—(1) One who sells unsound food liable to be seized to another person, which is not in fact seized, but is voluntarily given up by the purchaser for condemnation, is not guilty of an offence under the above sub-sect.

(2) An indictment lies against a limited co. in respect of an offence created by the sub-sect.—*R. v. ASCANIO PUCK & CO. & PAICE* (1912), 76 J. P. 487; 29 T. L. R. 11; 11 L. G. R. 136.

Annotation:—*Generally, Mentd.* *R. v. Daily Mirror Newspapers, R. v. Glover*, [1922] 2 K. B. 530.

C. Proceedings against Offenders.

378. Institution of proceedings—Conditions precedent—Condemnation of article.]—*HEWETT v. HATTERSLEY*, No. 370, *ante*.

379. By whom—Private person.]—Resp., a sanitary inspector of a borough council, entered the premises of applt., a butcher, & seized certain meat which was then taken before a magistrate & by him condemned as unsound & ordered to be destroyed. On the same day a summons was issued on an information laid by resp. under P. H. Act, 1891, s. 47 (2), charging applt. with having the meat in his possession for the purpose of sale. Both the information & the summons stated that resp. was acting on behalf of the borough council, but he had not been expressly authorised by the council to take proceedings against applt. Applt. was convicted:—*Held*: a private person can prosecute for an offence under sect. 47, sub-sect. 2, & the absence of authority on the part of resp. did not invalidate the proceedings, the words "on behalf of" the borough council in the information & summons being

mere surplusage.—**GIEBLER v. MANNING**, [1906] 1 K. B. 709; 75 L. J. K. B. 463; 94 L. T. 580; 70 J. P. 181; 54 W. R. 527; 22 T. L. R. 416; 50 Sol. Jo. 377; 4 L. G. R. 561; 21 Cox, C. C. 160, D. C.

Annotations:—**Refd.** *Dodd v. Pearson* (1911), 80 L. J. K. B. 927. **Mentd.** *Lake v. Smith* (1911), 106 L. T. 41; *Kates v. Jeffery*, [1914] 3 K. B. 160.

380. Against whom—Company.—**R. ASCANIO PUCK & CO. & PAICE**, No. 377, *ante*.

381. Information—By officer “on behalf of” local authority—Officer in fact unauthorised.—**GIEBLER v. MANNING**, No. 379, *ante*.

382. Defences—Not intended for food of man—Notice displayed on premises—Terms on which goods sold.—**R. v. DENNIS**, No. 375, *ante*.

D. Compensation.

383. Whether recoverable—Against wholesale dealer—Goods sold with warranty.—If a retailer buys provisions with an implied or expressed warranty, & such provisions are seized & destroyed, & he himself is fined, because, unknown to him, they are unfit for food, he may recover from his vendor, in addition to their value, the costs of his defence & costs ordered to be paid by him; *semble*: also the amount of the fine, if he can show that it was not imposed, or increased, in consequence

of any default on his part.—**CRAIG v. FRY** (1903), 67 J. P. 240; 1 L. G. R. 253.

Annotations:—**Refd.** *Cointat v. Myham*, [1913] 2 K. B. 220. **Mentd.** *Leslie v. Reliable Advertising &*

384. — Against officer—For failure to inform defendant that articles unfit for food—Information received by officer from original vendor.—Certain tins of preserved meat were sold at Glasgow to plff. as “rejects,” that is to say, as unfit for human food, but as fit for poultry consumption. The vendor communicated the fact & circumstances of the sale to the sanitary inspector at Glasgow, who forwarded the same to the medical officer of health for Stepney where plff. carried on his business. The medical officer communicated the information to the Stepney sanitary inspector, but neither communicated the fact to plff. Plff., who was subsequently convicted for selling the meat knowing that it was unfit for human food, claimed damages from the Stepney sanitary inspector & the Stepney medical officer of health for negligence in not having informed him that the meat was unfit for human food: *Held*: neither deft. had been guilty of negligence & in any event defts. were protected by Public Authorities Protection Act, 1893 (c. 61), inasmuch as before action brought more than six months had elapsed since the alleged grievance. — **WEIR v. THOMAS & ABSON** (1914), 70 J. P. 51.

Part IV.—Importation of Food and Drugs.

See Note on p. 70, *ante*; 1899 Act, s. 1; 1907 Act, s. 5 (1).

385. Analysis of sample—Certificate—Form.—In proceedings by the Comrs. of Customs under 1899 Act, s. 1, as extended by 1907 Act, s. 5 (1), for the recovery of a penalty in respect of the importation into the United Kingdom of an article of food specified therein, the certificate of the analysis given by the principal chemist of the Govt. laboratories need not be in the form prescribed by 1875 Act, s. 18, & sched.—**FOOT v. FINDLAY**, [1909] 1 K. B. 1; 78 L. J. K. B. 48; 99 L. T. 798; 72 J. P. 494; 25 T. L. R. 10; 53 Sol. Jo. 32; 6 L. G. R. 1129, D. C.

386. Warranty—Not available as defence.—Where deft. is charged under 1899 Act, s. 1 (1) (b), with importing into the United Kingdom adulterated butter in packages not conspicuously marked with a name or description indicating that the butter has been so treated, the fact that he received from the foreign vendor a written warranty of the purity of the butter under circumstances which comply with the provisions of 1875 Act, s. 25, & 1899 Act, s. 20 (1), (3), affords no defence, inasmuch as the written warranty so received only constitutes a defence to a charge of selling adulterated goods in the United Kingdom, & not to a prosecution for importing into the United Kingdom goods in packages insufficiently marked.—**KELLY v. LONSDALE & CO.**, [1906] 2 K. B. 486; 75 L. J. K. B. 822; 95 L. T. 427;

70 J. P. 411; 22 T. L. R. 655; 50 Sol. Jo. 577; 4 L. G. R. 949; 21 Cox, C. C. 281, D. C.

—**Refd.** *Monro v. Central Creamery Co.* (1912), 10 L. G. R. 134.

387. Proceedings against offender Appeals—No appeal to quarter sessions.—Sect. 25 of 1899 Act, which provides that, unless the context otherwise requires, “an offence under this Act shall be treated as an offence under those Acts” (i.e. Sale of Food & Drugs Acts), does not confer the right of appeal to a ct. of quarter sessions from a conviction by a ct. of summary jurisdiction, under 1899 Act, s. 1, of the offence of importing into the United Kingdom margarine in packages not conspicuously marked.—**R. v. OTTO MONSTER, LTD.**, [1906] 2 K. B. 456; 75 L. J. K. B. 629; 95 L. T. 526; 70 J. P. 435; 50 Sol. Jo. 595; 4 L. G. R. 942; 21 Cox, C. C. 289, D. C.

Annotation:—**Refd.** *Kelly v. Lonsdale*, [1906] 2 K. B. 486.

388. “Procuring” dangerous drug—Agreement for despatch of drug from Switzerland to Japan—Shipping documents received in London—Whether drug procured in London.—By Dangerous Drugs Act, 1920 (c. 46), s. 6, the importation into, or the export from, the United Kingdom of certain drugs, including morphine, except under licence, is made unlawful; by sect. 7, authority is given for regulations being made for controlling the manufacture, sale, possession & distribution of those drugs; & by a regulation made under that sect., “no person shall supply

or procure or offer to supply or procure any of the drugs to or for any person, whether in the United Kingdom or elsewhere," unless he is duly licenced to do so.

Applt., who had an office in London, & who had no licence to deal in morphine, arranged with a firm in Switzerland for the despatch from that country to Japan of a quantity of morphine. The morphine never was in this country, but bills of

lading & other shipping documents in respect of the consignment were received by applt. in London:—*Held*: applt. was properly convicted of having "procured" the morphine in London within the regulation.—*R. v. YASUKICHI MIYAGAWA*, [1924] 1 K. B. 614; 88 J. P. 44; 18 Cr. App. Rep. 4; *sub nom.* *R. v. MIYAGAWA*, 93 L. J. K. B. 384; 40 T. L. R. 267; 68 Sol. Jo. 500, C. C. A.

Part V.—Particular Articles of Food.

SECT. 1.—BEER.

Inland Revenue Act, 1880 (c. 20); Customs & Inland Revenue Act, 1885 (c. 51).

389. What is beer—Botanic beer.—M. sold a liquor in bottles called S.'s Botanic Beer without having a retail licence to sell beer. The liquor was made of sugar, herbs, & water, without hops, & had about 6 per cent. spirit, while ginger beer & table beer had about the same percentage of spirit. The justices dismissed the information, holding that it was not beer within Beerhouse Act, 1834 (c. 85), & other Acts:—*Held*: the justices were right.—*LEAH v. MINNS* (1883), 47 J. P. 198, D. C.

Annotations:—*Consd.* *Howarth v. Minns* (1886), 56 L. T. 316; *Fairhurst v. Price*, [1912] 1 K. B. 404.

390. — Liquor containing more than 2 per cent. of proof spirit.—Applt. sold a liquor in bottles called "S.'s Botanic Beer" without having a retail licence to sell beer. The liquor was made of sugar, herbs, & water, without hops, & had over 5 per cent. spirit. Justices having dismissed an information laid under Beerhouse Act, 1834 (c. 85), s. 17, in respect of such sale, upon a case stated in an appeal to quarter sessions against such dismissal:—*Held*: by virtue of the definition in sect. 4 of the Customs & Inland Revenue Act, 1885 (c. 51), it is an offence against sect. 17 of Beerhouse Act, 1834 (c. 85), to sell any liquor found on analysis to contain more than 2 per cent. of proof spirit, if such liquor is sold under any epithet describing it as a beer, whether it is sold as a substitute for beer or not.—*Howarth v. Minns* (1886), 56 L. T. 316; 51 J. P. 7; 3 T. L. R. 256, D. C.

Annotation:—*Consd.* *Fairhurst v. Price*, [1912] 1 K. B. 404.

391. — Liquor not containing more than 2 per cent. of proof spirit.—(1) By the first clause of sect. 52 of the Finance (1909–10) Act, 1910 (c. 8), the expression "beer" in Part II. of the Act "includes ale, porter, spruce beer, black beer, & any other description of beer, & any liquor which is made or sold as a description of beer or as a substitute for beer, & which on analysis of a sample thereof at any time is found to contain more than two per cent. of proof spirit":—*Held*: the clause is divisible into two parts, of which the first ends with the words: "& any other description of beer," each of which comprises a definition of "beer"; & a liquid may be "beer" within the meaning of the first part of the clause although it does not contain more than 2 per cent. of proof spirit so as to be "beer" within the meaning of the second part of the clause.

(2) An information was laid against under Finance (1909–10) Act, 1910 (c. 8), s. 50 (3), for having sold by retail certain beer without having taken out a licence as required by the Act. The liquor was sold by applt. at his shop, in which were exhibited certain advertisements containing the statements that "ales & stouts" offered to the public on the premises were "manufactured at about the same strength as ordinary ales & stouts," & "Finlay's ales & stouts" were "brewed from the best malt, Kent & Worcester hops." The liquor was in fact of the ordinary gravity of beer. It contained 2 per cent. of proof spirit & was manufactured from liquid glucose & hops & was fermented with yeast. In colour, appearance, & taste it was exactly like ordinary beer, & the brewers of it paid duty upon it. The justices before whom the information was laid found that the liquor was "beer" within the meaning of the first clause of sect. 52 of the Finance (1909–10) Act, 1910 (c. 8), & convicted applt.:—*Held*: the conviction was right inasmuch as a licence to sell beer by retail is required by virtue of sects. 43, 92, 96 (6), & the First Schedule, head C, of the Finance (1909–10) Act, 1910 (c. 8), & the justices were warranted in finding upon the evidence that the liquor was "beer" within the meaning of the first part of the first clause in sect. 52.—*FAIRHURST v. PRICE*, [1912] 1 K. B. 404; 81 L. J. K. B. 320; 106 L. T. 97; 76 J. P. 110; 28 T. L. R. 132; 22 Cox, C. C. 660, D. C.

392. Dilution—No addition of water—Mixture of different strengths.—By Customs & Inland Revenue Act, 1885 (c. 51), s. 8 (2), "a dealer in or retailer of beer shall not adulterate or dilute beer, or add anything thereto, except finings for the purpose of clarification. . . ." Applt., a publican, had in his cellar a cask of beer supplied by a firm of brewers, & also a quantity of small beer of much less strength. He drew off a certain quantity from the cask of stronger beer, & filled it up with small beer, adding some finings for clarification; the result, as tested by the quantity of proof spirit in the two kinds of beer, was that the mixture was about 15 per cent. weaker than the beer which was in the cask as it came from the brewers. No water or any other matter or thing, except the finings, was added to the beer. On appeal against a conviction for "diluting" beer under the above sect.:—*Held*: the mixing of the two kinds of beer amounted to a dilution of the stronger beer, & applt. was properly convicted.—*CROFTS v. TAYLOR* (1887), 19 Q. B. D. 524; 56 L. J. M. C. 137; 57 L. T. 310; 51 J. P. 789; 36 W. R. 47; 3 T. L. R. 844; 16 Cox, C. C. 294, D. C.

393. Sale of beer containing arsenic—Ignorance of seller.]—GOULDER v. ROOK, BENT v. ORMEROD, LEE v. BENT, BARLOW (OR PALMER) v. NOBLETT, No. 96, *ante*.

Implied warranties & conditions on sale of beer.]—See SALE OF GOODS.

SECT. 2.—BREAD.

SUB-SECT. 1.—IN GENERAL.

NOTE.—In this Part, 3 Geo. 4, c. cvi., & Bread Act, 1836 (c. 37), are referred to as Bread Act, 1822, & Bread Act, 1836, respectively.

394. Application of Acts — Bread Act, 1822—To wholesale dealers.]—R. v. APOSTLES BREAD CO., LTD. (1907), 42 L. Jo. 651.

395. ——— Weights & Measures Act, 1889 (c. 21) —To Bread Act, 1836, s. 7.]—A customer was served with a loaf of bread by applt.'s son from a cart belonging to applt. & of which the son was in charge. The loaf was not weighed at the time of sale thereof nor did the purchaser require that such should be done, but it was afterwards found to be of short weight. Applt. was convicted under sect. 4 of Bread Act, 1836, which provides that bread shall not be sold otherwise than by weight:—*Held*: the conviction was right & Weights & Measures Act, 1889, as affecting Bread Act, 1836, only applies to sect. 7 of that Act & only to such part of such sect. as relates to a baker refusing to weigh bread purchased of him. — COPELAND v. WALKER (1891), 65 L. T. 262; 55 J. P. 809; 17 Cox, C. C. 331, D. C.

SUB-SECT. 2.—ADULTERATION.

See Bread Act, 1836, s. 8.

396. Elements of offence—Mens rea.]—Applt., a baker, was convicted under Bread Act, 1836, s. 8, for using a certain mixture or ingredient, to wit, alum, in making bread for sale. At the hearing it was proved that he sold a loaf adulterated with alum; but no evidence was adduced tending to prove knowledge on the part of applt. or of the servant who made the bread that alum was used in the loaf:—*Held*: to constitute the offence under the above sect., there must be a guilty knowledge, & the conviction was wrong. — CORE v. JAMES (1871), L. R. 7 Q. B. 135; 41 L. J. M. C. 19; 25 L. T. 593; 36 J. P. 519; *sub nom.* R. v. BOLTON J.J., CORE v. JAMES, 20 W. R. 201.

Annotations:—N.F. Betts v. Armistead (1888), 52 J. P. 471; Pain v. Boughtwood (1890), 24 Q. B. D. 353. **Consd.** Brown v. Foot (1892), 61 L. J. M. C. 110. **Reid.** Nichols v. Hall (1873), L. R. 8 C. P. 322; Hotchin v. Hindmarsh, [1891] 2 Q. B. 181.

PART V. SECT. 2, SUB-SECT. 3.—A.

397 i. Actual weighing—Necessity for.]—SKATER v. BREWSTERS, LTD. (1905), 2 I. R. 258; 38 I. L. T. 40.—**IR.**

397 ii. ———.]—R. v. MARCHAND, [1921] E. D. L. 344.—**S. AF.**

a. ———.]—Liability of master for act of servant.]—A baker is liable to the penalty for the sale of bread in his shop without weighing it in the presence of the purchaser, though the

sale is in fact made by his servant in his absence.—R. v. PANTON (1882), 8 V. L. R. 301.—**AUS.**

b. Validity of bye-law — Enacting that weight should be stamped on each loaf.]—Bye-law 1128 of the city of Toronto declared what the weight of loaves should be, & enacted that the weight of each loaf sold or offered for sale should be stamped thereon, & that all bread, offered for sale of any

less weight than the weight fixed by the bye-law should be seized & forfeited:—*Held*: the bye-law was *intra vires* & not unreasonable.—*Re* NAMMITH & TORONTO CORPN. (1883), 2 O. R. 192.—**CAN.**

c. ——— Imposing penalty for selling loaves of light weight.]—A city has power to pass a bye-law "to provide for the weight & sale of

SUB-SECT. 3.—SALE BY WEIGHT.

A. In General.

See Bread Act, 1822, s. 4; Bread Act, 1836, s. 4; &, generally, WEIGHTS & MEASURES.

397. Actual weighing—Necessity for.]—By sect. 4 of Bread Act, 1836, it is enacted that all bread sold beyond the limits of the metropolis shall be sold by weight:—*Held*: in order to comply with this provision, it is necessary that bread should not only be sold as of a certain weight, but should be actually weighed before being sold. *Semble*: the baker is bound to weigh a loaf sold in the presence of the purchaser, or at the time of the sale, whether requested to do so or not.—WILLIAMS v. DEGGAN (1867), 16 L. T. 492; 31 J. P. 807.

Annotation:—*Reid.* Cox v. Bleines (1902), 71 L. J. K. B. 437.

398. ——— Though no demand by purchaser for loaf of specific weight —Demand for loaf at specified price.]—By Bread Act, 1822, s. 4, which applies in substance to the metropolitan area, any baker or seller of bread who sells or causes to be sold bread in any other manner than by weight is liable to a penalty.

Resp., a grocer & general dealer, was asked by a purchaser for a twopenny loaf, & served him with a loaf for which he paid 2d. The loaf was not weighed in the shop in the purchaser's presence, nor was any statement made to him as to its weight, nor was there any evidence that it had ever been weighed. When subsequently weighed, the loaf, which resembled in shape & appearance a 2 lb. loaf, weighed 2½ ozs. short of 2 lbs.:—*Held*: it was immaterial that the purchaser had not asked for a loaf of a specific weight, & *resp.* had sold bread otherwise than by weight within the meaning of the sect.—LONDON COUNTY COUNCIL v. READ, [1900] 1 Q. B. 288, J. Q. B. 39; 81 L. T. 152; 63 J. P. 775; 18 W. R. 393; 16 T. L. R. 14; 41 Sol. Jo. 27; 10 Cox, C. C. 415, D. C.

Annotations:—*Reid.* Cox v. Bleines (1902), 71 L. J. K. B. 437; Welch v. Cutler (1905), 92 L. T. Houghton, [1915] 1 K. B. 489.

399. ——— Burden of proof on seller Bread deficient in weight.]—By sect. 4 of Bread Act, 1836, bakers & sellers of bread are to sell bread only by weight. Where, therefore, a person went into a baker's shop & asked for a quart loaf, meaning a quartern loaf, & he was served with a loaf which proved to be less in weight than 1 lb., the understood weight of a quartern loaf, & there was no evidence that the bread had at any time been weighed:—*Held*: this was evidence of a selling of bread otherwise than by weight. MITTON v. TROKE (1869), 20 L. T. 563; 33 J. P. 821.

Annotation:—*Reid.* Cox v. Bleines (1902), 71 L. J. K. B. 437.

400. ———.]—On an information for contravening Bread Act, 1836, s. 4, it was proved

Sect. 2.—Bread: Sub-sect. 3, A. & B.]

that a purchaser went into a baker's shop & asked for a 4 lb. loaf; a loaf was handed to him by the baker, which turned out substantially deficient in weight. The purchaser did not ask to have the loaf weighed, & there was no evidence as to whether the loaf had ever been weighed or not. The baker contended that the loaf was fancy bread:—*Held*: (1) the customer having asked for bread by weight, the baker was bound to sell by weight, whether the bread was ordinary or fancy bread; (2) though he was not bound to weigh in the presence of the customer, unless requested to do so, he was bound to weigh at some time or other, & that as the loaf was substantially deficient in weight it must be taken, as against the baker, that he had never weighed it; & the conviction was therefore right.

(3) Although the bread which is sold to-day as fancy bread may not be what it was at the time the statute passed, yet, if it is now of a fancy character & differently baked it is still fancy bread (*COCKBURN, C.J.*).—*R. v. KENNETT* (1869), 1 L. R. 4 Q. B. 565; 20 L. T. 656; *sub nom. R. v. KENNETT, R. v. SAUNDERS*, 10 B. & S. 545; 33 J. P. 824; 17 W. R. 852.

Annotations:—*As to* (2) *Reid. Sleater v. Brewsters* (1905), *Allwood's Weights & Measures*, 174; *Lyons v. Houghton*, [1915] 1 K. B. 489. *Generally, Reid. R. v. Wood* (1869), 1 L. R. 4 Q. B. 559.

401. Must be true weight—Weight unascertained.]—A servant of resp., a baker, was asked by a purchaser for a half-quartern loaf, & served him with a loaf & two rolls, for which he paid 2d. The loaf & rolls were in the purchaser's presence placed in the pan of a pair of scales, in the opposite scale of which there was already a 2 lb. weight; the beam of the scales did not move, & the weight of the loaf & rolls was not ascertained at the time of sale beyond the clear fact that they weighed less than 2 lbs. On being taken away by the purchaser & weighed, they were found to weigh 5 ozs. short of 2 lbs.:—*Held*: a sale by weight meant a sale by the true weight of the bread sold, & resp. had sold bread otherwise than by weight within Bread Act, 1822, s. 4.—*Cox v. BLEINES*, [1902] 1 K. B. 670; 71 L. J. K. B. 437; 86 L. T. 563; 66 J. P. 407; 50 W. R. 392; 18 T. L. R. 356; 20 Cox, C. C. 188, D. C.

Annotations:—*Consd. Bridge v. Passman* (1903), 68 J. P. 129; *Welch v. Cutler* (1905), 92 L. T. 239. *Folld. Houghton v. Buxton* (1907), 24 T. L. R. 200. *Appld. Evans v. Jones* (1908), 99 L. T. 799. *Expld. Mattinson v. Binley*, [1908] 2 K. B. 534. *Folld. Lyons v. Houghton*, [1915] 1 K. B. 489.

402. ——— Excess weight.]—In order to comply with the provisions of Bread Act, 1822, which prohibit the sale of bread otherwise than by weight within ten miles of the Royal Exchange, it is sufficient to ascertain that the weight of a loaf is above the weight professed to be sold without ascertaining its exact weight.—*BRIDGE v. PASSMAN* (1903), 68 J. P. 129; 47 Sol. Jo. 420, D. C.

Annotation:—*Reid. Evans v. Jones* (1908), 99 L. T. 799.

403. ———.]—*BLACKSHAW v. SWARTHMOOR & ULVERSTON (LANCASHIRE) CO-OPERATIVE SOCIETY* (1906), *Allwood's Weights & Measures*, 174, D. C.

selling loaves of light weight; & the same is not *ultra vires*.—*R. v. CHISHOLM* (1907), 9 O. W. R. 914; 14 O. L. R. 178.—*CAN.*

d. ——— Prescribing weight of loaf.]—A bye-law providing that no person should sell or dispose of any loaf of any size or weight but two or

404. ——— Of particular loaf—Several loaves weighed together.]—A purchaser having asked for a loaf of bread was served with a loaf for which he paid 3d. It purported to be a 2 lb. loaf, but on being weighed was $\frac{1}{2}$ oz. short of 2 lb. The seller proved that all the loaves of bread were weighed three-quarters of an hour after they were baked, three loaves at a time, & that all the batches of three loaves weighed 6 lb.:—*Held*: this was a sale otherwise than by weight within sect. 4 of Bread Act, 1836.

The weighing of the bread must be sufficient to ascertain the quantity or weight of bread in the particular loaf that is handed to the purchaser.—*WELCH v. CUTLER* (1905), 92 L. T. 239; 69 J. P. 149; 3 L. G. R. 282; 20 Cox, C. C. 809, D. C.

Annotation:—*Reid. Lyons v. Houghton*, [1915] 1 K. B. 489.

405. ——— Deficiency in weight.]—Sect. 4 of Bread Act, 1822, which provides that all bread sold in London & within a certain distance thereof shall be sold by weight means that the bread must be sold by its true weight. Therefore, where a half quartern loaf of bread was sold & at the same time weighed, & it weighed less than 2 lb., which would have been its correct weight, there was a sale otherwise than by weight within the meaning of the sect.—*HOUGHTON v. BUXTON* (1907), 24 T. L. R. 200, D. C.

Annotation:—*Folld. Lyons v. Houghton*, [1915] 1 K. B. 489.

—.]—*LYONS & CO. v. HOUGHTON*, No. 412, *post*.

407. Must be weighing with reference to sale—Weighing before baking.]—The practice in applts.' bakery & shop was to weigh out dough for 2 lb., 4 lb., & 8 lb. loaves before putting them into the oven, allowing 5 oz. for shrinkage of a 4 lb. loaf, which is the understood weight of a quartern loaf, but not to weigh the loaves afterwards unless required by the customer. A customer asked, in applt.'s shop, for a quartern loaf, & one was handed to him, & the current price of a 4 lb. loaf was asked & paid for it. The customer did not require to have the loaf weighed, & it never had been weighed since it was baked; it turned out 2 oz. 9 drs. deficient of 4 lbs.:—*Held*: applt. was rightly convicted under sect. 4 of Bread Act, 1836.—*JONES v. HUXTABLE* (1867), 1 L. R. 2 Q. B. 460; 8 B. & S. 433 36 L. J. M. 122; 16 L. T. 381; 31 J. P. 534 15 W. R. 900.

Annotations:—*Folld. Williams v. Deggan* (1867), 16 L. T. 492. *Consd. Cox v. Bleines*, [1902] 1 K. B. 670. *Folld. Houghton v. Buxton* (1907), 24 T. L. R. 200. *Consd. Evans v. Jones* (1908), 99 L. T. 799; *Mattinson v. Binley*, [1908] 2 K. B. 534; *Lyons v. Houghton*, [1915] 1 K. B. 489. *Reid. Mitton v. Broke* (1869), 33 J. P. 821; *Hill v. Browning* (1870), L. R. 5 Q. B. 453; *Blackledge v. Bolshaw* (1908), 99 L. T. 60. *Mentd. Dauncey v. Chatterton* (1874), 31 L. T. 514.

408. ———.]—The practice of applt. was to sell loaves of bread at 6d. varying the weight of the loaf with the price of corn. When he purposed to sell a 3½ lb. loaf for 6d., the custom in his bakery was to put into the oven 4 lbs. of dough, but the loaf was not weighed after baking. Applt. sold, at 6d. each, six loaves, which varied in weight; but all but one weighed over 3½ lbs.:—*Held*: applt. was rightly convicted of selling bread otherwise than by weight.—*HILL v. BROWN-*

four pounds is not unreasonable as prohibiting the sale of a loaf weighing more than the standard. The bye-law in question was passed by the

ING (1870), L. R. 5 Q. B. 453; 22 L. T. 584; 34 J. P. 774; 19 W. R. 21.

Annotation.—*Reid*. Lyons v. Houghton, [1915] 1 K. B. 489.

409. — Weighing before sale.—Although it is not necessary in order to constitute a sale of bread by weight within sect. 4 of Bread Act, 1836, that the bread should be weighed at the very instant of sale, it must be weighed at a time before & with reference to the sale.

Resp. weighed a loaf which then weighed 2 lb., but placed the loaf aside for consumption in his own household. Twelve hours later the loaf was, by mistake, sold by *resp.*'s brother-in-law, acting on his behalf. At the time of the sale the loaf was not weighed, & in fact was 1½ ozs. under 2 lbs., the loss in weight being due to evaporation which had taken place since it was weighed twelve hours previously.—*Held*: the loaf had not been sold by weight within Bread Act, 1836, s. 4, inasmuch as there had been no weighing with reference to the sale, & *resp.* had therefore committed an offence under the sect.—*MATTINSON v. BINLEY*, [1908] 2 K. B. 534; 77 L. J. K. B. 832; 99 L. T. 53; 72 J. P. 346; 24 T. L. R. 671; 6 L. G. R. 760; 21 Cox, C. C. 636, D. C.

Annotations.—*Folld*. Evans v. Jones (1908), 99 L. T. 799.

Reid. Blackledge v. Bolshaw (1908), 99 L. T. 60; Lyons v. Houghton, [1915] 1 K. B. 489.

410. — — — — ——The man in charge of applt.'s shop had served a woman, who asked for a threepenny best cottage loaf, with a loaf for which she paid 3d. When the loaf was handed to the purchaser it had round it a paper band, on which was printed the words "B.'s Fancy Bread, 3d. & 1½d. per loaf (2d. per lb.) always overweight, varying according to fluctuations in the price of flour." The loaf was not weighed in the presence of the purchaser, but it in fact weighed 1 lb. 11½ oz. In the ordinary course of business each morning the manager weighed each loaf himself & if it exceeded 1½ lb., put on it a band similar to the one in question, & passed the loaf for sale. This had been done to the loaf in question before the purchaser had entered the shop.—*Held*: there had been a weighing with reference to the sale, & applts. had not sold the loaf "in any other manner than by weight" contrary to sect. 4 of Bread Act, 1836.—*BLACKLEDGE & SONS, LTD. v. BOLSHAW* (1908), 99 L. T. 60; 72 J. P. 383; 24 T. L. R. 696; 6 L. G. R. 885; 21 Cox, C. C. 648, D. C.

Annotation.—*Reid*. Evans v. Jones (1908), 99 L. T. 799.

411. — — — — ——*Resp.* asked applt.'s vanman for a 2 lb. loaf, & handed him 3½d. the price thereof, & he then asked for it to be weighed, but the vanman, owing to insufficiency of weights, was not able to do so. Each loaf was weighed before it was delivered to the vanman, & if any loaf was found not to turn the scale at 1½ lb. it was not sent out; 3½d. was the price of a loaf weighing 1½ lb.:—*Held*: applt. was rightly convicted under sect. 4 of Bread Act, 1836, for selling the loaf of bread otherwise than by weight, as the loaf in question had not been weighed with reference to its sale.—*EVANS v. JONES* (1908), 99 L. T. 799; 72 J. P. 481; 25 T. L. R. 5; 6 L. G. R. 1166, D. C.

412. Necessity for communication to

council of the town of Regina in 1891. By an Ordinance of 1903, the town was incorporated under the name of

the city of Regina:—*Held*: the powers conferred on the town by the Municipal & the bye-law

purchaser of intention to sell loaf as at weight so ascertained.—A baker's man being asked by an intending purchaser for a loaf of bread produced a loaf & said the price was 2½d. He handed the loaf to the purchaser in a paper bag on which was printed a notice that the loaf was sold as weighing 1½ lbs., but the purchaser did not read the notice or know that any condition was printed on the bag. The purchaser then paid the price. Nothing was said by either party about the weight of the loaf, but the purchaser expected to get a 2 lb. loaf as 2½d. was the ordinary price of a loaf of that weight. The loaf had been weighed by the baker before it left the bakery, & in fact weighed more than 1½ lbs. but less than 2 lbs. Upon an information under a statute which prohibits the sale of bread otherwise than by weight:—*Held*: a sale by weight means a sale under a contract of which it is a term that the subject matter is of a particular weight with reference to which the price is calculated, & the mere fact that the seller has previously weighed the loaf & intends to sell it as of the weight so ascertained does not make the sale by weight unless he communicates that intention to the buyer.—*LYONS & CO. v. HOUGHTON*, [1915] 1 K. B. 489; 84 L. J. K. B. 970; 112 L. T. 771; 79 J. P. 233; 31 T. L. R. 135; 13 L. G. R. 605; 24 Cox, C. C. 666, D. C.

413. — — — — — Weighing at time of sale In presence of customer.—*WILLIAMS v. DEGGAN*, No. 307, ante.

414. — — — — ——*R. v. KENNETT*, No.

B. Sale from Cart or Carriage.

See Bread Act, 1836, s. 7.

415. "Cart or other carriage" What is Bicycle with basket.—A boy in the employment of applt., a baker, carried out for sale from applt.'s shop several loaves of bread, & for that purpose he rode a bicycle, to which was attached in front by means of a strap a wicker basket in which the loaves were carried. The boy was not provided with scales & weights. Upon an information charging applt. with having by his servant carried out bread for sale in & from a "carriage" without being provided with scales & weights the justices convicted him:—*Held*: as the bicycle & basket combined constituted a machine adapted for carrying bread & was being used as such, there was evidence upon which the justices were entitled to find that the machine was a "carriage" within Bread Act, 1836, s. 7.—*TURNER*, [1912] 3 K. B. 625; 82 L. J. K. B. 30; 107 L. T. 792; 77 J. P. 53; 29 T. L. R. 34; 11 L. G. R. 42; 23 Cox, C. C. 233.

416. Necessity for scales & weights Delivery under general order.—Applt., a baker, delivered bread from a cart at a customer's shop pursuant to a general order given some time previously: he was then unprovided with scales & weights:—*Held*: he had committed an offence against Bread Act, 1836, s. 7.—*ROBINSON v. CLIFF* (1870) 1 Ex. D. 294; 45 L. J. M. C. 109; 31 L. T. 40 J. P. 615.

Annotations.—*Folld*. Ridgway v. Ward (1884), 14 Q. B. 110. *Distd*. Daniel v. Whitfield (1885), 15 Q. B. D. *Reid*. Turner v. Holder (1911), 105 L. T. 34; Hunting Matthews (1913), 108 L. T. 1019.

pursuant thereto, continued in *R. v. WILLIAMSON*, R. v. (1908), 7 W. L. R. 501.—*CAN.*

Sect. 2.—Bread: Sub-sect. 3, B. & C.; sub-sects.

417. — Delivery under specific order—Previous weighing—Order received through traveller.]—Applt., a baker, having received through his traveller an order from a customer for a quartern loaf, the manager of the baker's shop selected, weighed, & appropriated to the customer a loaf which was then carried out in a cart & delivered to the customer, on credit, by a servant of the baker without being provided with any beam & scales with proper weights:—*Held*: applt. was rightly convicted under Bread Act, 1836, s. 7.—*RIDGWAY v. WARD* (1884), 14 Q. B. D. 110; 54 L. J. M. C. 20; 51 L. T. 704; 49 J. P. 150; 33 W. R. 166; 1 T. L. R. 112; 15 Cox, C. C. 603, D. C.

Annotations:—Distd. Daniel v. Whitfield (1885), 15 Q. B. D. 408. *Refd.* Turner v. Holder (1911), 105 L. T. 31.

418. — Sale completed at shop.]—A customer bought three loaves in a baker's shop. The baker weighed the loaves in her presence, & subsequently, at her request & to oblige her, his servant carried them out in a cart & delivered them at her house, without being provided with any beam & scales: *Held*: the baker had not carried out or delivered the loaves as "such baker or seller of bread," & therefore could not be convicted of an offence under Bread Act, 1836, s. 7.—*DANIEL v. WHITFIELD* (1885), 15 Q. B. D. 408; 54 L. J. M. C. 134; 53 L. T. 471; 49 J. P. 694; 33 W. R. 905; 1 T. L. R. 574; 15 Cox, C. C. 762, D. C.

419. — What weights required.]—The effect of sect. 7 of Bread Act, 1836, is to impose upon every person who carries out bread for sale from a cart the obligation of carrying such weights as will accurately show the weight of the bread he purports to sell.—*TURNER v. HOLDER*, [1911] 2 K. B. 562; 80 L. J. K. B. 895; 105 L. T. 34; 75 J. P. 445; 27 T. L. R. 472; 9 L. G. R. 979; 22 Cox, C. C. 484, D. C.

420. No weighing at sale—No request for weighing—Weights & Measures Act, 1889 (c. 21), s. 32.]—*COPELAND v. WALKER*, No. 395, *ante*.

C. Sale of Fancy Bread.

See Bread Act, 1822, s. 4; Bread Act, 1836, s. 4.

421. What is—Bread "usually" sold as fancy bread—At time of sale or when Bread Act, 1836, passed.]—By Bread Act, 1836, s. 4, any baker or seller of bread, who shall sell or cause to be sold bread in any other manner than by weight, is subject to penalties, provided that nothing in the Act shall extend to prevent a baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread without previously weighing the same:—*Held*: bread, which was usually sold as fancy bread at the time of the passing of the Act, 1836, but was not usually sold as fancy bread at the time of the sale, was not within the proviso.—*R. v. WOOD* (1869), L. R. 4 Q. B. 559; 10 B. & S. 534; 38 L. J. M. C. 144; 20 L. T. 654; 33 J. P. 823; 17 W. R. 851.

Annotations:—Consd. Aerated Bread Co. v. Gregg (1873), L. R. 8 Q. B. 355. *Apld.* V.V. Bread Co. v. Stubbs (1896), 74 L. T. 704. *Expld.* Bailey v. Barsby, [1909] 2 K. B. 610. *Refd.* Sleater v. Brewsters (1905), Allwood's & Measures, 174.

422.
400, *ante*.

R. v. KENNETT, No.

423. —]—Applt. made two kinds of bread, loaves baked in tins which they called household bread, & which they sold by weight, & bread made in separate loaves, which were put separately in the oven so as to be baked crusty all over, which they called French or fancy bread, & this they did not sell by weight. The justices found, as facts, that the material of which the bread called fancy bread was made in no way differed from the ordinary loaves sold by bakers generally, & except in the manner of baking it in separate loaves it in no way resembled what was called French or fancy bread at the time of the passing of the Act, & was, in fact, only English bread baked so as to have an outside of crust; they were therefore of opinion that the loaves in question were not "French or fancy bread" within the exception of Bread Act, 1836, s. 4:—*Held*: the justices had come to a right conclusion on the facts

My opinion is that that [bread usually sold as French or fancy bread] meant such bread as at the time the legislature passed this Act was sold under the denomination of French or fancy bread (*BLACKBURN, J.*).—*AERATED BREAD CO. v. GREGG* (1873), L. R. 8 Q. B. 355; 42 L. J. M. C. 117; 28 L. T. 816; 38 J. P. 86; 21 W. R. 848.

Annotations:—Apld. V.V. Bread Co. v. Stubbs (1896), 74 L. T. 704. *Refd.* Bailey v. Barsby (1909), 78 L. J. K. B. 974.

424. — Difference in manner of baking.]—*R. v. KENNETT*, No. 400, *ante*.

425. —]—*AERATED BREAD CO. v. GREGG*, No. 423, *ante*.

426. — Materials & quality same as household bread—Difference in size & appearance.]—*AERATED BREAD CO. v. GREGG*, No. 423, *ante*.

427. —]—To constitute bread "fancy bread" within the proviso to sect. 4 of Bread Act, 1836, it is not necessary that it should be superior in quality to ordinary household bread; it is enough that it is so different in size & appearance as not to be liable to be mistaken for it.—*BAILEY v. BARSBY*, [1909] 2 K. B. 610; 78 L. J. K. B. 974; 100 L. T. 370; 73 J. P. 138; 25 T. L. R. 224; 7 L. G. R. 381; 21 Cox, C. C. 795, D. C.

428. — Difference in materials & quality—Size & appearance same as household bread.]—Bread, though it be made by a different process or of better materials than ordinary household bread is not fancy bread within Bread Act, 1836, if it be similar in size, shape & appearance to ordinary household bread as usually sold & therefore it must be sold by weight.

Appls. manufactured a superior kind of bread. The chief difference between it & ordinary household bread was that a peculiar yeast, the nature of which was a trade secret, was used in its production. It was sold in loaves which in size, shape & appearance resembled ordinary loaves of household bread. These loaves were not sold by weight. Resp. summoned the appls. before the justices for breach of sect. 4 of Bread Act, 1822, similar to sect. 4 of Bread Act, 1836, & the justices convicted, holding that appls.' bread was

PART V. SECT. 2, SUB-SECT. 3.—C.
e. What is—Question for magis-

—Whether or not bread is fancy bread is solely for the magistrate.—*R. v. KAY*, *Ex p. LE BLANC* (1909), 7 E. L. R.

209.—**CAN.**

f. —.]—*FITCHER v. R. O. P. D.* 43.—**S. AF**

not fancy bread, & should therefore be sold by weight:—*Held*: the conviction was right.—*V.V. BREAD CO. v. STUBBS* (1896), 74 L. T. 704; 60 J. P. 424; 12 T. L. R. 451; 40 Sol. Jo. 568; 18 Cox, C. C. 336, D. C.

Annotation:—*Distd.* *Bailey v. Barsby*, [1909] 2 K. B. 610.

429. When sale by weight necessary - Demand for bread by weight.—*R. v. KENNETT*, No. 400, *ante*.

SUB-SECT. 4.—BAKING OR SELLING ON SUNDAY.

See Bread Act, 1822, s. 16; Bread Act, 1836, s. 14; &, *generally*, TIME.

430. Baking bread—Offence under Sunday Observance Act, 1677 (c. 7).—The above Act does not prohibit a baker baking dinners for his customers on a Sunday.

The baking of bread in the ordinary course of a baker's business is undoubtedly an offence under the Act (*BULLER, J.*).—*R. v. YOUNGER* (1793), 5 Term Rep. 449; 101 E. R. 253.

Annotations:—*Apld.* *Bullen v. Ward* (1905), 74 L. J. K. B. 916. *Refd.* *It. v. Mead*, [1902] 2 K. B. 212. *Mentd.* *Amorette v. James* (1914), 79 J. P. 116.

431. Selling bread—Only one offence committed on same day—Four charges of selling hot loaves—Sunday Observance Act, 1677 (c. 7).—A person can commit but one offence on the same day, by exercising his ordinary calling on a Sunday, contrary to the above Act; &, if a justice of peace proceed to convict him in more than one penalty for the same day [on four charges of selling hot loaves], it is an excess of jurisdiction for which an action will lie, before the convictions are quashed.—*CREPPS v. DURDEN* (1777), 2 Cowp. 610; 98 E. R. 1283.

Annotations:—*Consd.* *R. v. Younger* (1793), 5 Term Rep. 449. *Apld.* *Apothecaries Co. v. Jones*, [1893] 1 Q. B. 89. *Refd.* *Groome v. Forrester* (1816), 5 M. & S. 314. *Milnes v. Bale, Milnes v. Lea* (1875), L. R. 10 C. P. 591. *It. v. Portsmouth JJ.*, [1892] 1 Q. B. 491. *Mentd.* *Gray v. Cookson* (1812), 16 East, 13; *Brittain v. Kinnaird* (1819), 1 Brod. & Bing. 432; *Gimbert v. Coyney* (1825), M'Cle. & Yo. 469; *Dingsdale v. Clarke* (1829), 8 L. J. O. S. M. C. 137; *Mills v. Collett* (1829), 6 Bing. 85; *Re Westbury upon Severn Union* (1854), 4 E. & B. 314; *Llewellyn v. Vale of Glamorgan Ry.*, [1898] 1 Q. B. 473; *R. v. Baggallay, Ex p. Hurlock, Hurlock v. Shinn, R. v. Hedderwick, Ex p. Slade, Morris v. Ashton* (1912), 11 L. G. R. 367; *Parker v. Sutherland* (1917), 86 L. J. K. B. 1052.

432. — Discretion of magistrate to refuse summons—Baker in Jewish community.—The summons applied for was to punish a Jewish baker for selling his bread on Sunday. There was a large Jewish community in the district, & the baker had kept his shop shut on Saturday. If he had issued the summons applied for, the learned magistrate says he would have dismissed it at the hearing. I cannot but think that it is quite a

proper matter for a magistrate to take into consideration that there are other methods of proceeding better applicable to the nature of the offence alleged. It was not argued that the learned magistrate could not, upon hearing the summons, dismiss on the grounds stated by him. That being so, I also think he is entitled to take such grounds into consideration when exercising this discretion whether or not to issue a summons. . . . There is, therefore, no ground for interfering with the discretion the magistrate had exercised (*LORD ALVERSTONE, C.J.*).—*R. v. Bros* (1901), 85 L. T. 581; 66 J. P. 51; 18 T. L. R. 20 Cox, C. C. 89, D.

433. — Institution of prosecution—Conditions precedent imposed by Sunday Observance Prosecution Act, 1871 (c. 87), s. 1, not applicable.—

The provision of the above sect., that no prosecution or other proceeding shall be instituted for any offence committed under Sunday Observance Act, 1677 (c. 7), except by or with the consent in writing of the chief officer of police of the district or with the consent in writing of two justices of the peace or a stipendiary magistrate, has no application to prosecutions under sect. 16 of Bread Act, 1822, for selling or exposing for sale bread on the Lord's Day. *R. v. MEAD*, [1902] 2 K. B. 212; 71 L. J. K. B. 871; 87 L. T. 136; 66 J. P. 676; 20 Cox, C. C. 337; *sub nom. R. v.*

W. R. 589; 18 T. L. R. 544; 46 Sol. Jo. 165, D. C.

Factories.

SUB-SECT. 6.—PROCEEDINGS AGAINST OFFENDERS.

See Bread Act, 1836 (c. 37), s. 7.

434. Whether maintainable Refusal to weigh in presence of purchaser. (1) Bread Act, 1836 (c. 37), s. 7, imposes a penalty not exceeding £5 upon any baker refusing to weigh bread purchased of him in the presence of the purchaser, whether the bread be sold in the shop, or from any cart or carriage, & is not confined to a sale of the latter description.

(2) Where deft. appears in answer to an information, any defect in, or the want of a summons, becomes immaterial, even in cases where a special form of summons is required by the statute under which the information is laid. *R. v. KINGSLEY* (1851), 16 L. T. O. S. 408; 15 J. P. Jo. 65.

435. — Failure to provide scales & weights

PART V. SECT. 2, SUB-SECT. 6.

g. Whether maintainable—Proof of correctness of scales & weights.—G., an inspector under Health Act, 1900, entered the premises of S., a baker, & on weighing bread found therein, discovered a shortage in weight. G. used the scales & weights which S. kept for weighing his dough. G. did not compare these with standard weights, & was unable to say that the weights were in accordance with standard weights:—*Held*: the mere fact that the scales & weights were used by S. on his own premises did not amount to a representation that they

were correct.—*GABRIEL v. SMITH*, [1905] S. R. Q. 106.—**AUS.**

h. Institution of Information—Contents of. Information under Bread Act C., a baker, for having in his 30 batch two pound loaves, deficient in weight:—*Held*: information need not state that the bread was for sale & the words "batch two pound loaves" merely described the class of bread afterwards alleged to be under weight.—*Ex p. COOKE* (1891), 12 N. S. W. L. R. 12; 7 N. S. W. N. 105.—**AUS.**

k. Inspection of bakery out-

side statutory hours. An whose only authority to enter was Health Act, 1900, s. 163, w authorised him to enter betw 9 a.m. & 6 p.m. on any day ex Sunday, entered & w before 9 a.m.:—*Held*: could not institute process the baker for having on his pre newly baked bread defic DANIEL v. WEBSTER, [1910] S. R. Q. 91. **AUS.**

l. Mens rea—Necessity for *of.*—No evidence of mens rea is necessary for a conviction for selling loaves of light weight, the word "willfully" not being used in the statute

Sect. 2.—Bread: Sub-sect. 6. Sect. 3: Sub-sects. 1,

in shop.]—Bread Act, 1822, s. 8, & therefore Bread Act, 1836 (c. 37), s. 6, which is in the same terms, though directing that every baker, etc., shall fix in his shop proper weights & scales, etc., does not provide a penalty for the breach of this duty, which therefore does not constitute an offence cognisable by a ct. of summary jurisdiction. —R. v. SMITH & AERATED BREAD CO. (1894), 63 L. J. M. C. 67; 70 L. T. 373; 58 J. P. 445; 17 Cox, C. C. 735; *sub nom. Re AERATED BREAD CO., R. v. SMITH*, 10 T. L. R. 227, D. C.

436. Institution of proceedings—Selling bread on Sunday—Conditions precedent imposed by Sunday Observance Prosecution Act, 1871 (c. 87), s. 1, not applicable.]—R. v. MEAD, No. 433, *ante*.

437. — Summons—Irregularity—Effect of appearance.]—R. v. KINGSLEY, No. 434, *ante*.

438. Disqualification of justice under Bread Act, 1836 (c. 37), s. 15—Application for certiorari—Form of affidavit.]—A baker was charged under sect. 4 of the above Act with selling bread otherwise than by weight & was convicted in presence of two justices. He obtained a rule *nisi* for a writ of *certiorari* to quash the conviction on the ground that one of the justices alleged to have taken part in the conviction was a person concerned in the business of a baker. The affidavit on which the rule *nisi* was obtained did not state that any objection to the competence of the ct. was taken at the hearing before the justices, nor did it state that at the date of that hearing appct. was without knowledge of the facts alleged to disqualify one of the justices:—*Held*: this defect in the affidavit disentitled appct. to the issue of a writ of *certiorari ex debito justitiae*. R. v. WILLIAMS, *Ex p. PHILLIPS*, [1911] 1 K. B. 608; 83 L. J. K. B. 528; 110 L. T. 372; 78 J. P. 148. *Annotation*: **Consd. R. v. West Suffolk Compensation Authority, *Ex p. Hudson's Cambridge & Pampistord* [1919] 2 K. B. 371.**

See, generally, CROWN PRACTICE, Vol. XVI., p. 465, Nos. 3415-3419.

439. Appeals—Notice of appeal—Necessity for.]—By a local Act, which imposes a penalty on bakers baking on Sundays, it is enacted that persons aggrieved by the judgment of the magistrate may appeal to the next general or general quarter sessions, they entering into a recognisance at the time of such conviction, or within twenty-four hours after, with sureties, upon condition to prosecute such appeal with effect, which recognisance the convicting magistrate is required to take:—*Held*: an order of sessions that all notices of appeal made to the ct. should be given by the parties concerned eight days before the sessions began, did not apply to an appeal under this Act, where the party appealing had, at the time of the conviction, declared his intention to appeal, & had entered into the required recognisance.—R. v. KENT JJ. (1817), 6 M. & S. 258; 105 E. R. 1239.

or bye-law.—R. v. CHISHOLM (1907), 9 O. W. R. 914; 14 O. L. R. 178.—CAN.

— **Who may prosecute—officer not a purchaser.]—A police summoned a baker for having sold bread from a van otherwise than by weight. It was contended that**

the police officer, not being the purchaser of bread, was not entitled to prosecute:—*Held*: the police officer was entitled to prosecute.—KENNALLY v. O'KEEFE, [1901] 2 I. R. 39.—IR.

n. — **Common informer—Sale from van.]—Bread (Ireland) Act, 1838, s. 4, which requires that all**

SECT. 3.—BUTTER, CHEESE, AND MARGARINE. SUB-SECT. 1.—IN GENERAL.

See Note on p. 70, ante.

Definitions.]—See 1887 Act, s. 3; 1907 Act, s. 13.

440. — “Butter”—“Pure butter”—Butter containing small percentage of boracic acid.]—This was a trade transaction between tradesmen, & it seems to me that the judge ought to have considered that fact, & ought to have considered whether by the addition of a very small percentage of boracic acid to butter to be sold by description as pure butter, though not in the abstract pure, was nevertheless pure butter as that term was used in the trade. For these reasons I think the judge ought to reconsider the question & see whether in fact this was not pure butter in the trade sense of that term, although not so in the abstract sense (RIDLEY, J.)—ROOSE v. PERRY & Co. (1900), 41 Sol. Jo. 503, D. C.

441. — “Margarine”—Milk-blended butter.]—(1) Butter blended with milk so that it contains an excess of water does not become margarine.

(2) A vendor of such milk-blended butter cannot be convicted under sect. 8 of 1899 Act for selling margarine containing more than 10 per cent. of butter fat.

(3) The sale of butter blended with milk is lawful if sold as such.—BAYLEY v. PEARKS, GUNSTON & TEE, LTD. (1902), 87 L. T. 67; 66 J. P. 790; 18 T. L. R. 567; 20 Cox, C. C. 289, D. C.

442. — Vegetable butter—Consisting wholly of nuts.]—A vegetable butter, consisting wholly of nuts, & containing no animal fat whatsoever, but prepared in imitation of butter, is within the definition of margarine in sect. 3 of 1887 Act, & must be sold as such, & the fact that the compound contains no animal fat, & was unknown when that Act was passed, does not prevent it from being margarine.—WILKINSON v. ALTON (1908), 99 L. T. 119; 72 J. P. 252; 24 T. L. R. 528; 52 Sol. Jo. 457; 6 L. G. R. 544; 21 Cox, C. C. 655.

443. Sale under name of margarine—What is—Sale under fancy name—Notice given that article sold as margarine.]—Resp. went into applt.'s shop & asked for half a pound of “Marvo,” & was served with a substance from a box labelled “Margarine,” which substance, before being handed to resp. was wrapped in paper on which was printed in $\frac{1}{4}$ -in. letters “Margarine.” Inside the package was found a slip on which was printed, “Marvo (registered by Act of Parliament). Without this slip none is genuine”; & behind the counter was a notice; “Notice—“Marvo,” the new butter substitute, equal in flavour to the finest dairy butter. To comply with the provisions of the Food & Drugs Act is sold as ‘Margarine’”;—*Held*: applt. had not sold a substance prepared in imitation of butter under a name other than margarine, within sect. 3 of 1887 Act.—TANNER

bread, with certain exceptions, sold in Ireland shall be sold by weight only, & not by measure, applies to sales from a van on the public road as well as sales in a shop. A prosecution for an offence under that section may be brought by a common informer.—RIGNEY v. PETERS, [1915] 2 I. R. 342.

v. DYBALL (1906), 94 L. T. 539; 70 J. P. 279; 4 L. G. R. 506; 21 Cox, C. C. 123, D. C.

*Annotations:—***Keeloma Dairy Co. v. Jones (1906), 70 J. P. 533. Refd. Williams v. Baker (1910), 80 L. J. K. B. 545; Millard v. Allwood (1912), 106 L. T. 111.**

444.

half a pound of "Keeloma" in a dairy co.'s retail shop & was served with a substance by G., the co.'s servant, wrapped in brown paper with no label or printing upon it. P. paid 4½d. Nothing was said by G. P. did not see the bulk from which the substance was taken, & she did not see it wrapped up. Two notices were displayed in the shop; (1) "If you ask for butter you will be served with one of our new butter substitutes," & (2) "Only Keeloma & overweight, the new butter substitutes, sold here, & to comply with the provisions of the Food & Drugs Acts, 1875 & 1899, are sold under the name of 'margarine.'" On the package being opened it was found that underneath the brown paper was a second wrapper of paper with the word "margarine" printed on it as required by 1887 Act, & 1899 Act. On the substance itself was a small label with the words: "Ninepence. Keeloma, the only perfect substitute for butter." P. knew that the substance was, what in fact it was, margarine. On a prosecution for selling by retail a parcel of margarine under a name other than margarine, to wit, the name of "Keeloma," contrary to 1887 Act, the justices overruled the contention of appls. that, having regard to the notices displayed in the shop, the parties had knowledge that they were in fact buying margarine, & that the paper wrapper underneath the brown paper, being printed as required by the Act, the provisions of the Act as to the sale of margarine had been duly complied with, & found as a fact that the substance was sold as "Keeloma," & convicted the co.:—*Held*: there had been no offence & the conviction must be quashed.—**KEELOMA DAIRY CO., LTD. v. JONES (1906), 70 J. P. 533; 22 T. L. R. 535; 5 L. G. R. 246, D. C.**

*Annotations:—***Refd. Williams v. Baker (1910), 9 L. G. R. 178; Millard v. Allwood (1912), 106 L. T. 111.**

Use of fancy name, *see, now*, 1907 Act, ss. 8, 10; No. 465, *post*.

445. Offering for sale—Offer to sell.]—An offer to sell margarine under any other name is not an offence against 1887 Act. An offering for sale contrary to the Act is not proved by proof of an offer to sell. It is not necessary that the word "margarine" should be the only word printed on the wrapper required by the Act to be delivered to the purchaser on a sale of margarine by retail, so long as it is printed thereon in capital letters of the required size.

Qu.: whether, if the word "margarine," although printed on the wrapper in capital letters of the required size, were so printed in relation to other words printed thereon as to convey the idea that it was not intended for the designation of the article sold therewith, that would be sufficient.—**WORLD'S TEA CO. v. GARDNER (1895), 59 J. P. 358, D. C.**

*Annotation:—***Refd. Millard v. Allwood, [1912] 1 K. B. 590.**

PART V. SECT. 3, SUB-SECT. 2.

o. Margarine — Containing small percentage of butter — Described as "butter mixture."]—Margarine containing a small percentage of butter & ticketed "Butter mixture, 1s. 2d. per lb." was exposed for sale. A customer, who had seen the ticket & had a know-

ledge of its terms, having demanded "1 lb. of that butter in the window" was supplied with 1 lb. of the "butter mixture":—*Held*: as the descriptive words on the ticket were not such as would make it clear to a purchaser endowed with ordinary intelligence that the commodity was not butter, the article supplied was not of the

nature, substance, & quality of the article demanded, & the sale was to the prejudice of the purchaser.—**ROBERTSON v. M'KAY, [1921] S. C. (J.) 31.—SCOT.**

PART V. SECT. 3, SUB-SECT. 4.—A. p. "Parcel" — Necessity for label.]—On deft.'s counter there was a bott-

SUB-SECT. 2.—STANDARD OF QUALITY.

See 1899 Act, s. 8.

446. Butter—Excess of water.]—**BOSOMWORTH v. BRIDGE (1892), 36 Sol. Jo. 594, D. C.**

447. ——— Mixing milk with butter by special process.]—Appls., after butter had been made in the ordinary way, mixed milk with it, for the purpose of increasing its weight, by a process which had the effect of retaining the water in the milk, & caused an excessive quantity of water in the butter so treated. They sold the butter so treated to a purchaser as butter:—*Held*: they had committed the offence specified in sect. 6 of 1875 Act, namely, selling to the prejudice of the purchaser an article of food not of the nature, substance, & quality of the article demanded by him.—**PEARKS, GUNSTON & TEE, LTD. v. KNIGHT, SAME v. VAN TROMP, [1901] 2 K. B. 825; 70 L. J. K. B. 1002; 85 L. T. 379; 65 J. P. 822; 50 W. R. 104; 17 T. L. R. 771; 45 Sol. Jo. 716; 20 Cox, C. C. 46, D. C.**

*Annotation:—***Refd. Pearks, Gunston & Tee v. Houghton, [1902] 1 K. B. 889.**

448. ——— Addition of small percentage of boracic acid.]—**ROOSE v. PERRY & Co., No. 440, ante.**

449. Margarine — Question of fact for justices.]—**ROBERTS v. LEEMING, No. 150, ante.**

450. ——— Excess of water.]—Margarine having been purchased & analysed, evidence was given that it contained 21 per cent. of water, which was at least 5 per cent. in excess of water that margarine should contain:—*Held*: the vendor was rightly convicted of selling to the prejudice of the purchaser margarine not of the nature, substance, & quality demanded, contrary to sect. 6 of 1875 Act.—**BURTON & SONS v. MATTINSON (1902), 86 L. T. 770; 66 J. P. 628; 18 T. L. R. 545; 20 Cox, C. C. 262, D. C.**

*Annotation:—***Folld. Roberts v. Leeming (1905), 69 J. P. 417.**

451. ——— Deficiency in fat.]—**ROBERTS v. LEEMING, No. 150, ante.**

452. Mixture of butter & margarine — Excess of butter fat.]—**ANNESS v. GRIVELL, No. 151, ante.**

Part IV., *ante*.

SUB-SECT. 4.—MARKING.

A. Packages and Parcels.

See 1887 Act, s. 6.

453. "Package" — More articles than one — Cardboard box, paper band, & advertisement.]—A person sold margarine by retail in a cardboard

Sect. 3.—Butter, cheese, and margarine: Sub-sect. 4, A. & B; sub-sects. 5, 6 & 7.]

box, the lid of which was fastened on by an adhesive paper band, to which was attached a folded paper containing an advertisement of margarine. The word margarine was stamped in letters a quarter of an inch square partly on the box & partly on the paper band. The box was delivered to the purchaser wrapped in brown paper, which was not marked with the word margarine, but it did not appear whether the covering of brown paper was added at the request of the purchaser or not:—*Held*: the cardboard box, paper band, & advertisement together formed a paper wrapper within 1887 Act, s. 6 (3), & did not form a package within sect. 6 (1); & if the outer covering of brown paper was added at the request of the purchaser the delivery of the box so covered did not constitute an offence against the sect. *Qu.*: whether, if the outer covering had been added by the seller of his own accord or to conceal the mark of "margarine," the delivery of the box so covered would have constituted an offence against the Act.—*TOLER v. BISCHOP* (1895), 65 L. J. M. C. 4; 73 L. T. 403; 60 J. P. 9; 12 T. L. R. 3; 18 Cox, C. C. 202, D. C.

Annotations:—*Reid*. Millard v. Allwood (1912), 81 L. J. K. B. 514. *Mentd.* Williamson v. Tierney (1900), 83 L. T. 592.

454. — Tub.]—A tub standing at the back of the counter from which margarine is scooped to be supplied to a customer is a "package" within sect. 6 of 1887 Act, & must be marked in accordance with that sect.—*McNAIR v. HORAN* (1904), 91 L. T. 555; 68 J. P. 518; 2 L. G. R. 1230; 20 Cox, C. C. 729, D. C.

455. "Parcel" — More articles than one—Pyramid of several pats.]—Six rounded pieces of margarine placed in the form of a triangle so that three form the base, two being placed upon the three & one upon the two, all touching, sufficiently form one "parcel" within sect. 6 of 1887 Act.—*PARKINSON v. McNAIR* (1905), 93 L. T. 553; 69 J. P. 399; 3 L. G. R. 982; 21 Cox, C. C. 42, D. C.

456. Whether margarine "exposed for sale" — Margarine not visible to customers—Placed behind screen.]—Resp. kept margarine for sale in his shop, in a parcel which was not labelled, behind a screen, & not in sight of customers. There was no evidence that this was done for the purpose of evading the Act:—*Held*: the margarine was not "exposed for sale" within 1887 Act.—*CRANE v. LAWRENCE* (1890), 25 Q. B. D. 152; 59 L. J. M. C. 110; 63 L. T. 197; 54 J. P. 471; 38 W. R. 620; 6 T. L. R. 370; 17 Cox, C. C. 135, D. C.

Annotation:—*Folld.* Wheat v. Brown, [1892] 1 Q. B. 418.

457. — Parcel in paper wrapper visible.]—By 1887 Act, s. 6, if margarine be "exposed for sale by retail" there shall be attached to each parcel thereof a label of the prescribed size & marked in the prescribed manner:—*Held*: the

meaning of the words "exposed for sale" was not limited to such an exposure as would enable purchasers to see the margarine itself, but that margarine, when wrapped in paper so as to be invisible to the purchaser, might be exposed for sale within the meaning of the Act.—*WHEAT v. BROWN*, [1892] 1 Q. B. 418; 61 L. J. M. C. 94; 66 L. T. 464; 56 J. P. 153; 40 W. R. 462; 8 T. L. R. 294; 36 Sol. Jo. 257.

458. — Sale in refreshment rooms for consumption with other food.]—Resps. were summoned for exposing margarine for sale by retail, without a label marked "margarine" attached to each parcel, contrary to 1887 Act, s. 6. Resps. kept a refreshment room, in which were posted notices that "Nothing but a mixture of the best Danish butter & margarine is sold at this establishment." Slices of bread, spread with a mixture of Danish butter & margarine, were sold for consumption on the premises, & also haddocks, on which was put margarine cut from a lump kept on a shelf. There were no labels either on the slices or on the lump of margarine:—*Held*: the margarine had not been exposed for sale by retail, within sect. 6, & no offence had been committed.—*MOORE v. PEARCE'S DINING & REFRESHMENT ROOMS*, [1895] 2 Q. B. 657; 65 L. J. M. C. 7; 73 L. T. 400; 59 J. P. 805; 44 W. R. 94; 12 T. L. R. 2; 40 Sol. Jo. 12; 18 Cox, C. C. 196; 15 R. 611, D. C.

Annotations:—*Reid*. Bishop v. Toler (1895), 59 J. P. 807; Toler v. Bishop (1896), 60 J. P. 9.

B. Wrappers.

See 1887 Act, s. 6; 1899 Act, s. 6; 1907 Act, s. 8.

459. "Wrapper" — More articles than one—Cardboard box, paper band & advertisement.]—*TOLER v. BISCHOP*, No. 453, *ante*.

460. — Whether outer or inner covering—Outer cover concealing marking.]—*TOLER v. BISCHOP*, No. 453, *ante*.

461. — Outer cover transparent.]—A retail dealer sold by retail a parcel of margarine in a cardboard case bearing on its outside an impression of a cabbage leaf & the words "Green Leaf Margarine"; the cardboard case was wrapped in a wrapper of thin transparent paper upon which was printed "margarine." The words "Green Leaf Margarine" appeared through this wrapper. The wrapper was fastened at each end by means of a circular gummed label on which was printed the phrase "4d. per packet about $\frac{1}{2}$ lb." :—*Held*: the words "Green Leaf" appearing through the outside transparent wrapper might constitute, & the printed matter "4d. per packet about $\frac{1}{2}$ lb." did constitute, a breach of 1887 Act, s. 6, as amended by 1899 Act, s. 6.—*MILLARD v. ALLWOOD*, [1912] 1 K. B. 590; 81 L. J. K. B. 514; 106 L. T. 111; 76 J. P. 139; 10 L. G. R. 127; 22 Cox, C. C. 676, D. C.

of margarine, from which the lid had been removed, but which was branded on the lid, bottom & side, with the word "margarine." There was no label attached. Deft.'s assistant, on being asked for 1 lb. of margarine by prosecutor, sliced away that quantity from the margarine in the butt, & sold it to him:—*Held*: the magistrates ought to have convicted deft. under Margarine Act, 1887, s. 6, Regulation (2).—*MAQUIRE v. PORRER*, [1905] 2 L. R. 147.—

PART V. SECT. 3, SUB-SECT. 4.—B.

q. "Wrapper" — Notice on — Sufficiency of.]—A boy entered a shop of a limited co. & presented a written order for $\frac{1}{2}$ lb. of butter. The salesman, without remark, handed him a mould of butter, contained in a wrapper, on which was printed, "This article is not sold by weight." The butter only weighed 3 $\frac{1}{2}$ ozs. & the price paid by the boy was the price, according to the current wholesale rates, of that

quantity of butter:—*Held*: the butter had been represented as being of the weight asked for, the notice on the wrapper not being sufficient to displace the representation implied in the transaction between the buyer & the seller.—*GALBRAITH'S STORES, LTD. v. McINTYRE*, [1912] S. C. (J.) 66; 6 Adam, 641.—*SCOT*.

r. How to be marked — Other words than "margarine" — Trade ment.]—*Held*: a wrapper having the

462. How to be marked—Other words than “margarine” —Relative sizes of type.]—WORLD'S TEA CO. v. GARDNER, No. 445, *ante*.

463. ———.]—Sect. 6 of 1899 Act, which provides, in amendment of sect. 6 of 1887 Act, that no other printed matter than the word “margarine” shall appear “on” the paper wrapper in which margarine is delivered to a purchaser, is not repealed by sect. 8 of 1907 Act, which permits margarine to be described “in” a wrapper by a name combining the word “margarine” with a fancy or descriptive word approved by the Board of Agriculture & Fisheries. It is, therefore, an offence, on a sale of a kind of margarine called “Karmo,” an approved fancy or descriptive word to deliver it to the purchaser in a paper wrapper on which are printed the words “Karmo margarine.”—WILLIAMS v. BAKER, [1911] 1 K. B. 566; 80 L. J. K. B. 545; 104 L. T. 178; 75 J. P. 89; 9 L. G. R. 178.

*Annotation:—*Folld. Millard v. Allwood, [1912] 1 K. B. 590. If that decision does not express the intention of the Legislature it should be made the subject of a repealing Act (LORD ALVERSTONE, C.J.).

464. ——— Other words appearing through transparent wrapper.]—MILLARD v. ALLWOOD, No. 461, *ante*.

465. ——— Words merely descriptive of process of manufacture.]—Margarine was sold wrapped in two wrappers. The outside wrapper had the word “margarine” printed thereon, & the inside wrapper had the words “Kernut margarine churned with fresh milk” printed thereon. The word “Kernut” had been approved by the Board of Agriculture & Fisheries for use in combination with the word “margarine.” The magistrate convicted the vendor of an offence under sect. 8 of 1907 Act, on the ground that the words “churned with fresh milk” were associated with the words “Kernut margarine” so as to constitute part of the fancy or descriptive name of the article sold:—*Held*: the words “churned with fresh milk” were merely descriptive of the process of manufacture of the article sold & did not form part of the fancy or descriptive name under which it was sold.—HAWES v. STEPHENS, [1921] 2 K. B. 179; 93 L. J. K. B. 891; 131 L. T. 110; 88 J. P. 97; 40 T. L. R. 682; 68 Sol. Jo. 793; 22 L. G. R. 422, D. C.

SUB-SECT. 5.—FACTORIES.

See Butter & Margarine Act, 1907 (c. 21), ss. 1-3, & generally, FACTORIES, Vol. XXIV., pp. 895 *et seq.*

word “margarine” printed on it in letters of the size & type required by Margarine Act, s. 6, in such a way as to stand out as a word by itself, was in compliance with the Statute, although there was other matter of the nature of a trade advertisement printed on the wrapper.—FYE v. M'LAUGHLIN (1893), 1 Adam, 74.—SCOT.

a. ——— Addition must be approved.]—The label, wrapper, & advertisement used in a shop for certain margarine bore the words “Mayco Margarine mixed with Maypole Butter.” The name “Mayco” was a duly approved addition to the word “Margarine”:—*Held*: the words “mixed with Maypole Butter” were not a mere statement as to the nature

of the article but formed part of a descriptive name which had not been approved; & an offence had been committed against Butter & Margarine Act, 1907, s. 8.—MAYPOLE DAIRY CO. v. PATTERSON, [1923] S. C. (J.) 85.—SCOT.

PART V. SECT. 3, SUB-SECT. 7.

t. Institution of proceedings—Conditions precedent—Compliance with formalities prescribed by 1875 Act—Whether particulars of analysis necessary.]—*Held*: (1) It was not necessary to set forth the particulars of the analysis in the complaint; & (2) the use of the word “margarine” in the complaint was surplusage, & did not make the complaint invalid.—WILSON

SUB-SECT. 6.—SALE OF BUTTER.

See 1899 Act, s. 8.

466. Sale as such—Whether legal.]—BAYLEY v. PEARKS, GUNSTON & TEE, LTD., No. 441, *ante*.

SUB-SECT. 7.—PROCEEDINGS AGAINST OFFENDERS.

See 1887 Act, s. 12; & generally, Part II., Sect. 5, *ante*.

467. Institution of proceedings—Conditions precedent—Compliance with formalities presented by 1875 Act.]—SMART & SON v. WATTS, No. 256, *ante*.

468. ——— Notification of intention to have article analysed.]—BUCKLER v. WILSON, No. 32, *ante*.

469. ———.]—By sect. 14 of 1875 Act, as amended by sect. 27 of 1899 Act, the person purchasing any article with the intention of submitting the same to analysis shall notify to the seller his intention to have the same analysed & shall divide the article into three parts & further proceed as therein directed.

By sect. 19 of 1899 Act, where any article of food has been purchased for test purposes, any prosecution under Sale of Food & Drugs Acts in respect of the sale thereof shall not be instituted after the expiration of twenty-eight days from the time of the purchase:—*Held*: (1) it is not necessary to observe the formalities prescribed by sect. 14 of 1875 Act, on the taking of a sample under sect. 2 of 1907 Act, & the observance of those formalities is not a condition precedent to proceedings under sect. 3 of that Act; (2) proceedings under that sect. are not subject to the limit of time prescribed by sect. 19 of 1899 Act.—MONRO v. CENTRAL CREAMERY CO., LTD., [1912] 1 K. B. 578; 81 L. J. K. B. 547; 106 L. T. 114; 70 J. P. 131; 10 L. G. R. 134; 22 Cox, C. C. 682, D. C.

470. Jurisdiction of court—County justices—Offence committed in borough without separate court of quarter sessions.]—BUCKLER v. WILSON, No. 32, *ante*.

471. Summons—Issue—Time of Article purchased for test purposes.]—MONRO v. CENTRAL CREAMERY CO., LTD., No. 469, *ante*.

472. ——— Service—Time of Article not purchased for test purposes.]—BUCKLER v. WILSON, No. 32, *ante*.

v. M'LAUGHLIN (1907), S. C. (J.) 61; 44 Sc. L. R. 469; 14 S. L. T. 850.—SCOT.

a.

Complaint self-

*An objection to the relevancy of a complaint under Sale of Food & Drugs Acts, 1875-1907, on the ground that it was self-contradictory & ambiguous, sustained; an objection to its relevancy on the ground that it should have contained the words “to the prejudice of the purchaser” repelled.—*NIMMO v. LEES, [1910] S. C. (J.) 75; 47 Sc. L. R. 681; 6 Adam, 279.—SCOT.

b. Sale of margarine as Burden on defendant of disproving intent & knowledge.]—Margarine Act, “““

Sect. 3.—Butter, cheese, and margarine: Sub-sect. 7.
Sect. 4: Sub-sects. 1, 2 & 3.]

Hearing—Evidence—Analyst's certificate.]—See
 Nos. 79, 385, *ante*.

Appeals—No appeal to quarter sessions—Con-
viction for offence under 1899 Act, s. 1.]—See No.
 387, *ante*.

473. Penalties—Appropriation—To whom pay-
able.]—(1) A penalty recovered under sect. 6 of
 1887 Act, before a metropolitan police magistrate,
 in the case of a prosecution by an "officer, in-
 spector, or constable of the authority who shall
 have appointed an analyst, or agreed to the acting
 of an analyst within their district" within sect. 26
 of 1875 Act, must be paid to such officer, inspector,
 or constable, & not to the receiver of the metro-
 politan police district.

(2) The appropriation of penalties effected by
 sect. 26 of 1875 Act, is a "proceeding" within
 1887 Act.—*R. v. TITTERTON*, [1895] 2 Q. B. 61;
 64 L. J. M. C. 202; 73 L. T. 345; 11 T. L. R.
 394; 18 Cox, C. C. 181; *sub nom. R. v. TITTERTON*,
Ex p. QUELCH, 59 J. P. 327; 43 W. R. 603; 15
 R. 418, D. C.

SECT. 4.—MILK AND CREAM.

SUB-SECT. 1.—IN GENERAL.

See Dairies, Cowsheds & Milkshops Orders (Stat.
R. & O. 1925, No. 704).

474. Registration of milk sellers — Who must
register—Farmer occasionally supplying small

s. 7, does not make the sale of mar-
 garine as butter penal, irrespective of
 deft.'s state of mind, but throws on
 deft. the burden of disproving intent &
 knowledge.—*FITZGERALD v. LEONARD*
 (1893), 32 L. R. Ir. 675.—**IR.**

c. Wholesale dealer—Register of
consignments—Failure to produce for
inspection.]—Held: the power of
 inspection conferred by Sale of Food &
 Drugs Act, 1899, s. 7 (1), carried with
 it a right to take notes, & a firm of
 margarine dealers were rightly con-
 victed of failure to produce the register
 kept by them, when they had produced
 it but declined to allow the inspector
 to take notes from its contents.—
HART v. COHEN & VAN DER LAAN
 (1902), 1 F. (Ct. of Sess.) 445; 39
 Sc. L. R. 322; 9 S. L. T. 379.—**SCOT.**

PART V. SECT. 4, SUB-SECT. 1.

d. Registration of milk sellers—
Who must register—Whether vendor of
ice-cream.]—An ice-cream manufacturer
 was convicted of a contravention of
 Contagious Diseases (Animals) Acts,
 1878-1886, in respect that he, as a
 manufacturer of ice-cream, should have
 been registered as a purveyor of milk,
 under Dairies, Cowsheds, & Milk-
 Shops Order, 1885, s. 6 (1).—*Held:*
 although ice-cream is composed of two-
 thirds of milk & the appellant used
 upwards of 32 gallons of milk per
 week in the manufacture of ice-cream,
 he was not a purveyor of milk.—
PIANTA v. LANG (1891), 1 Adam, 330.—
SCOT.

e. Supply of milk to cheese
factories.]—Held: Act to Provide
 Against Frauds in the Supplying of
 Milk to Cheese or Butter Manufactures,
 51 Vict. c. 32 (o), though penal in its
 nature, does not deal with criminal
 law within B. N. A. Act, s. 91 (27),
 but merely protects private rights & is
infra vires.—*R. v. WASON* (1890), 17
 A. R. 231; 4 Cart. 378.—**CAN.**

f. —.]—A conviction under 52
 Vict. c. 43 (D.), s. 1, for supplying to a
 cheese factory milk from which the
 cream had been removed, was quashed,
 as neither in the evidence nor in the
 conviction was any offence against the
 Act shown, it not having been proved
 that the milk was supplied to be manu-
 factured.—*R. v. WESTGATE* (1892),
 21 O. R. 621.—**CAN.**

g. —.]—52 Vict. c. 43 (D.), an
 Act to provide against frauds in the
 supplying of milk to cheese factories,
 etc., is *infra vires* the Dominion Parlia-
 ment.—*R. v. STONE* (1892), 23 O. R.
 46.—**CAN.**

h. Validity of bye-law—Regulating
sale of milk.]—The city of Winnipeg,
 relying on Municipal Act, ss. 593 &
 607, & 57 Vict. c. 20, s. 17, passed a
 bye-law for inspecting & regulating
 dairies, & licensing vendors of milk:—
Held: (1) a provision requiring the
 owners of all dairies whose milk was
 sold in the city to submit to an inspec-
 tion & to take out a licence whether
 their dairies were in the city or not,
 was *ultra vires* & illegal so far as it
 applied to the owners of dairies who
 did not sell their milk in the city, but
 to other persons, who might or might
 not sell it there; (2) s. 3 of the bye-
 law, which required applicants for
 licences to satisfy the health officer of
 the city before their licences could issue,
 & left it in his power to decide who
 should have a licence & who should not,
 was also *ultra vires* as an illegal delega-
 tion of authority which the Council
 itself should exercise.—*Re ELLIOTT &*
CITY OF WINNIPEG (1896), 11 Man.
 L. R. 358.—**CAN.**

k. —.]—Held: (1) the
 Council has no authority to pass a
 bye-law requiring a licensed vendor
 of milk, when asked by a health
 officer or veterinary inspector, to
 state where he obtained the milk he
 has sold or is about to sell, along

quantities to neighbours.]—S. was a farmer who
 kept cows for the supply of his family & for
 recreation & amusement. For some years he had
 occasionally supplied a few quarts of milk to two
 dairymen living a mile off when these ran short
 of milk. During six weeks he supplied some
 quarts sixteen times to these persons:—*Held:*
 this occasional supply did not bring S. within the
 description of one carrying on the trade of a
 cowkeeper or dairyman so as to require registration
 as such.—*SOUTHWELL v. LEWIS* (1880), 45 J. P.
 206, D. C.

Annotation:—Reid. Spiers & Pond v. Green (1912), 82
 L. J. K. B. 26.

475. — Refreshment buffet selling occa-
sional glasses of milk.]—The keepers of a refresh-
 ment room at a railway station in the course of
 their business sold milk by the glass to such of their
 customers as asked for it. The amount so sold
 by them did not exceed three or four glasses per
 week:—*Held:* they did not "carry on the
 trade of a purveyor of milk" within the meaning
 of art. 6 of the Dairies, Cowsheds, & Milkshops
 Order, 1885, so as to require registration there-
 under.—*SPIERS & POND, LTD. v. GREEN*, [1912]
 3 K. B. 576; 82 L. J. K. B. 26; 77 J. P. 11;
 29 T. L. R. 14; 10 L. G. R. 1050, D. C.

476. — Registration in one district—Sale in
another district on one occasion.]—Resp. was
 summoned for carrying on the trade of a purveyor
 of milk in M. without being registered in that
 district as required by art. 6 (1) of the Dairies,
 Cowsheds & Milkshops Order, 1885, as amended
 by the Dairies, Cowsheds & Milkshops Amending
 Order, 1886. Resp. was registered in St. P.,

with a provision for cancellation of
 licences & other penalties for an
 infraction of the bye-law; (2) it is
ultra vires of the Council to pass a bye-
 law requiring a vendor of milk to per-
 mit a sample or samples to be taken for
 examination without compensation,
 under penalties in case of refusal.—
Re TAYLOR & CITY OF WINNIPEG (1897),
 12 Man. L. R. 18.—**CAN.**

l. — Cleansing of cans.]
BROWN v. AMBURY (1907), 26 N. Z.
 L. R. 821.—**N.Z.**

m. —.]—Ord. 9 of 1912,
 s. 72 (17), vests the control of the
 introduction & distribution of milk
 in a municipal area in the municipality
 concerned. Where a municipality by
 its bye-laws prohibited the intro-
 duction & distribution within the
 municipality of milk from dairies
 outside the municipal area unless the
 dairies were licensed:—*Held:* the
 bye-laws were not *ultra vires*.—*COOPER*
v. JOHANNESBURG MUNICIPALITY (1916),
 T. P. D. 601.—**S. AF.**

n. Bye-law regulating condition of
premises—Interpretation of terms.]—
 A municipal bye-law provided a penalty
 for the holder of any licence in respect
 of any dairy, cowshed or milk shop
 failing "to the satisfaction of the
 Council, to maintain the same in a
 state of thorough cleanliness & ventila-
 tion. A dairyman's licence was issued
 in respect of all his premises including
 cowsheds:—*Held:* the words "to the
 satisfaction of the Council" were
 surplusage & the word "dairy"
 included the cowsheds & premises
 immediately adjoining the place to
 which the milk was taken & stored
 after milking, the condition of which
 might affect the state of the milk;
 & "thorough cleanliness" meant such
 cleanliness as was reasonably possible,
 regard being had to the nature of the
 premises & the use to which they were

where his premises were situated, & on one occasion he sold a pennyworth of milk from a churn carried on a hand cart or barrow in a street in M. The magistrate held that resp. was not shown to have carried on the trade of a purveyor of milk in M. by reason of this one transaction, & he dismissed the summons:—*Held*: the magistrate's decision was right.—*EMERTON v. HALL* (1910), 102 L. T. 889; 74 J. P. 301; 8 L. G. R. 686, D. C. *Annotation*:—*Consd. Spiers & Pond v. Green*, [1912] 3 K. B. 576.

Protection of milk against infection or contamination.]—See PUBLIC HEALTH.

"Dairyman"—Who is—Public Health Acts.]—See PUBLIC HEALTH.

SUB-SECT. 2.—ANALYSIS OF SAMPLES.

See 1879 Act, s. 3, & generally, Part II., Sect. 2, *ante*.

477. Procuring samples—Who may procure—Agent—Of private purchaser.]—HARRIS v. WILLIAMS, No. 13, *ante*.

478. ———— Of authorised officer.]—TYLER v. DAIRY SUPPLY CO., LTD. No. 12, *ante*.

479. ———— Where samples may be procured—Outside district for which officer appointed.]—R. v. SMITH, No. 238, *ante*.

480. ———— McNAIR v. CAVE, No. 15, *ante*.

481. ———— "Place of delivery."—FILSHIE v. EVINGTON, No. 16, *ante*.

482. ———— .]—LUSH v. WILSON, No. 17, *ante*.

483. ———— .]—SANDERS v. SADLER, No. 225, *ante*.

484. ———— ———— ELDER v. BISHOP AUCKLAND CO-OPERATIVE SOCIETY, LTD., No. 227, *ante*.

485. ———— ———— "In course of delivery."—COX v. EVANS, No. 20, *ante*.

486. ———— ———— .]—HELLIWELL v. HASKINS, No. 21, *ante*.

487. Division of sample—Milk in separate churns.]—WILDRIDGE v. ASHTON, No. 46, *ante*.

put.—*HULLEY v. JOHANNESBURG MUNICIPALITY* (1909), T. S. 115.—**S. AF.**

o. "Milk"—What included in term—Power of Board of Agriculture to make regulations as to "skimmed milk"—Sale of Food & Drugs Act, s. 4 (1), empowers the Board of Agriculture to make regulations determining what deficiency in the constituents of "genuine milk" cream, butter or cheese "or what addition of extraneous matter" in any sample of milk, including condensed milk, shall raise a presumption that the same is not genuine:—*Held*: "milk" included skimmed milk, & that "genuine" meant merely "unadulterated"; & the Board of Agriculture had power to make regulations as to skimmed milk.—*GORDON v. LOVE*, [1911] S. C. (J.) 75.—SCOT.****

PART V. SECT. 4, SUB-SECT. 2.

488 i. Procuring samples—Where samples may be procured—"In course

488. Delivery of sample—Necessity for To seller or his agent.]—ROUCH v. HALL, No. 253, *ante*.

489. ———— What must be delivered—Whether whole sample.]—ROLFE v. THOMPSON, No. 54, *ante*.

SUB-SECT. 3.—STANDARD OF QUALITY.

See 1875 Act, s. 6; Sale of Milk Regulations, 1901, 1912.

490. Quality of article demanded—"Milk"—Skimmed milk supplied.]—It was proved on an information under 1875 Act, s. 6, that applt., who was an inspector under the Act, on asking resp., a milk seller, for "milk," was supplied by resp. with milk which had been skimmed, & which was, in consequence, as compared with normal milk as it comes from the cow, deficient in butter fat to an extent of 60 per cent.:—*Held*: on these facts it was not proved that any offence had been committed by resp. against the provisions of the sect.—*LANE v. COLLINS* (1881), 11 Q. B. D. 193; 51 L. J. M. C. 76; 52 L. T. 257; 49 J. P. 89; 33 W. R. 365; 15 Cox, C. C. 677, D. C.

Annotations:—*Consd. Smithies v. Bridge*, [1902] 2 K. B. 13. *Distd. Hunt v. Richardson*, [1916] 2 K. B. 116. *Distd. Herrington v. Slater* (1920), 90 L. J. K. B. 265.

491. ———— "New milk"—Milk sold as taken from cow—Deficiency in fat through method of milking.]—It was proved on an information under 1875 Act, that applt., who was a milk seller, supplied resp., an inspector under the Act, on being asked for new milk, with a liquid which had been taken direct from the cow, & had not been tampered with or adulterated, but which in consequence of the length of time which had elapsed since the cow had last been milked, was deficient in fat to an extent of 30 per cent., the remainder of the fat having been absorbed by the cow during the unduly long interval between the milkings:—*Held*: applt. was rightly convicted of having supplied resp. with an article which was not of the nature, substance, & quality of the article demanded by him.—*SMITHIES v. BRIDGE*, [1902] 2 K. B. 13; 71 L. J. K. B. 555; 87 L. T. 167; 66 J. P. 710; 50 W. R. 686; 18 T. L. R. 575; 46 Sol. Jo. 486; 20 Cox, C. C. 677, D. C.

Annotations:—*Distd. Wolfenden v. McCulloch* (1905), 92 L. T. 857. *Consd. Hunt v. Richardson*, [1916] 2 K. B. 116.

*of delivery.]—A dairyman was under contract to supply a quantity of milk to another dairyman. Immediately after the milk had been poured into clean cans belonging to the purchaser, on the purchaser's premises, an Inspector of Nuisances took samples:—*Held*: the samples in question had been procured while the milk was "in course of delivery" within Sale of Food & Drugs Act, 1879, s. 3.—*SEMPLE v. DUNBAR* (1901), 4 Adam, 399.—**SCOT.***

p. ———— What is a fair method of taking sample.]—A dairy-farmer supplied 22 gallons of sweet milk, contained in three cans, two of which contained 8 gallons each & the third 6 gallons. Two vessels were provided for the reception of the milk. Into one the contents of the two 8 gallon cans & 4 gallons from the 6 gallon can were poured & an inspector took a sample from each vessel for analysis. The dairy-farmer having been convicted

of a contravention of Sale of Food & Drugs Act, 1879, s. 3, in respect of the sample taken from the 2 gallon vessel:—*Held*: in the circumstances the sample from the 2 gallon vessel was not a fair sample of the original contents of the 6 gallon tin.—*CRAWFORD v. HARDING*, [1907] S. C. (J.) 11; 44 Sol. L. R. 84; 14 S. L. T. 122.—**SCOT.**

a. ———— .]—TELFORD v. FYLL, [1908] S. C. (J.) 83.—**SCOT.**

*r. ———— .]—1911 S. C. (J.) 24.—**SCOT.***

PART V. SECT. 4, SUB-SECT. 3.

s. Statutory standard of quality. Milk sold as taken from cow.]—A milk-seller supplied milk pure & in the same state as that in which it came from the cow, but below the standard, to a purchaser who asked simply for "milk":—*Held*: no

Sect. 4.—Milk and cream: Sub-sect. 3.]

Milk below statutory standard of quality sold as taken from cow, *see* Nos. 498-500, *post*.

492. ———.] — By sect. 4 of 1899 Act, the Board of Agriculture were empowered to make regulations for determining what deficiency in any of the normal constituents of genuine milk should for the purposes of the Sale of Foods & Drugs Acts raise a presumption, until the contrary was proved, that the milk was not genuine. By Sale of Milk Regulations, 1901, No. 1 made under this enactment, where a sample of milk contains less than 3 per cent. of milk fat it is to be presumed that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water.

A farmer contracted to sell new milk each morning to a purchaser who was a retail dealer. The milk was delivered in churns. Nothing was added to or abstracted from the milk. The herbage on which the cows producing milk were fed was in a watery condition owing to heavy rains in previous months. As a consequence the milk produced was copious but inferior. To maintain the quantity of milk the cows were also fed on green maize. They were given in addition such an amount of cake each day as was usual under normal conditions. On analysis the milk in a churn delivered to the purchaser was found to contain less than 3 per cent. of milk fat. The farmer was summoned under 1875 Act, s. 6 for selling to the prejudice of the purchaser milk which was not of the nature, substance, & quality of the article demanded by the purchaser. The justices found that milk taken from a healthy herd should show not less than 3 per cent. of milk fat, & that the deficiency was due to the manner in which the farmer fed his cows with the object of obtaining a very large supply of milk without regard to the quality thereof, & they convicted the farmer. On a case stated:—*Held*: the conviction should be quashed on the ground that there was no evidence of an offence under sect. 6 of the Act.—*HUNT v. RICHARDSON*, [1916] 2 K. B. 446; 85 L. J. K. B. 1360; 115 L. T. 114; 80 J. P. 305; 32 T. L. R. 560; 60 Sol. Jo. 588; 14 L. G. R. 854; 25 Cox, C. C. 441, D. C.

Annotations:—*Distd.* *Bowen v. Jones* (1917), 86 L. J. K. B. 802. *Folld.* *Grigg v. Smith* (1917), 87 L. J. K. B. 188; *Williams v. Rees* (1918), 87 L. J. K. B. 639; *Few v. Robinson*, [1921] 3 K. B. 504. *Distd.* *Bridges v. Griffin* (1925), 41 T. L. R. 523.

493. ——— “Hot milk.”] — Applt. asked resp. to supply him with a glass of hot milk, which she did. The milk was deficient in fats. The evidence was that the heating of the milk would not affect the percentage of fats, & that genuine milk after boiling would not have shown the results shown by the milk in question:—*Held*: resp. should have been convicted of selling milk not of the nature, substance & quality demanded.—*HERRINGTON v. SLATER* (1920), 90 L. J. K. B. 265; 124 L. T. 272; 85 J. P. 83; 37 T. L. R. 51; 18 L. G. R. 840; 26 Cox, C. C. 670, D. C.

494. ——— *Effect of provision in contract as to quality.*]—*FECITT v. WALSH*, No. 250, *ante*.

495. ———.] — A farmer, being under con-

tract to supply milk containing a specified percentage of fat, delivered milk which contained a less percentage. The milk was in the same condition as that in which it came from the cow. On a prosecution under 1875 Act, s. 6, for selling to the prejudice of the purchaser milk not being of the nature, substance, & quality demanded:—*Held*: as the milk was not adulterated either by the addition of something to, or the abstraction of something from, the natural product of the cow, there mere fact that it was not of the quality contracted for by the purchaser did not make the sale an offence against the sect.

The Sale of Food & Drugs Act, 1899, c. 51, gave the Board of Agriculture power to make regulations for determining what deficiency in any of the normal constituents of genuine milk should raise a presumption, until the contrary was proved, that the milk was not genuine. In pursuance of that power the Board made a regulation that the fact if milk containing less than 3 per cent. of fat should raise that presumption. But [it is said], that even if the contrary be proved, & if it be shown that the milk is genuine in the sense that it is not adulterated, that fact will afford no defence if the milk be of a less good quality than that expressly contracted for. To my mind that contention is contrary to the intention of the Act, & is moreover extremely inexpedient (*LAWRENCE, C.J.*).—*FEW v. ROBINSON*, [1921] 3 K. B. 504; 91 L. J. K. B. 42; 126 L. T. 94; 85 J. P. 257; 66 Sol. Jo. (W. R.) 15; 19 L. G. R. 708; 27 Cox, C. C. 113, D. C.

496. *Effect of notice.—That milk diluted & sold as such.*]—*DEARDEN v. WHITELEY*, No. 178, *ante*.

497. *No statutory standard of quality.—Addition of water.—Milk exceptionally good.*]—On a charge of selling milk contrary to 1875 Act, s. 6, the certificate of the analyst stated that 10 per cent. of water had been added; but that the milk was exceptionally good, the butter fat being above normal. The justices, therefore, having regard to all the circumstances, thought that though the charge was proved the offence was of so trifling a nature that it was inexpedient to inflict any punishment & dismissed the summons:—*Held*: if the milk was exceptionally good after the adulteration they need not convict; but if it was only exceptionally good before resp. should be convicted.—*BANKS v. WOOLER* (1900), 81 L. T. 785; 64 J. P. 245; 19 Cox, C. C. 432, D. C.

—*Folld.* *Preston v. Redfern* (1912), 107 L. T. 410. *Refd.* *Hunt v. Richardson*, [1916] 2 K. B. 446.

Compare No. 149, *ante*.

498. *Statutory standard of quality.—Milk sold as taken from cow.—Deficiency in fat.—Method of milking.*]—Applt. was charged under 1875 Act, s. 6, for selling milk not of the nature, substance, & quality demanded, as such milk contained only 2.81 per cent., of milk fat.

It was proved that there had been no adulteration of or abstraction from the milk, but that the deficiency of fat was due to the cows not having been milked for fourteen hours, & the fat becoming absorbed by the cows. The hours of milking adopted by applt. were the hours usually adopted

20 N. S. W. L. R. 353, L.; 16 N. S. W. W. N. 117.—*AUS.*

1. ———.] — Under Pure Foods Act, 1908, No. 31, the Board of Health

has power to fix standards for natural as well as artificial products, & a natural product, such as milk, which does not conform to the standard is

adulterated, even though it has not been tampered with or adulterated in the ordinary meaning of the term.—*MANSFIELD v. NELGAN* (1911), 11

in the district:—*Held*: (1) the justices ought to have considered whether the milk was of the nature, substance, & quality demanded; (2) unless the quantity of milk fat which was absent was so large as to point to an abnormal state of things, there was no evidence upon which they could convict under the circumstances.—*WOLFENDEN v. McCULLOCH* (1905), 92 L. T. 857; 69 J. P. 228; 21 T. L. R. 411; 3 L. G. R. 561; 20 Cox, C. C. 864, D. C.

Annotation:—*As to* (2) *Apprvd.* *Hunt v. Richardson*, [1916] 2 K. B. 446.

499. ————.] — When milk has been sold as it comes from the cow, the fact that, by reason of the cow not having been fully milked, the milk is deficient in milk fat does not make the sale an offence against sect. 6 of 1875 Act.

Resp. was the owner of one cow which had recently calved, & he sold to applt. a half pint of milk taken from the morning's milking. The cow was not fully milked, some being left for the calf. There was no addition to or abstraction from the milk sold except for the necessary purposes of straining impurities, but the milk was found deficient in milk fat to the extent of 13 per cent. On a charge of supplying milk not of the nature, substance, & quality demanded by the purchaser, the justices found that the deficiency was due to the manner in which the cow had been milked but that as it had been sold as it came from the cow without abstraction or addition, it was of the nature, substance, & quality demanded by the purchaser, & they dismissed the charge:—*Held*: the decision was right.—*GRIGG v. SMITH* (1917), 87 L. J. K. B. 488; 117 L. T. 477; 82 J. P. 2; 33 T. L. R. 541; 61 Sol. Jo. 677; 15 L. G. R. 769; 26 Cox, C. C. 26, D. C.

Annotation:—*Folld.* *Williams v. Rees* (1918), 87 L. J. K. B. 639.

500. ———— **Method of feeding.]**
HUNT v. RICHARDSON, No. 492, *ante*.

501. ————.] — The agent of *resp.* when asked for a pint of new milk, sold to the purchaser milk which was 28 per cent. deficient in butter fat. The milk was sold as it came from the cow, its inferior quality being due to the fact that the animal had only had some exceptionally poor pasture on which to graze. On an information under 1875 Act, the magistrate found that the milk sold was not of merchantable quality, but that as it was sold as it came from the cow, he was bound to dismiss the case:—*Held*: the decision of the magistrate was right.—*WILLIAMS v. REES* (1918), 87 L. J. K. B. 639; 118 L. T. 356; 82 J. P. 97; 16 L. G. R. 159; 26 Cox, C. C. 173, D. C.

Annotation:—*Folld.* *Few v. Robinson*, [1921] 3 K. B. 504.

502. ———— **Evidence of other milkings.]**—*Resp.* was charged with having sold milk which was deficient in fat according to the standard fixed by the Sale of Milk Regulations, 1901. At the hearing of the information it was proved or admitted that another consignment of the same morning's milk from the same cows showed an excess of fat, & that the morning's milk from the same cows some days later showed a small deficiency only. The justices were of opinion upon the evidence that although the sample complained of was deficient in respect of fat, &

was not of the nature, substance, & quality contracted for by the purchaser, yet *resp.* had not tampered with the milk, & they therefore dismissed the summons:—*Held*: the case must be sent back to the justices with an intimation to convict, unless there was further evidence forthcoming to show that the difference in the quality of fat in the two consignments was consistent with ordinary milking.—*MARSHALL v. SKERT* (1912), 108 L. T. 1001; 77 J. P. 173; 29 T. L. R. 152; 11 L. G. R. 259; 23 Cox, C. C. 435, D. C.

Annotation:—*Refd.* *Hunt v. Richardson*, [1916] 2 K. B. 446.

503. ————.] — In a prosecution under the Sale of Food & Drugs Acts, 1875 to 1907, for unlawfully selling to the prejudice of the purchaser milk which is not of the nature, substance, & quality demanded by him, evidence as to the circumstances connected with a sample & its nature, substance, & quality taken on the day succeeding that on which the offence is alleged to have been committed is admissible on behalf of the prosecution for the purpose of showing that the milk sold on the day that the offence is alleged to have been committed could not have been in the condition in which it came from the cow. But it is a condition precedent to the admissibility of the evidence (1) that the sample taken on the succeeding day was from the same cow if the milking on the two days was from one cow, or from the same herd of cows if the milking was the product of a mixture; (2) that the sample taken on the succeeding day was from the same milking, *e.g.* the morning milking, as distinguished from the evening milking; (2) that there is *prima facie* proof that the cows were milked in the same way, *i.e.* by some experienced person who understands the milking of cows. The evidence would not be admissible on behalf of the prosecution for the purpose of showing that the sample taken on the succeeding day was below the standard required by the regulations made under the Acts, & that therefore the accused had on the succeeding day committed an offence of the same nature as that which is the subject of the charge.—*WILKINSON v. CLARK*, [1916] 2 K. B. 636; 85 L. J. K. B. 1641; 115 L. T. 385; 80 J. P. 334, 32 T. L. R. 681; 14 L. G. R. 849; 25 Cox, C. C. 519, D. C.

Annotation:—*Consd.* *Smith v. Philpott & Philpott*, [1920] 1 K. B. 222.

504. ————.] — At the hearing of an information preferred by applt. against *resps.* for having sold milk to the prejudice of applt., the purchaser, which was not of the nature, substance & quality demanded by him, justices refused to admit, on behalf of the prosecution, evidence as to an analysis of a sample of milk obtained three days after the date of the alleged offence for the purpose of showing that the milk sold on the day the offence was alleged to have been committed could not have been in the condition in which it came from the cow:—*Held*: the evidence was admissible, but only subject to the conditions pointed out by the ct. in *Wilkinson v. Clark*, No. 503, *ante*. There may be such an interval of time as to make it ridiculous to suggest that a sample taken so long after the date of the offence can have any weight at all, & therefore it may be right to exclude it.—*SMITH v. PHILPOTT*

S. R. N. S. W. 406; 28 N. S. W. W. N. DOLAN (1910), 45 L. L. T. 144.—IR.

96.—AUS..

a. ————.] — O'DRISCOLL v.

J.—VOL XXV.

b. ————.] — BELFAST GUAR.—

r. JONES, [1916] 2 I. R. 269.—IR.

c. ————.] — SCOTT v. JACK, [1912] S. C. (J.) 87; 49 Sc. L. R. 981; 2 S. L. T. 151.—SCOT.

Sect. 4.—Milk and cream: Sub-sects. 3 & 4. Sects.

& PHILPOTT, [1920] 1 K. B. 222; 89 L. J. K. B. 296; 122 L. T. 273; 84 J. P. 5; 17 L. G. R. 781; 26 Cox, C. C. 541, D. C.

505. ——— Evidence of control.]—B. sold milk to J. which upon analysis was found to be deficient in milk fat to the extent of 5.3 per cent. An information was laid by J. against B. & upon the hearing of the information the justices were not satisfied upon the evidence adduced that the control of the milk by B. covered the whole of the period between the time when the grass fed cows were milked & the milk was sold to the purchaser. The justices accordingly convicted B. upon the strength of the analyst's certificate:—*Held*: there was sufficient ground upon which the justices could arrive at their determination.—BOWEN v. JONES (1917), 86 L. J. K. B. 802; 117 L. T. 125; 81 J. P. 178; 15 L. G. R. 517; 25 Cox. C. C. 757, D. C.

506. ———.]—By sect. 2 of the Sale of Milk Regulations, 1901, made by the Board of Agriculture under the powers conferred by 1899 Act, s. 4, it is provided that "where a sample of milk (not being sold as skimmed, or separated, or condensed milk), contains less than 8.5 per cent. of milk solids other than milk fat, it shall be presumed for the purposes of the Sale of Food & Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk solids other than milk fat, or the addition thereto of water."

In a prosecution for selling milk to the prejudice of the purchaser, the public analyst's certificate showed a less percentage of milk solids other than milk fat than that required by the above Regulations:—*Held*: the presumption created by the Regulation can only be rebutted by evidence that the seller has neither added water to the milk nor abstracted anything from it; in other words, that he has sold it in the same condition as it was when it came from the cow.—KINGS v. MERRIS, [1920] 3 K. B. 566; 90 L. J. K. B. 161;

508 i. ——— Deficiency in fat—Milk allowed to stand & drawn off from bottom of churn.]—Accused was charged with selling milk which was not genuine in respect that it was deficient in milk-fat. The milk contained less than 3 per cent. milk fat, but it had not been tampered with in any way, the deficiency being due to the milk having stood for some hours in a can & to the sample having been drawn from a tap at the bottom after the cream had risen:—*Held*: while the failure to restore milk to its original condition by redistribution of the milk fat might in some circumstances constitute an "abstraction therefrom of milk fat," the offence charged had not been proved in the present case, there being no finding to the effect that there was some well-known method of redistribution which the accused had failed to adopt.—KNOWLES v. SCOTT, [1918] S. C. (J.) 32.—SCOT.

508 ii. ———.]—A farmer was charged with serving sweet milk, which was not genuine in respect that it contained less than 3 p.c. of milk fat. The deficiency was established, but the milk had not been tampered with in any way, the deficiency being due to the milk having stood for some time in the cans & to the samples having been drawn from the tap at the bottom after the cream had risen. It further proved that sellers of

milk recognised the necessity of re-distributing the milk fat, & that the method which accused instructed his servant to follow, but which his servant omitted on the occasion libelled, was to draw off a quantity of milk from the bottom of the can & to pour it in at the top before proceeding to sell the milk:—*Held*: the offence had been proved.—PENRICE v. BRANDER, [1921] S. C. (J.) 63; 58 Sc. L. R. 307.—SCOT.

d. Quality of article demanded — "Pure milk."]—Two quantities of milk sold by resp. were found on analysis to contain respectively 3.07 & 3.1 of butter-fat, & also to have added to them respectively 36 per cent. & 34 per cent. of water:—*Held*: the requirement in Dairy Industry Act, 1898, s. 3, of the presence of not less than 3 per cent. of butter-fat is not alternative to or in substitution for the previous requirements, & the milk sold was not "pure milk" although it contained the above minimum of butter-fat.—MACPHERSON v. NICHOL (1906), 25 N. Z. L. R. 273.—N.Z.

e. ——— "Condensed milk" — Not described as "skim-milk."]—*Held*: condensed milk was "milk" within Adulteration Prevention Acts, & the sale of such milk containing less than 2.5 per cent. of butter-fat & not described as "skim-milk" was unlawful.—KLATZER v. CASELBERG & Co. (1909), 28 N. Z. L. R. 994.—N.Z.

124 L. T. 150; 85 J. P. 68; 18 L. G. R. 775; 26 Cox. C. C. 649, D. C.

507. No. 495, ante.

FEW v. ROBINSON.

508. ——— Milk allowed to stand & drawn off from bottom of churn.]—If a seller of milk puts milk into a churn & allows it to stand, well knowing that in the ordinary course of nature the cream in the milk will rise to the top, & then, after the cream has risen to the top, sells milk which is found to be deficient in milk fat & which is drawn from the bottom of the churn by means of a tap, he is guilty of selling milk which is not genuine, & cannot maintain that the milk when it was sold was in the same condition, as that in which it came from the cow.

Resp., a retail milk seller, was charged with contravening 1875 Act, s. 6, by selling to the prejudice of the purchaser milk which was not of the nature, substance & quality demanded by the purchaser. The milk was proved to be deficient in milk fat, containing, according to the analyst's certificate, only 1.61 per cent. of milk fat instead of 3 per cent. as required by the Milk Regulations, 1901. The milk was put into the churn in the state in which it came from the cow, & it had not been directly tampered with. The deficiency in milk fat was due to the fact that the cream in the milk had risen to the top of the churn, & the sample of milk was drawn from the bottom of the churn by means of a tap after the cream had risen. Resp. had given instructions to his servant to stir the milk before starting on his round, but these instructions had not been carried out:—*Held*: resp. had been guilty of the offence charged, having sold as milk something which was not of the nature, substance & quality of the article demanded by the purchaser.—BRIDGES v. GRIFFIN, [1925] 2 K. B. 233; 94 L. J. K. B. 728; 133 L. T. 177; 89 J. P. 122; 41 T. L. R. 523; 69 Sol. Jo. 558, D. C.

509. ——— Minute quantity of extraneous matter in milk.]—Applt. was charged with selling milk not of the nature, substance, & quality

f. ——— "Clean milk."]—Applt. was convicted of selling milk that was not clean as required by Part II. Regulation 12 (1), of regulations made under the Sale of Food & Drugs Act, 1908:—*Held*: what "clean" means must be obtained from the evidence of experts.—CITY MILK SUPPLY, LTD. v. RAWLINSON, [1918] N. Z. L. R. 679.—N.Z.

g. ——— "Sweet milk" — Question of fact for magistrate.]—In an appeal against an acquittal from a charge of contravention of Sale of Food & Drugs Act, 1875, s. 6, by selling as sweet milk, milk that had been watered, presented on the ground that the sheriff had not given effect to the facts ascertained by the Public Analyst:—*Held*: an article may cease to be of the nature, substance, & quality of milk, for which it has been sold, by the addition of water to it, & whether that is so in any particular case is for the determination of the sheriff or magistrate trying the case.—MACLEOD v. O'NEIL (1882), 4 Couper, 629.—SCOT.

h. ——— Effect of notice that milk may not be "sweet milk."]—Prosecutor having demanded twopence worth of sweet milk, accused was proceeding to supply him with milk from a can containing the produce of his own dairy, as to the genuineness of which he had personal knowledge,

**Warranty as defence.]—See Part II., Sect. 4, sub-
sect. 1, C.,**

See 1899 Act, ss. 9, 11 ; Milk & Cream Regulations, 1912, 1917.

511. Sale of condensed, separated or skimmed milk—What is—Sale of ordinary skimmed milk.]—FRENCH v. CARD, No. 25, *ante*.

but prosecutor insisted on getting milk from a can containing purchased milk. Accused sold twopence worth of milk from this can to prosecutor after informing him that the milk was not the produce of his own cows, & warning him that it might or might not prove to be sweet milk:—*Held*: accused was rightly acquitted on the ground that prosecutor had been supplied with the milk which he insisted on getting after warning that it might not prove to be sweet milk.—*FREW v. GUNNING* (1901), 3 F. (Ct. of Sess.) 51; 38 Sc. L. R. 555; 8 S. L. T. 487, J.—*SCOT*.

1. — Cream — Inferior though pure quality.]—Held: the sale of an inferior though pure quality of cream

Tea merchant giving articles of plate to purchasers—Necessity for licence to deal in plate.]—See REVENUE.

m. Possession of impure milk intended for sale.—Whether an offence.—The full ct. sustained an order quashing a conviction of deft. for having milk in his possession intended for sale which was below the standard prescribed by the Provincial Board of Health under Public Health Act. It is not an offence to be in possession of impure milk intended for sale.—R. v. GARVIN (1909), 11 W. L. R. 218.—CAN.

Part VI.—Control in Wartime.

SECT. 1.—MODE OF CONTROL.

516. Ministerial order—Operation—Date of—Date of publication.]—The Food Controller, by an order dated May 16, 1917, directed that all cargoes of beans, peas & pulse which had arrived, or should thereafter arrive, in the United Kingdom should be placed & held at the disposal of the Food Controller.

A cargo of beans arrived in London on May 13, 1917, & on May 16 pltf., under a contract dated April 18, 1917, for a part of it, was given a delivery note, & he paid the invoice price. The order was announced in the daily newspapers on the morning of May 17, & the public were not aware of it earlier. Pltf. claimed that under this order defts. could not give delivery, that there was a total failure of consideration under the contract, & that it should be cancelled:—*Held*: the day on which the order came into operation was that on which it was made known to the public, May 17, & not, as would have been the case with an Act of Parliament, on May 16, on the first moment after midnight of May 15; & therefore pltf. was not entitled to have the contract cancelled.—*JOHNSON v. SARGANT & SONS*, [1918] 1 K. B. 101; 87 L. J. K. B. 122; 118 L. T. 95; 62 Sol. Jo. 88.

Annotations:—*Reid*. *Brightman & Co. v. Tate* (1919), 35 T. L. R. 209. *Mentd.* *Shutler v. Rolfe* (1920), 36 T. L. R. 828.

517. — — — — — Whether retrospective.]—(1) On a complaint against a milk producer before the local complaints tribunal for charging 2s. per gallon for milk, the tribunal expressed the opinion that the milk producer was only entitled to charge 1s. 4d. per gallon for May, 1s. 7d. for June, & 1s. 6d. for July, 1920, & ordered repayment of the difference:—*Held*: the tribunal was not thereby fixing maximum prices for milk producers generally, which power, by sect. 1 (1) (a) of Profiteering Act, 1919 (c. 66), belonged only to the Board of Trade, & by sect. 2 (1), the Board could not delegate.

(2) The milk producer sold the milk on dates before May 14, 1910, on which date the Act was, by an order of the Board of Trade, applied to milk:—*Held*: notwithstanding the decision of the tribunal was good.

(3) By an order made by the Board of Trade in Sept. 1918, the complaints tribunal was to be appointed by the complaints committee. By an order made in Aug. 1920, the power of appointing the complaints tribunal was given to the chairman of the central committee. The chairman had accordingly appointed the committee which dealt with the complaint against the milk producer:—*Held*: the Board had power to amend the former rule, & the tribunal was properly constituted.—*R. v. COMPLAINTS TRIBUNAL OF CENTRAL COMMITTEE UNDER PROFITEERING ACT, 1919*, *Ex p. IVORY* (1920), 90 L. J. K. B. 337; 124 L. T. 474; 85 J. P. 97; 37 T. L. R. 228; 19 L. G. R. 97, D. C.

518. — — — — — Validity—Bread to be sold in multiples of one pound—Whether order for securing public safety.]—Resp., an inspector of weights & measures, stopped the roundsman of applt., who was a baker & confectioner, & weighed the loaves baked by applt. for delivery to customers, &

found that a number of the loaves weighed each less than 1 lb. or an even number of pounds. Resp. then preferred an information against applt. for a breach of arts. 8 & 13 of Bread Order, 1918. Art. 8 provides that "no loaf of bread shall be sold unless its weight be one pound or an even number of pounds," & art. 13, "bread which may not under the foregoing provisions of this order be lawfully sold shall not be offered or exposed or carried for sale or delivered under a contract for sale." The order was made by the Food Controller under Defence of the Realm Regulations & all other powers enabling him in that behalf. Reg. 2F. (1) provides: "The Food Controller may make orders regulating or giving directions with respect to the production, manufacture, treatment, use, consumption, transport, storage, distribution, supply, sale or purchase of, or other dealing in, or measures to be taken in relation to any article . . . where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country. . . ." This regulation was made under sect. 1 (1) of Defence of the Realm (Consolidation) Act, 1914 (c. 8), which provides that "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety & the defence of the realm. . . ." The justices convicted applt.:—*Held*: art. 8 was reasonably capable of being a regulation for securing the public safety & the defence of the realm & was within the powers of the Food Controller, & therefore the conviction was right.—*GURNEY v. HOUGHTON* (1920), 123 L. T. 706; 84 J. P. 239; 36 T. L. R. 682; 18 L. G. R. 642, D. C.

519. — — — — — Payment for licence to buy milk—Levying of money for Crown without authority of Parliament.]—When statutory authority has been given to the executive Govt. to make regulations controlling acts to be done by His Majesty's subjects, a minister cannot, without the express authority of Parliament, demand money for exercising his power of control in a particular way, such money to be applied to some public purpose, to be determined by the Govt.; & therefore, when the Food Controller, purporting to act in pursuance of his powers & duties under New Ministries & Secretaries Act, 1916 (c. 68), s. 4, & Defence of the Realm Regulations, with regard to the supply, regulation & consumption of food, prohibited persons dealing in milk from buying milk in one area in England for export to another area except under licence, & imposed a charge of 2d. per gallon as a condition of the granting of a licence, with a view of regulating the supply:—*Held*: the charge was a levying of money for the use of the Crown without the authority of Parliament, & was a tax *ultra vires* the Food Controller.—*A.-G. v. WILTS UNITED DAIRIES* (1922), 91 L. J. K. B. 897; 127 L. T. 822; 38 T. L. R. 781; 66 Sol. Jo. 630, H. L.

Annotations:—*Reid*. *Brocklebank v. R.*, [1924] 1 K. B. 647. *Mentd.* *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.*, [1923] A. C. 695; *Marshal Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343.

— — — — — **Fixing prices.]**—See Sect. 2, sub-sect. 4, A., *post*.

520. — — — — — Food hoarding—Whether order

too vague or impossible of application.]—*CAMPBELL v. SPEARS*, No. 527, *post*.

521. — Revocation — Effect — Offence committed before revocation.—An information was preferred on Mar. 15, 1918, against resp. under arts. 8 & 11 of Public Meals Order, 1917, for failing to keep a register in the prescribed form between Dec. 22, 1917, & Jan. 10, 1918, & the justices dismissed the information on the ground that Public Meals Order, 1917, had been "revoked as on Feb. 3, 1918" by art. 16 of Public Meals Order, 1918, made on Jan. 21, 1918, without any express provision as to the revocation being without prejudice to proceedings for infringement of the revoked order. By art. 11 of Public Meals Order, 1917: "If any person acts, in contravention of this order . . . that person is guilty of a summary offence against Defence of the Realm Regulations. . . ." By reg. 63 of Defence of the Realm Regulations: "Interpretation Act, 1889 (c. 63), applies for the purpose of the interpretation of these regulations & of orders & rules made thereunder in like manner as it applies for the purpose of the interpretation, of an Act, of Parliament." By sect. 38 (2) of the Act: "Where . . . any Act, passed after the commencement of this Act, repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or affect any . . . legal proceedings . . . in respect of any such . . . penalty . . . & any such . . . legal proceeding . . . may be instituted . . . as if the repealing Act had not been passed:—*Held*: the justices were wrong, as the term "revoked" in art. 16 of the order of 1918 must be interpreted in accordance with sect. 38 (2) of the above Act, & the case must be remitted to the justices with this direction.—*BENNETT v. TATTON* (1918), 88 L. J. K. B. 313; 118 L. T. 788; 82 J. P. 303; 34 T. L. R. 591; 16 L. G. R. 786, D. C.

Annotation:—*Mentd. R. v. Ellis, Ex p. Amalgamated Union* (1921), 125 L. T. 397.

522. Proof—Stationery Office copy.—Informations were preferred by applt., a police inspector, against resps. for alleged offences against Bread Order, 1917 (No. 189), & Defence of the Realm Regulations, & resps. having pleaded "Not guilty," it was agreed that all four informations should be heard together. Applt. having called evidence in support of each of the informations stated to the justices that his case was closed. The solr. for resps. thereupon, before going into the merits of the defence or calling any evidence, took the preliminary objection that no proof had been offered of any order or regulations under which the proceedings had been taken, that as such proof had not been given, no convictions could take place, & that no proof could then be given to remedy the defect. Applt. submitted that the justices had judicial cognisance of the order & the regulations, as of an Act of Parliament, but the justices held that they had no judicial cognisance of the Bread Order, 1917, & that it ought to have been proved, & therefore they dismissed the informations:—*Held*: although the case for the prosecution had been closed, the justices ought to have allowed applt. to prove the

order by putting in a Stationery Office copy in accordance with New Ministries & Secretaries Act, 1916 (c. 65), & if applt. had no Stationery Office copy in ct., they should have adjourned the case to enable him to procure one.—*DUFFIN v. MARKHAM* (1918), 88 L. J. K. B. 581; 119 L. T. 148; 82 J. P. 281; 16 L. G. R. 807; 26 Cox, C. C. 308, D. C.

523. — Of directions issued under order — Copy without printer's name.—Applt., a wholesale fruit dealer, bought a box of dates, containing 2 qrs. 10 lb., at 42s. per cwt., from a firm of wholesale dealers at the London docks, & paid the carriage to his place of business, & no mention or offer of any rebate or payment of carriage was made to him by his vendors. Applt. knew that there was a fixed wholesale price of 42s. per cwt. at the docks, but he had no knowledge of any other provisions as to the wholesale price, & he sold the dates to a retailer at 50s. per cwt. Applt. was then summoned for contravening a direction issued by the Food Controller under Dried Fruits (Distribution) Order, 1918, by selling to the retailer at a price exceeding the full price allowed by the direction. By sect. 3 of the order: "All persons" concerned shall in the sale of any dried fruits comply with the instructions & directions relative thereto for the time being in force: & by sect. 6: "Any direction purporting to be given pursuant to this order or headed Dried Fruits (Distribution) Order, 1918, shall, unless the contrary be proved, be deemed to be prescribed or given pursuant to this order." At the hearing the prosecution produced as evidence a print of directions to wholesalers, headed "Dried Fruit (Distribution) Order, 1918." But apart from the production of the document, which bore no printer's name, no evidence was given of the making of the direction. The direction required all wholesalers to invoice dates at 42s. a cwt., & provided for a system of rebate to be allowed to primary wholesalers by the Govt., & to secondary wholesalers by the primary wholesalers. The justices convicted applt.:—*Held*: since the direction was not proved to have been made by the Food Controller, & might have been proved in the manner provided by Documentary Evidence Acts, 1868 (c. 37), & 1882 (c. 9), in accordance with sect. 11 of New Ministries & Secretaries Act, 1916 (c. 68), the conviction was bad.—*TYRRELL v. COLE* (1918), 120 L. T. 156; 83 J. P. 53; 35 T. L. R. 158; 17 L. G. R. 258, D. C.

SECT. 2. —IN RESPECT OF WHAT MATTERS.

SUB-SECT. 1.—CULTIVATION OF LAND FOR GROWING FOOD.

See Defence of Realm Regulations, reg. 22; Cultivation of Lands Order, 1917, No. 2.

524. What land affected — Partly cultivated land.—Deft. council, acting under Defence of the Realm Regulation 21, & adopting the resolution of their estates committee that it was desirable in the public interest that they should enter on certain land & arrange for its cultivation, sent a letter to pltf. stating that they had entered upon a certain field occupied by pltf.:—*Held*: the ct.

PART VI. SECT. 2, SUB-SECT. 1.

n. What land affected — Lands let in conacre.—Lands which were the time sublet in conacre were

compulsorily acquired by defts. for the maintenance of food supply under Defence of the Realm (Consolidation) Regulations, 1914, reg. 2L. In an action brought by the owners of the

lands for a declaration that they were entitled to compensation from defts., & for an order for the assessment & payment of such compensation:—*Held*: pltf. were entitled to com-

Sect. 2.—In respect of what matters: Sub-sects. 1, 2, 3 & 4, A.]

had no jurisdiction to review the decision arrived at by the council & that the council was under no obligation to give pltf. notice before entry.

The only basis for the suggestion that this land is not within the provisions of the order is that under regulation 2 (a), power is conferred upon the authority to arrange with any society having for its object the cultivation of vacant land for the cultivation of any land in which the authority has entered. It is argued that the conclusion to be deduced from this provision is that only vacant or uncultivated lands are contemplated being dealt with under the order. I cannot possibly construe this enabling clause as cutting or qualifying in any way the comprehensive language of the order itself. The words "Where the Board of Agriculture . . . are of opinion that . . . it is expedient they should exercise the powers given to them under these regulations as respects any land" quite dispose of pltf.'s contention on this point (*ÉVE, J.*).—*HUSSEY v. EXETER CORPN.* (1918), 87 L. J. Ch. 443; 118 L. T. 13; 82 J. P. 67.

525. Conditions precedent to acquisition—Notice to occupier.]—*HUSSEY v. EXETER CORPN.*, No. 524, *ante*.

526. Jurisdiction of court—To review decision of local authority.]—*HUSSEY v. EXETER CORPN.*, No. 524.

SUB-SECT. 2.—HOARDING FOOD.

See Food Hoarding Order, 1917.

527. Validity of order—Not vague or impossible of application.]—Applt., who was the proprietress of a hotel, not licensed for the sale of intoxicating liquor, purchased 1 cwt. of rice on Nov. 5, 1917. This was the only acquisition of rice by applt. since Apr. 9, 1917, & within six months before the date of the information hereinafter mentioned. On Feb. 2, 1918, 280 lb. of rice were found on the premises. The hotel contained eighteen bedrooms, & in summer additional bedrooms outside the hotel were taken for visitors, who were provided with all their meals in the hotel. The dining room could accommodate sixty persons, & was open to non-residents. A register kept by applt. under Public Meals Order, 1917, showed that 38,254 meals had been served by her in the forty-two weeks preceding Mar. 14, 1918, the date of an information against her for contravening sect. 1 (a) of Food Hoarding Order, 1917, by acquiring after Apr. 9, 1917, & within the six months prior to the date of the information, 1 cwt. of rice, so that the quantity found in her possession on Feb. 2, 1918, exceeded the quantity required for ordinary use & consumption in her household or establishment. Evidence was given that a reasonable provision of rice for thirty-four persons per week would be 8½ lb. Sect. 4 (a) of the order provides that "This order shall not apply to any article of food acquired or held in the ordinary course of business

by any producer, dealer, or manufacturer." The justices held that the hotel was a household or establishment within sect. 1 (a) of the order, & that applt. was not a dealer within sect. 4 (a), & they convicted her:—*Held*: (1) the hotel was an "establishment"; (2) applt. was not a "dealer"; (3) sect. 1 (a) of the order was not so vague or indeterminate as not to create an offence which could be the subject of a charge, & therefore the conviction was right.—*CAMPBELL v. SPEARS* (1918), 120 L. T. 90; 83 J. P. 30; 17 L. G. R. 54, D. C.

528. Construction of order—"Article of food"—Tea.]—Tea is not an "article of food" within art. 5 of Food Hoarding Order, 1917.—*HINDE v. ALLMOND* (1918), 87 L. J. K. B. 893; 118 L. T. 447; 82 J. P. 151; 34 T. L. R. 403; 16 L. G. R. 645; 26 Cox, C. C. 202, D. C.

Annotation:—*Distd. Sainsbury v. Saunders* (1918), 88 L. J. K. B. 441.

529. ——"Household" or "establishment"—Private hotel.]—*CAMPBELL v. SPEARS*, No. 527, *ante*.

530. ——"Dealer"—Proprietor of private hotel.]—*CAMPBELL v. SPEARS*, No. 527, *ante*.

531. Conviction for hoarding various articles of food—Bad for duplicity.]—Where a person was convicted for that he, on or between Apr. 9, 1917, & Nov. 22, 1917, did unlawfully acquire various articles of food, to wit, sugar & flour, so that the quantity in his possession at any one time exceeded the quantity ordinarily required for use & consumption in his household, contrary to Food Hoarding Order, 1917:—*Held*: a separate offence was committed in respect of each article of food hoarded, & as the conviction disclosed two offences, it was bad for duplicity.—*R. v. HAMMICK, Ex p. MURDOCH* (1918), 87 L. J. K. B. 816; 82 J. P. ; 34 T. L. R. 342; 16 L. G. R. 467, D. C.

SUB-SECT. 3.—IMPOSING CONDITIONS ON SALE OF FOOD.

See Food (Conditions of Sale) Order, 1917.

532. Who liable—Master—For acts of servant—In disobedience to express instructions.]—Resps., a limited co., owned a shop for the sale of food & they caused to be posted in the shop a notice that in relation to the sale of sugar, there were at the shop no conditions involving the purchase of other goods. Resps.' manager also gave express instructions to all their assistants that they must impose no conditions on the sale of food. On an information against resps. for imposing, in connection with the sale of sugar, a condition relating to the purchase of another article, contrary to the Food (Conditions of Sale) Order, 1917, the justices found that an assistant, who, with the authority of resps.' manager, was serving at the counter, had, in connection with the sale of sugar, imposed a condition relating to the purchase of another article, but they held that, as resps. had expressly forbidden the assistant to impose any condition,

compensation, & to an inquiry in chambers to assess such compensation.—*ROONEY v. AGRICULTURAL DEPARTMENT*, [1920] 1 I. R. 176.—*IR.*

PART VI. SECT. 2, SUB-SECT. 2. a. Validity of complaint.]—*Held*:

a complaint charging accused with having purchased 56 lbs., or thereby, of butter contrary to Food Hoarding Order, of Apr. 5, 1917, Art. 1, was irrelevant, in respect that the expression "the quantity required by you for ordinary use & consumption in

your household or establishment" being indeterminate, the accused was not sufficiently certiorated of the offence alleged to have been committed.—*SHEPHERD v. HOWMAN*, [1918] S. C. (J.) 78.—*SCOT.*

they were not criminally responsible. By reg. 1 of the order: "Except under the authority of the Food Controller, no person shall in connection with a sale or proposed sale of any article of food impose or attempt to impose any condition relating to the purchase of any other article." By reg. 3: "If any person acts in contravention of this order . . . that person is guilty of a summary offence against Defence of the Realm Regulations, & if such person is a co., every director & officer of the co. is also guilty of a summary offence against those regulations unless he proves that the contravention took place without his knowledge or consent":—*Held*: the terms of the order showed that it was intended to make a master criminally responsible, for the act of his servant, acting within the scope of his employment, even when such act was done in disobedience to express instructions, & therefore the justices ought to have convicted.—*WARRINGTON v. WINDHILL INDUSTRIAL CO-OPERATIVE SOCIETY* (1918), 88 L. J. K. B. 280; 118 L. T. 505; 82 J. P. 149; 16 L. G. R. 456; 26 Cox, C. C. 218, D. C.

Annotation:—*Reid*. *Buckingham v. Duck* (1918), 120 L. T. 84.

533. As regards what articles — "Other article" — Article of same kind as article sold.] — *Resps.*, who were preserve manufacturers, sold jam & marmalade to a co-operative society in Jan. 1918, & in Apr. 1918, in reply to an inquiry from the society as to supplies, wrote a letter inclosing the following suggested draft agreement: "In consideration of our agreeing to supply you with such preserves as we allot to you & which you accept up to Dec. 31, 1918, at controlled prices, you give us the option to forward to you similar goods to the same amount in value in each of the five consecutive years commencing on Jan. 1, after the termination of the war, monthly deliveries at our option at our current prices at the times of the various deliveries." *Resps.* were summoned for attempting, in connection with the proposed sale of an article of food, to impose a condition relating to the purchase of another article of food, contrary to Food (Conditions of Sale) Order, 1917, s. 1, which provides: "Except under the authority of the Food Controller no person shall in connection with a sale or proposed sale of any article of food impose or attempt to impose any condition relating to the purchase of any other article." The justices dismissed the summons on the ground that the order contemplated a sale of an article different in kind from that proposed to be sold:—*Held*: the words "other article" in the order do not necessarily mean an article of a kind different from the article in connection with the sale or proposed sale of which there is an attempt to impose a condition, but include another article of the same kind, & the case must be remitted to the justices with a direction to convict.—*COTMAN v. CARR, WHITE & Co., LTD.* (1918), 120 L. T. 158; 83 J. P. 39; 17 L. G. R. 160, D. C.

534. What is a condition—Refusal to sell tea unless customer registered for purchase of sugar.]—*Applt.* refused to sell tea to a customer because he was not registered with him for the purchase of sugar:—*Held* this was an attempt in connection with the sale of an article of food to impose a

condition relating to the purchase of another article within the meaning of art. 1 of Food (Conditions of Sale) Order, 1917.—*WELCH v. RUSSELL* (1918), 87 L. J. K. B. 1038; 118 L. T. 715; 82 J. P. 142; 34 T. L. R. 357; 16 L. G. R. 499; 2 Cox, C. C. 250, D. C.

SUB-SECT. 4.—PRICE OF FOOD.

A. Power to Fix

See Defence of Realm Regulations, reg. 2F; New Ministries & Secretaries Act, 1916 (c. 68), s. 4; Maximum Prices Order, 1917; Profiteering Act, 1919 (c. 66).

535. Food Controller—Article not food.]—The combined effect of sects. 3, 4 of New Ministries & Secretaries Act, 1916 (c. 68), & reg. 2F (1) of Defence of the Realm Regulations (Consolidated), is to empower the Food Controller, for the purpose of regulating the food supply of the country during the present war (*inter alia*), to make orders regulating the sale of any article, & to fix the maximum & minimum price thereof:—*Held*: whether tea is or is not "food" within sect. 4 of the Act, the Food Controller has power to make an order regulating the sale of tea & to fix the price at a "flat rate" that is, the maximum & minimum price at the same figure. *Qu.*: whether tea is "food" within the sect. 4 of the above Act.

SAINSBURY v. SAUNDERS (1918), 88 L. J. K. B. 441; 120 L. T. 120; 83 J. P. 47; 35 T. L. R. 140; 17 L. G. R. 148, D. C.

Annotations: *Consd.* *Fowle v. Moncell* (1920), L. J. K. B. 105. *Mentd.* *Robinson v. R.* (1920), 30 T. L. R. 773.

536. ———.]—*Held*: art. 4 of Spirits (Prices & Description) Order, 1919, which was made by the Food Controller, fixing maximum prices for whisky, was *intra vires* the Food Controller under reg. 2F of Defence of the Realm Regulations (Consolidated) & New Ministries & Secretaries Act, 1916 (c. 68), ss. 3 & 4. — *FOWLE v. MONSELL* (1920), 90 L. J. K. B. 105; 124 L. T. 154; 85 J. P. 25; 36 T. L. R. 863; 18 L. G. R. 661, D. C.

537. ——— Maximum & minimum prices at same figure.]—*SAINSBURY v. SAUNDERS*, No. 535, *ante*.

538. Food control committee — Alternative maximum prices.]—By clause 4 (a) of Butter (Maximum Prices) Order, 1917, "No person shall sell butter by retail at a rate per lb. exceeding by more than 2½d. the actual cost to him of the butter sold." By clause 5, "(a) A food control committee may . . . prescribe a scale of maximum prices applicable to sales of butter by retail in their area. . . . (b) Where any scale has been so prescribed . . . no butter shall be sold by retail within the area of the committee at prices exceeding the prices provided by the scale. . . . (d) Compliance with the terms of a scale prescribed under the provisions of this clause shall not relieve any person from the necessity of complying with the provisions of clause 4 of the Order":—*Held*: a food control committee has power under clause 5 to prescribe a maximum price lower than that fixed by clause 4 (a).—*STAR*

PART VI. SECT. 2, SUB-SECT. 4.—A.
p. Commonwealth Parliament.] —
Held: the legislative powers of the

Commonwealth Parliament conferred by Constitution, s. 51 (vi.) & (xxxix.), include a power during the present state of war to fix within limits of

locality the highest price which during the continuance of the war may be charged for bread.—*FAREY v. BURVETT* (1916), 21 C. L. R. 433.—*AUS.*

Sect. 2.—In respect of what matters: Sub-sect. 4, A. & B. (a).]

TEA CO. v. DAVIES (1918), 88 L. J. K. B. 192; 82 J. P. 269; 16 L. G. R. 605, D. C.

539. Profiteering committee—Price for particular case.]—R. v. COMPLAINTS TRIBUNAL OF CENTRAL COMMITTEE UNDER PROFITEERING ACT, 1919, Ex p. IVORY, No. 517, ante.

B. Sale above Maximum Price.

(a) In General.

540. Who liable—"Grower"—Food growing not main occupation—Potatoes (1916) Main Crop (Prices) Order (No. 2), 1917.]—Art. 2 of the above Order fixes the maximum price applicable on the occasion of a sale of potatoes by or on behalf of a grower thereof to any person other than a retailer as thereafter defined.

Resp. a builder by trade, grew potatoes on an allotment, half an acre in extent, & in a small garden. He sent some of his produce to auctioneers, who sold it on his behalf to persons other than retailers as defined in the order at a price exceeding the maximum:—*Held*: resp. had been guilty of an offence under the order since he was a "grower" within art. 2, which was not intended to apply only to persons whose sole or substantial business consisted of the cultivation of potatoes, & since he had contravened art. 10, which prohibited any person selling, or offering to sell, any potatoes at a price exceeding the maximum.—COOK v. DUNN (1917), 87 L. J. K. B. 364; 82 J. P. 4; 16 L. G. R. 63, D. C.

541. — Liability of master — For acts of servant — Carelessness.] — Margarine (Maximum Prices) Order, 1917, regs. 3 & 6, provide that the maximum retail price of margarine, with an immaterial exception, shall be at the rate of 1s. per lb., & that no person shall sell or offer or expose for sale or buy or agree to buy margarine at a price exceeding that price. Appls.' assistant, in violation of their instructions, but by an innocent mistake, sold margarine to a customer, at the price of 1s. per lb., giving only 14½ ozs. by weight instead of 16 ozs. Appls. were convicted of contravening the order by selling margarine at a price exceeding the maximum price on the grounds (a) that the assistant was acting within the scope of her authority, (b) that short weight was equivalent to an increased price, & (c) that *mens rea* on the part of appls. was not an essential element of the offence:—*Held*: the

conviction was right.—PEARKS' DAIRIES, LTD. v. TOTTENHAM FOOD CONTROL COMMITTEE (1918), 88 L. J. K. B. 623; 120 L. T. 95; 83 J. P. 36; 35 T. L. R. 114; 17 L. G. R. 33; 26 Cox, C. C. 356, D. C.

Annotation:—*Mentd.* Warburton v. Stamp (1919), 88 L. J. K. B. 1170.

542.

Unauthorised act.]—

Applt. was a milk seller. On Dec. 13, 1917, a carrier employed by him to supply his customers with milk served a customer with what purported to be two separate pints of milk, but which in fact were both short measure. The customer paid the carrier 8d., which was the maximum price for a quart of milk under the Milk (Prices) Order, 1917. Owing, however, to the measure being short, the price paid for the actual milk served was at the rate of 10½d. per quart & 8½d. per quart. Applt. had warned the carrier against giving short measure. Informations were preferred against applt. for selling the milk at prices exceeding the maximum, & he was convicted:—*Held*: the conviction must be affirmed, since (a) although the carrier did not offer for sale milk at a price exceeding the maximum, the amount of milk he supplied was in fact sold at a price exceeding the maximum; (b) applt. was liable for the act of his servant which was performed within the scope of his authority, even though against applt.'s express instructions; & (c) *mens rea* was not a necessary ingredient of the offence charged against applt.—BUCKINGHAM v. DUCK (1918), 88 L. J. K. B. 375; 120 L. T. 84; 83 J. P. 20; 17 L. G. R. 19; 26 Cox, C. C. 349, D. C.

Annotations:—*Consd.* Pearks' Dairies v. Tottenham Food Control Committee (1918), 88 L. J. K. B. 623. *Refd.* Warburton v. Stamp (1919), 88 L. J. K. B. 1170.

543. — Wholesale milk seller—Delivery by producer to retail dealer.]—By art. 3 of Milk (Winter Prices) Order, 1918, a maximum price of 2s. 3d. per imperial gallon, together with a sum equal to the net amount of the charges for railway transport actually incurred by the seller, was fixed as that which was to be chargeable between Oct. 1, 1918, & Apr. 30, 1919. By art. 4 of the same order there were further provisions where milk was sold wholesale by or on behalf of any person other than the producer, which included (*inter alia*) the following: "(a) In the case of milk delivered by the producer to or for the account of the buyer in accordance with the directions of the seller, the rate shall . . . be ½d. per imperial gallon higher than the price chargeable to the seller by the producer. (b) In the

PART VI. SECT. 2, SUB-SECT. 4.— B. (a).

g. Who liable—Liability of master —For acts of servant—In disobedience to instructions.]—A servant, employed by a dairy co. to sell milk, in disobedience to his instructions charged a higher price for the milk than the authorised maximum rate, but he did not account to his employers for the portion of the price in excess of that rate:—*Held*: the servant, in so far as he sold the milk at a price beyond the authorised rate, was acting out with the scope of his employment; the company was not guilty of a contravention of the order.—CITY & SUBURBAN DAIRIES v. MACKENNA, SCOTTISH FARMERS' DAIRY CO. (GLASGOW), LTD. v. MACKENNA, [1918] S. C. (J.) 105.—SCOT.

h. "Actual cost" to retailer—Duty

of retailer.]—Under Butter (Maximum Price) Order, 1917 (1917, No. 913), the maximum retail price of butter is fixed at a price not exceeding by more than 2½d. the "actual cost" of the butter to the retailer. Such "actual cost" is the net price paid by the retailer (not exceeding the maximum wholesale or first-hand prices fixed by the order), plus money actually paid for transport not included in that price.

A retailer in order to show that his retail price does not exceed by more than 2½d. the actual cost, & to protect himself, should obtain a written statement from his vendor as to the money or moneys paid or payable by the vendor in relation to the butter sold, & must ascertain whether the price charged by the vendor, having regard to such statement, does not exceed the maximum price chargeable by that vendor to him.—R. v. SMYTH, [1918]

2 I. R. 402.—IR.

s. Additional charge for delivery —Meaning of "delivery."—Under Flour & Bread (Prices) Order, 1917, clause 5 (b), which allows a reasonable charge for making delivery in addition to the maximum price of bread fixed by clause 5 (a) delivery in respect of which such additional charge may be made must be delivery other than & in addition to the act of the delivery of the bread to a purchaser across the counter or on a sale from a travelling van.—WALLACE v. BURROWS, [1918] 2 I. R. 590.—IR.

t. — —.]—Under Flour & Bread Prices Order, 1917, 5 (b), an additional charge for delivery may be made in the case of bread sold (not in pursuance of any previous contract) from a van that comes at the express or implied request of a customer

case of milk not so delivered the rate shall be where the delivery is made by the seller to the buyer's railway station, 2s. 5d. per imperial gallon, together with the railway charges paid by the seller for carriage from the seller's station to the buyer's station. . . ."

T., resp., was a wholesale milk seller residing & carrying on business at P. In Nov. 1918, he sold milk to a buyer at G. at 2s. 5d. per imperial gallon. The milk was purchased in the first instance from a large producer of milk at R. with whom resp. had considerable dealings, & whatever milk was thus purchased was always sent to its destination at the request of & according to the express directions of resp. The consignment of milk sold by resp. to the buyer at G. was sent to the latter by the producer at R. by rail from R. station. The producer paid cost of carriage & was repaid the amount thereof by resp. in addition to the 2s. 3d. per imperial gallon. The labels for the milk were supplied by resp. The buyer at G. dealt with resp. & had nothing to do with the producer at R. On an information against resp. for contravening the above order by selling milk at a price exceeding the maximum fixed by the order, the justices found as a fact that the delivery of the milk was made at G. & not at R., & that therefore art. 4 (b) & not art. 4 (a) was applicable under the circumstances, & dismissed the information:—*Held*: the decision of the justices was correct.—*ROSE v. TEASDALE* (1919), 122 L. T. 281; 84 J. P. 6; 17 L. G. R. 785, D. C.

544. As regards what articles—“Cockerel, pullet, cock or hen”—Capon—Poultry & Game Prices Order, 1918.—The words “cockerel, pullet, cock or hen” as used in the amending order of Aug. 30, 1918, to the above order, include a young male, young female, grown male & grown female of the domestic fowl species, & this definition covers the case of a capon.—*WILLIAMS v. BRAZIER* (1919), 122 L. T. 64; 83 J. P. 252; 36 T. L. R. 25, D. C.

545. Food Tea—New Ministries & Secretaries Act, 1916 (c. 68), s. 4.—*SAINSBURY v. SAUNDERS*, No. 535, *ante*.

546. Maximum price—What price includes—Charge for delivery—Charge for railway transport incurred by seller.—The true construction of Milk (Prices) Order, 1917, dated Sept. 7, 1917, is that the maximum price of milk fixed by it is the absolute maximum which the seller is entitled to receive where he delivers the milk to the buyer's premises. The seller is not entitled to add to that maximum price any charge for delivery except in the case of a charge for railway transport actually incurred by the seller. The adjustment referred to in sub-clause (b) of clause 3 of the order must be construed as an adjustment in favour of the buyer & not of the seller, where

the milk is not delivered at the buyer's premises at the seller's expense.—*WHYATT v. ERLAM* (1918), 87 L. J. K. B. 1043; 119 L. T. 86; 82 J. P. 206; 16 L. G. R. 505, D. C.

547. ————.]—*ROSE v. TEASDALE*, No. 543, *ante*.

548. Sale of wild rabbit—Whether skin included in sale—Wild Rabbits (Prices) Order, 1918.—Appl't. agent visited resp.'s shop & bought a rabbit. Resp.'s assistant weighed the rabbit in its skin in the presence of the purchaser & then proceeded to skin it, the purchaser making no objection. Resp. charged the purchaser a sum equal to the maximum price for the rabbit if the skin was included in the sale. The assistant, after skinning the rabbit & throwing the skin on a pile of rabbit skins, wrapped up the skinned rabbit, & without asking whether the purchaser wanted the skin, gave the rabbit, without the skin, to the purchaser, who took it & left the shop. Resp. was charged on an information with selling by retail a part of a wild rabbit at a price exceeding the maximum under the above order. The magistrates were of opinion that the property in the unskinned rabbit passed to the purchaser on its being weighed, & they therefore held that the skin was included in the sale, & dismissed the information:—*Held*: the question whether there was a sale of the whole of the rabbit, including the skin, was a question of fact for the magistrates, & consequently that the magistrates were entitled to refuse to convict.—*WARNBURN v. STAMP* (1919), 88 L. J. K. B. 1170; 121 L. T. 92; 83 J. P. 189; 35 T. L. R. 391; 17 L. G. R. 317, D. C.

549. Conviction for selling at price exceeding maximum price—Omission of words “by retail”—Whether bad for uncertainty.—By Part 1 of Meat (Maximum Prices) Order, 1917, as amended by the Meat (Maximum Prices) Order (No. 2), 1917, it was made an offence to sell meat by wholesale at a price above the maximum fixed by the schedule or in some cases to be fixed by the Food Controller. Part 2 provided for maximum prices for sales by retail & enabled food control committees to prescribe an alternative scale. The schedule provided a wholesale maximum of 9s. 6d. per stone of 8 lb. for home-killed pork. Applt. was convicted of selling certain home-killed meat, to wit, one leg of pork, one piece of pork, & one pig's foot, at a price, to wit, 1s. 8d. per pound, exceeding the price, to wit, 1s. 6d. per pound; provided by the scale fixed by the food control committee:—*Held*: although the words “by retail” were not in the conviction, yet as it was clear from the price of 1s. 6d. per pound mentioned in the conviction from the reference therein to the scale fixed by the food control committee that the offence of which applt. was convicted was an offence on the occasion of a sale by retail & not

residing in the country at a distance from the bakery & other bakers' shops.—*SPICER v. MURNANE*, [1919] 2 L. R. 57.—*IR*.

u. ——— *Complaint must state what is reasonable.*—The complaint must state what is the reasonable additional charge for delivery which has been exceeded.—*ALLAN v. HOWMAN*, [1918] S. C. (J.) 50.—*SCOT*.

a. “Unreasonable charge.”—A farmer was charged with a contravention of Milk (Winter Prices) Order, 1918, clause 12, by having, in con-

nection with sales of milk, made “the unreasonable demands” that the purchasers should pay certain specified sums in addition to the maximum prices fixed by the Order:—*Held*: any charge in addition to the maximum prices being an unreasonable charge, the word “unreasonable” did not require more precise definition.—*STIRRA v. CAMERON*, [1919] S. C. (J.) 11.—*SCOT*.

b. *Meaning of “wholesale.”*—*Held*: (1) the definition of “wholesale” in Milk (Registration of Dealers) Order, 1918, could not be imported

into Milk (Summer Prices) Order, 1918, for the purpose of construing the word “wholesale” as used in the latter Order; (2) as there used, “wholesale” meant the sale of milk to a retailer for sale by him to consumer irrespective of the quantity sold.—*MACKENNA v. M'MILLAN*, [1919] S. C. (J.) 4.—*SCOT*.

c. *As regards what articles—April (Prices & Order, 1919.)*—*O'MALLEY v. HERN*, [1920] S. C. (J.) 74; 57 L. R. 640; 2 S. L. T. 134.—*SCOT*.

Sect. 2.—In respect of what matters: Sub-sect. 4, B. (a) & (b); sub-sects. 5 & 6. Sect. 3.]

against a regulation made by the Food Controller in regard to maximum prices on sales by wholesale, the conviction was not void for uncertainty. —**SMART v. WILKINS** (1919), 83 J. P. 181; 17 L. G. R. 400, D. C.

(b) Profiteering.

550. Complaints tribunal—Constitution—Power of Board of Trade to alter.]—R. v. COMPLAINTS TRIBUNAL OF CENTRAL COMMITTEE UNDER PROFITEERING ACT, 1919, Ex p. IVORY, No. 517, ante.

551. As regards what articles — Article sold in restaurant—Sale including something additional.]—Profiteering Act, 1919 (c. 66), applies to an article sold in a restaurant, & the fact that the sale includes something additional does not prevent the sale from being the sale of an article within the Act. In the Board of Trade Order of Sept. 11, 1919, applying the Act to certain articles, the word "biscuits" includes chocolate biscuits, but the word "coffee" does not include a cup of coffee.—R. v. BIRMINGHAM PROFITEERING COMMITTEE, Ex p. PROVINCIAL CINEMATOGRAPH THEATRES, LTD. (1919), 89 L. J. K. B. 57; 122 L. T. 348; 84 J. P. 13; 36 T. L. R. 92; 18 L. G. R. 40, D. C.

Annotation:—Appld. R. v. Manchester Profiteering Committee, Ex p. L. & Y. Ry. (1920), 89 L. J. K. B. 1089.

552. — "Biscuits" — Chocolate biscuits.]—R. v. BIRMINGHAM PROFITEERING COMMITTEE, Ex p. PROVINCIAL CINEMATOGRAPH THEATRES, LTD., No. 551, ante.

553. — "Coffee" — Cup of coffee.]—R. v. BIRMINGHAM PROFITEERING COMMITTEE, Ex p. PROVINCIAL CINEMATOGRAPH THEATRES, LTD. No. 551, ante.

554. — "Ready cooked or prepared food" — Food ordered to be cooked.]—A complaint was made to a profiteering committee that a charge of 12s. had been made in a restaurant, belonging to appets., for a meal supplied to complainant & three friends. The meal consisted of seven sausages, chipped potatoes, four pieces of bread, six small cakes, & a pot of tea for four persons. An Order of the Board of Trade of Sept. 11, 1919, applied Profiteering Act, 1919 (c. 66), to "ready cooked or prepared food" & other articles mentioned in sched. 2 of the order. A rule nisi having been obtained to prohibit the committee from proceeding with the hearing of the complaint, on the ground that the articles comprised in the subject matter of the complaint as a whole did not come within the schedule to the order:—Held:** the words "ready cooked or prepared food" covered both food which a person entering a restaurant found ready cooked, & food which, not being ready cooked, he ordered to be cooked, & as the ct. would not prohibit the committee from hearing the complaint on the ground merely that some of the articles included therein might not be within the schedule, the rule must be discharged.—R. v. MANCHESTER LOCAL PROFITEERING COMMITTEE, Ex p. LANCASHIRE & YORKSHIRE RY. Co. (1920), 89 L. J. K. B. 1089; 123 L. T. 98; 84 J. P. 177; 36 T. L. R. 593; *sub nom.* WILSON v. LANCASHIRE & YORKSHIRE RY. Co., 64 Sol. Jo. 461; 18 L. G. R. 392, C. A.**

Annotation:—Repld. R. v. Newcastle-upon-Tyne Profiteering Committee, Ex p. Provincial Cinematograph Theatres (1920), 89 L. J. K. B. 1098.

SUB-SECT. 5.—REQUISITION OF FOOD.

See Defence of Realm Regulations, regs. 2B, 2F.

555. Defence of Realm Regulation 2B—Whether ultra vires.]—The Food Controller requisitioned certain cattle feeding stuffs under the Defence of the Realm Regs., but whether under Reg. 2B or Reg. 2F was doubtful. By Reg. 2B the price to be paid for goods taken thereunder was to be determined by the tribunal by which claims for compensation under the Defence of the Realm Regs. were determined, but was not to exceed a certain maximum price fixed by an Order in Council. By Reg. 2F compensation for goods taken thereunder was to be paid as determined by an arbitrator, taking into account the cost of production of the goods & a reasonable profit. The maximum price fixed by the Order in Council had been paid. The Defence of the Realm Losses Commission having refused to entertain a claim for compensation, the owners of the goods presented a petition of right, claiming that the Food Controller had acted under Reg. 2F & that they were entitled to compensation fixed by arbn. thereunder. At the trial the judge held that the Controller had acted under Reg. 2B & dismissed the petition.

On July 22, 1920, the suppliants gave notice of appeal.

Held: (1) the goods were taken under Reg. 2B; (2) the provisions of that Reg. for fixing the price of goods taken thereunder were not *ultra vires*; (3) the suppliants were not precluded by that Reg. from having the price of their goods fixed by the Supreme Ct. upon the terms of the Reg.; (4) the suppliants were entitled to payment for the goods at prices to be determined in accordance with Reg. 2B & to an account of what was due to them on that basis.—**ROBINSON & Co. v. R.**, [1921] 3 K. B. 183; 90 L. J. K. B. 1177; 125 L. T. 675; 37 T. L. R. 698, C. A.

Annotation:—Generally, Mentd. Bowling v. Camp (1922), 128 L. T. 342.

556. Compensation—Fixed by judicial decision —Right of owner to—Food Controller willing to pay maximum fixed price.]—ROBINSON & Co. v. R., No. 555, ante.

557. — Arbitration — What amount may be awarded.]—Reg. 2F (2) of Defence of the Realm Regulations provides (*inter alia*) that compensation for goods requisitioned thereunder shall be determined by arbn. in manner therein mentioned, "but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article & to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time." In a claim for compensation under the reg.:—Held:** in assessing the amount, the arbitrator, whilst he was bound to have regard to the cost of production of the article & the allowance of a reasonable profit, was not restricted to these two matters, but could take other matters into consideration, without necessarily being bound by the market price of the article, for the purpose of determining what was a fair & reasonable amount of compensation.—**DANISH BACON Co. v. FOOD MINISTRY** (1922), 91 L. J. K. B. 743; 127 L. T. 428; 38 T. L. R. 507; 66 Sol. Jo. 523, C. A.**

558. — — —.]—By Reg. 2F of the Defence of the Realm Regulations the Food Controller was authorised to make orders regulating the sale or purchase of any article for

the purpose of maintaining the food supply of the country & to requisition any article or any stocks thereof; &, in default of agreement, the compensation to be paid for any article or stock so requisitioned was to be determined by arbn.; "but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article & to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time."

By an Order of Aug. 6, 1919, the Food Controller prescribed maximum prices for the sale by wholesale or retail of bacon, ham & lard, & by an Order of Aug. 8 the Food Controller required every owner of any bacon, ham or lard which might thereafter be discharged from ship in England, to place the same at his disposal.

Under this order large stocks of bacon, ham & lard belonging to a firm in the United States were, on arrival in this country, placed at the disposal of the Food Controller, & the question of compensation was referred to arbn.:—*Held*: (1) the Reg. did not authorise the arbitrator to award cost of production with an allowance of profit where the result would be to give the claimants more than they could have legally realised by an actual sale, & the duty of the arbitrator was to ascertain what, if not requisitioned, the goods would have produced to claimants under all the conditions which existed at the time when they would have been sold, including the maximum controlled prices; (2) the arbitrator was not entitled to allow interest from a date anterior to the final award. —*SWIFT & CO. v. BOARD OF TRADE*, [1925] A. C. 520; 94 L. J. K. B. 629; 133 L. T. 49; 41 T. L. R. 411; 69 Sol. Jo. 508, II. L.

SUB-SECT. 6.—OTHER MATTERS.

559. Bread - Sale in multiples of one pound—Validity of order.—*GURNEY v. HOUGHTON*, No. 518, *ante*.

560. ———— Loaf slightly in excess of exact weight.—Bread Order, 1917, Art. 7, which provides that "No loaf of bread shall be sold or offered or exposed for sale unless its weight be one pound or an even number of pounds," means that a loaf must weigh not less than one lb., 2 lb., & so on, & that, if it weighs a little over such weight, the seller is not guilty of an offence. It

is no defence to a charge under the art. to show that the seller has made up a deficiency in weight in a loaf by the addition of pieces of bread cut from another loaf.—*HILDRETH v. LOUIS* (1917), 87 L. J. K. B. 351; 82 J. P. 59; 62 Sol. Jo. 212; 16 L. G. R. 102, D. C.

561. ———— Making up deficiency by pieces from another loaf.—*HILDRETH v. LOUIS*, No. 560, *ante*.

562. Milk—Sale by imperial measure—Whether offence to give short measure.—Milk Order, 1920, art. 2, provided that no milk should be sold or offered for sale by retail otherwise than by imperial measure except (a) sales of milk by the pennyworth or two pennyworth, or (b) sales by any fraction of a gill, pint, quart, or gallon of milk. Where a vendor measures out milk by means of an imperial half-pint measure, where the purchase is of a quart, the mere fact that three half-pints are delivered instead of four is not, in the absence of fraud, an offence against the order.—*WELFORD'S SURREY DAIRIES, LTD. v. NEWTON* (1920), 90 L. J. K. B. 364; 124 L. T. 343; 85 J. P. 59; 37 T. L. R. 53; 18 L. G. R. 819, D. C.

563. Licence—Necessity for—For slaughter-house—Slaughter of cattle not intended for human food.—Slaughter-houses (Licensing) Order, 1918, does not apply only to slaughter-houses for the slaughter of cattle intended for human food, & consequently a person who keeps premises for the slaughter of any cattle, whether intended for human food or not, commits an offence unless he has obtained a licence under the provisions of the order.—*PALMER v. POWELL* (1920), 89 L. J. K. B. 1119; 123 L. T. 671; 84 J. P. 200; 36 T. L. R. 759; 18 L. G. R. 502, D. C.

564. ———— For wholesale dealer in meat—Dealing in veal.—Veal is "dead meat" within the meaning of clause 1 of Meat (Licensing of Wholesale Dealers) Order, 1918, as being "meat . . . obtained from cattle" within clause 6, & can therefore only be sold wholesale by licensed dealers.—*WILLIAMS v. DAVIES* (1920), 89 L. J. K. B. 1164; 123 L. T. 711; 84 J. P. 231; 18 L. G. R. 508, D. C.

SECT. 3.—PROCEEDINGS AGAINST OFFENDERS.

565. Institution of proceedings—Within what time—Whether within twenty-eight days of purchase.—On a prosecution under Spirits (Prices &

PART VI. SECT. 2, SUB-SECT. 6.

d. Bread—Sale in multiples of one pound—Quarter or half-quarter loaves.—Under Flour & Bread (Prices) Order, 1917, s. 5 (a) (i), a vendor of bread may sell & charge for any number of 1-lb. loaves at the rate of 2½d. per lb., provided that at the time of such sale he is able & willing to sell to the customer quarter or half-quarter loaves or other bread at the rate of 2½d. per lb. to the extent of the customer's requirements.—*R. v. O'BRIEN (L.), O'BRIEN (M.) & WALSH* (1918), 52 L. L. T. 34.—*IR*.

g. within thirty hours of baking.—Bread Order, 1917 (1917, No. 189), Art. 7, is an absolute prohibition against the sale of a loaf which does not weigh an even pound or even number of pounds weight. Bread may be weighed at any time within thirty hours after the completion of the baking. Where a loaf of bread is weighed at mid-day

on the day on which it is delivered, *prima facie* the weighing is done within thirty hours of the completion of the baking, & the onus of proving the contrary is on deft.—*R. v. M'DONNELL*, [1918] 2 L. R. 590.—*IR*.

f. Bacon—What are "accurate records."—An invoice showing the quantity of bacon bought by the retailer, a railway receipt for the carriage of the bacon bought, & a list of prices of various "cuts" of bacon hung up in the retailer's shop are not "accurate records" within Bacon, Ham, & Lard (Provisional Prices) Order (1917, No. 1180), art. 13.—*R. v. O'NEILL*, [1918] 2 L. R. 590.—*IR*.

g. Analysis of samples—Application to spirits—By Spirits (Prices & Description) Order, 1919.—A person authorised to procure a sample of spirits for analysis under Spirits (Prices & Description) Order, 1919, clause 8, must conform to the procedure laid down by Sale of Food & Drugs Act,

1875, s. 14, by dividing the into three parts, &, if required to do so, delivering one of these to the seller or agent.—*STRATHERN v. HEALY*, S. C. (J.) 68; 57 Sc. L. R. 240; 1 S. L. T. 157.—*SCOT*.

h. —————Sale of Food & Drugs Act, 1875, s. 14, as to method of dealing with articles purchased for the purpose of analysis, is imported into Spirits (Prices & Description) Order, 1919, clause 8, thereof only with regard to purchases made by a person duly authorised under that Order, & do not apply to purchases made by ordinary members of the public.—*STRATHERN v. GRAHAM & SONS*, [1920] S. C. (J.) 82; 57 Sc. L. R. 644.—*SCOT*.

PART VI. SECT. 3.

k. Order made by Government Department—Not having force of statute—May be challenged as ultra vires.—An order made by a Govt

Sect. 8.—Proceedings against offenders.]

Description) Order, 1919, for selling whisky at a price in excess of the maximum price, the limit of twenty-eight days from the time of the purchase fixed by 1899 Act, s. 19 (1), within which a prosecution under Sale of Food & Drugs Acts must be commenced, does not apply.—**REDMOND v. AUGER** (1920), 89 L. J. K. B. 847; 123 L. T. 712; 84 J. P. 224; 18 L. G. R. 513, D. C.

566. Jurisdiction of court—Borough sessions—Offence in county—Summons served in borough.]—R. v. PEARCE, Ex p. RAYNES, [1918] W. N. 291, D. C.

567. Hearing—Powers of court—To adjourn—For proof of order.]—DUFFIN v. MARKHAM, No. 522, *ante*.

— **Evidence—Proof of orders.]—See Nos. 522, 523, *ante*.**

568. ——— Conviction—Form—Whether bad for duplicity.]—R. v. HAMMICK, Ex p. MURDOCH, No. 531, *ante*.

569. ——— Whether bad for uncertainty.]—SMART v. WILKINS, No. 549, *ante*.

570. Appeals—To quarter sessions—After plea of guilty.]—An information was preferred by applt. against resp. under Defence of the Realm Regs. for a breach of the Pigs (Maximum Prices) Order, 1917. At the hearing resp. was present, & his solr. stated that he pleaded not guilty. At the end of the case for the prosecution resp.'s solr. submitted that there was no case for him to answer, but the justices overruled the objection & decided to fine resp. Resp.'s solr. thereupon withdrew his plea, & resp. gave evidence in mitigation. The justices then fined him 10s. Resp. appealed to quarter sessions, which held that resp. had a right of appeal under reg. 58 of Defence of the Realm Regs.:—Held**: Reg. 58 was not affected by Criminal Justice Administration Act, 1914 (c. 58), s. 37 (1), & if a person was aggrieved by any part of the conviction, i.e. either the decision as to his guilt or the sentence, he was a person aggrieved & had a right of appeal under Reg. 58 even if he had pleaded guilty.—**HARRIS v. COOKE** (1918), 88 L. J. K. B. 253; 110 L. T. 744; 83 J. P. 72; 16 L. G. R. 850, D. C.**

571. To Court of Appeal from Divisional

Dept. in pursuance of powers conferred by statute, but which was not declared to have the force of statute, may competently be challenged as *ultra vires* by accused in a summary complaint for contravention of the Order brought in the Sheriff Court.—**SHEPHERD v. HOWMAN**, [1918] S. C. (J.)

1. Slaughter of cow in calf—

Mens rea—Sale for the purpose.]—In a prosecution of a farmer for selling a heifer in calf for slaughter contrary to Live Stock (Sales) Order, 1918:—Held**: the fact that the seller did not know the heifer was in calf was no defence to the charge.—**ANDERSON v. ROSE**, [1919] S. C. (J.) 20.—**SCOT**.**

m. ———.]—A butcher convicted in the Sheriff Court of a contra-

Court—Discharge of rule for prohibition against profiteering committee—Whether appeal in criminal cause or matter.]—Complainant & three friends were supplied in a restaurant with a meal consisting of sausages, bread, cakes & tea ordered separately. Complainant made a complaint concerning the prices charged to the Local Profiteering committee, who proceeded to investigate the complaint under Profiteering Act, 1919 (c. 66), s. 1 (1) (b). The proprietors of the restaurant obtained a rule *nisi* for a prohibition against the committee investigating the matter on the ground that the articles supplied did not come within sched. 2 of the order of the Board of Trade, dated Sept. 11, 1919, made under the above Act, & that the articles described as six small cakes were not separately complained of. This rule was discharged by a Div. ct. & the railway co. appealed, when a preliminary objection was taken that no appeal lay, on the ground that the order of the Div. ct. was made in a criminal cause or matter within Jud. Act, 1873 (c. 66), s. 47:—Held**: the order of the Div. ct. was not in a criminal cause or matter.—**R. v. MANCHESTER LOCAL PROFITEERING COMMITTEE, Ex p. LANCASHIRE & YORKSHIRE RY. CO.** (1920), 89 L. J. K. B. 1089; 123 L. T. 98; 84 J. P. 177; *sub nom.* **WILSON v. LANCASHIRE & YORKSHIRE RY. CO.**, 36 T. L. R. 412; 64 Sol. Jo. 358; 18 L. G. R. 333, C. A.**

Annotation:—Distd. R. v. Newcastle-upon-Tyne Profiteering Committee, Ex p. Provincial Cinematograph Theatres (1920), 89 L. J. K. B. 1098.

572. ———.]—Where a complaint has been made to a profiteering committee that an overcharge has been made, & the committee have found that the charge made was excessive & have directed a prosecution to be instituted, & a rule *nisi* for *certiorari* on the ground that the committee was not properly constituted, & that the proceedings were without jurisdiction, has been discharged:—Held**: an appeal would not lie, as the direction to institute a prosecution was the first step in a "criminal cause or matter" within Jud. Act, 1873 (c. 66), s. 47.—**PROVINCIAL CINEMATOGRAPH THEATRES, LTD. v. NEWCASTLE-UPON-TYNE PROFITEERING COMMITTEE** (1921), 90 L. J. K. B. 1064; 125 L. T. 651; 85 J. P. 211; 37 T. L. R. 799; 65 Sol. Jo. 661; 19 L. G. R. 505; 27 Cox, C. C. 63, H. L.**

Annotation:—Mentd. Re Clifford & O'Sullivan, [1921] 2 A. C. 570.

vention of the Live Stock (Sales) Order, 1919, by causing the slaughter of an in-calf cow, which he had bought at a public mart, appealed to the High Court by a stated case. The case set forth that accused bought the cow at the mart, after she had been graded & allocated to him.—**BEATTIE v. WAUGH**, [1920] S. C. (J.) 64; 2 S. L. T. 23; 57 Sc. L. R. 471.—**SCOT**.

FOOTPATHS.

See EASEMENTS AND PROFITS À PRENDRE ; HIGHWAYS, STREETS, AND BRIDGES.

FORBEARANCE.

See CONTRACT.

FORCIBLE ENTRY.

See DISTRESS ; LANDLORD AND TENANT ; TRESPASS.

FORECLOSURE.

See MORTGAGE ; PRACTICE AND PROCEDURE.

FOREIGN BILLS.

See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

FOREIGN COMPANIES.

See COMPANIES.

FOREIGN COPYRIGHTS.

COPYRIGHT AND LITERARY PROPERTY.

FOREIGN CORPORATIONS.

See CORPORATIONS.

FOREIGN DOMICIL.

See CONFLICT OF LAWS.

FOREIGN ENLISTMENT.

See CRIMINAL LAW AND PROCEDURE.

FOREIGN JUDGMENTS.

See CONFLICT OF LAWS ; EVIDENCE ; JUDGMENTS AND ORDERS.

FOREIGN JURISDICTION

See CONSTITUTIONAL LAW.

FOREIGN LAW.

See CONFLICT OF LAWS.

FOREIGN OFFICE.

See CONSTITUTIONAL LAW.

FOREIGN SOVEREIGNS.

See ACTION ; CONFLICT OF LAWS.

FOREIGN TRADE MARK.

See TRADE MARKS, TRADE NAMES AND DESIGNS.

FOREIGN WILLS.

See CONFLICT OF LAWS ; WILLS.

FORESHORE.

See FISHERIES ; WATERS AND WATERCOURSES.

FOREST COURTS.

See CONSTITUTIONAL LAW ; COURTS.

FORESTS.

See CONSTITUTIONAL LAW.

FORFEITURE.

See PARTICULAR TITLES *passim*.

FORGERY.

See BANKERS AND BANKING ; CRIMINAL LAW AND PROCEDURE.

FORMÂ PAUPERIS.

See COURTS ; HUSBAND AND WIFE ; PRACTICE AND PROCEDURE.

FORTUNE-TELLING.

See CRIMINAL LAW AND PROCEDURE.

FOX-HUNTING.

See TRESPASS.

FRANCHISE.

See CONSTITUTIONAL LAW ; COPYHOLDS ; ELECTIONS ; FERRIES ; FISHERIES ; MARKETS AND FAIRS ; REAL PROPERTY AND CHATTELS REAL.

FRANCHISE CORONERS.

See CORONERS.

FRAUD.

See FRAUDULENT AND VOIDABLE CONVEYANCES ; MISREPRESENTATION AND FRAUD ; AND PARTICULAR TITLES *passim*.

FRAUDS, STATUTE OF.

See CONTRACT ; GUARANTEE AND INDEMNITY ; SALE OF GOODS ; SALE OF LAND.

FRAUDULENT AND VOIDABLE CONVEYANCES.

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PART IV. CONVEYANCES VOIDABLE FOR MISREPRESENTATION OR FRAUD.
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PART V. CONVEYANCES VOIDABLE FOR MISTAKE. *See MISTAKE.*

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<i>Deeds</i>	<i>See</i> DEEDS.	<i>Misrepresentation, Actual</i>	
<i>Duress</i>	„ CONTRACT ; WILLS.	<i>or Constructive</i>	<i>See</i> MISREPRESENTATION AND FRAUD.
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<i>Gifts</i>	„ GIFTS.	<i>Self-protective Settlements</i>	„ SETTLEMENTS.
		<i>Settlements</i>	„ SETTLEMENTS.

Part I. Conveyances Impeachable by Creditors under Statute.

NOTE.—See Stat. 13 Eliz. c. 5, repealed & replaced by Law of Property Act, 1925 (c. 20), ss. 172, 207.

SECT. 1.—PROPERTY WITHIN THE STATUTE.

See, now, Law of Property Act, 1925 (c. 20), s. 172.

1. Effects liable to be taken in execution.]—A bond is not "goods" or "chattels" within 13 Eliz. c. 5, as to fraudulent alienations.

It is only such things as may be taken in execution that are affected by the statute of Elizabeth. Bonds indeed are now to be taken in execution, but they were not so at the time of the making of the indenture of assignment (LORD DENMAN, C.J.).—SIMS v. THOMAS (1840), 12 Ad. & El. 536; 4 Per. & Dav. 233; 9 L. J. Q. B. 390; 4 Jur. 1181; 113 E. R. 916.

Annotations:—*Reid*. Edwards v. Cooper (1847), 11 Q. B. 33; Barrack v. McCulloch (1856), 3 K. & J. 110; *Re Baldwin, Ex p. Foss* (1858), 2 De G. & J. 230; *Spiro v. Willows* (1865), 13 W. R. 329; *R. v. Smith* (1870), L. R. 1 C. C. R. 266.

2. — At time of assignment.]—SIMS v. THOMAS, No. 1, *ante*.

3. — Though made so since the statute.]—(1) An assignment of choses in action, since these became subject to attachment by C. L. P. Act, 1854 (c. 125), ss. 60 *et seq.*, may be void under 13 Eliz. c. 5, as tending to defeat, hinder, or delay creditors.

If one particular creditor only is, in effect, though not necessarily intentionally, defeated, hindered, or delayed by an assignment executed by the judgment debtor, such assignment may be void under the statute as tending to defeat, hinder, or delay creditors.

(2) It was urged that the judgment creditor could take no more rights under the deed than the judgment debtor had; in my opinion this is not in point where the rights of third parties are affected at the time of the assignment, & in my judgment the deed can be challenged by the judgment creditor in these proceedings (GORELL BARNES, J.).—EDMUNDS v. EDMUNDS, [1904] P. 362; 73 L. J. P. 97; 91 L. T. 568.

Annotations:—*As to (2)* *Reid*. Glegg v. Bromley (1911), 81 L. J. K. B. 334. *Generally*, *Mentd.* Wells v. Wells (1914), 30 T. L. R. 437.

4. — Effect of Judgments Act, 1838 (c. 110), s. 12.]—BARRACK v. McCULLOCH, No. 89, *post*.

See, also, No. 18, *post*.

What may be taken in execution.]—See Judgments Act, 1838 (c. 110), s. 12; Nos. 18, 89, *post*, & generally, EXECUTION, Vol. XXI., pp. 480 *et seq.*

5. Leaseholds — Fraudulently conveyed—Assets of grantor on his death.]—ANON. (1621), 2 Roll. Rep. 173; 81 E. R. 732.

Whether liability to rent is valuable consideration.]—See No. 119, *post*.

6. Copyholds.]—MATHEWS v. FEAVER, No. 245, *post*.

See, now, Judgments Act, 1838 (c. 110), s. 11.

7. Money — Gift immediately before death.]—DUFFIN v. FURNESS (1729), Cas. temp. King, 77; 25 E. R. 232.

8. — Held in trust.]—PEACOCK v. MONK, No. 25, *post*.

9. — Judgments Act, 1838 (c. 110), s. 12.]—BARRACK v. McCULLOCH, No. 89, *post*.

10. Bond.]—SIMS v. THOMAS, No. 1, *ante*.

Assignment of bonds generally.]—See BONDS, Vol. VII., pp. 224 *et seq.*

11. Chose in action.]—A voluntary assignment by a person, who was insolvent at the date thereof, may be set aside by his assignee, appointed at a subsequent period by the Insolvent Debtors Ct., although the subject-matter of the assignment was a chose in action.—NORCUTT v. DODD (1841), Cr. & Ph. 100; 10 L. J. Ch. 296; 5 Jur. 835; 41 E. R. 428, L. C.

Annotations:—*Consd.* Edmunds v. Edmunds, [1904] P. 362. *Reid*. R. v. Smith (1870), L. R. 1 C. C. R. 266. *Mentd.* Colonial Bank v. Whinney (1885), 30 Ch. D. 261.

—EDMUNDS v. EDMUNDS, No. 3, *ante*.

13. — Equitable reversionary interest.]—IDEAL BEDDING CO., LTD. v. HOLLAND, No. 176, *post*.

— Fruits of action as & when recovered distinguished.]—See No. 133, *post*.

— Assignment of chose in action generally.]—See CHOSES IN ACTION, Vol. VIII., pp. 424 *et seq.*

14. Equitable interest in real estate — Estate contracted to be purchased.]—A debtor, having contracted to purchase an estate, caused the conveyance to be made to trustees, & trusts to be declared by deeds, dated in Mar. 1850, which recited the agreement of the debtor for the purchase, & that the conveyance to the trustees was by his direction, & declared the trusts to be for the sale of the property, & retaining the proceeds for the benefit of the wife & children of the debtor. By one of the deeds of Mar. 1850, the debtor also assigned to the same trustees all the furniture in certain houses (one of which was on the purchased estate), upon the same trusts, for his wife & children. The debtor was, at the date of these deeds, indebted to an extent which would render a voluntary disposition of his estate fraudulent under 13 Eliz. c. 5, as against creditors. The trustees were not informed of the assignment of the furniture to them, & it continued in the possession of the debtor until the subsequent assignment next mentioned. By a mtge. deed,

PART I. SECT. 1.

21. Effects liable to be taken in execution—At time of assignment.]—13 Eliz. c. 5, extends only to the assign-

ment of such things as are liable to be taken in execution, & a mtgee.'s interest is not so liable.—LODER v. CREIGHTON (1860), 9 C. P. 295.—CAN.

21. — Though made so since the

statute.]—Bills & notes are, by virtue of the legislation passed since 13 Eliz. c. 5, goods & chattels within that Act.

O. R. 617.—CAN.

Sect. 1.—Property within the statute. Sect. 2: Sub-sect. 1.]

dated in Nov. 1851, the debtor conveyed & assigned all his real & personal estate to a creditor, to whom he had, after the date of the voluntary deeds of Mar. 1850, become largely indebted, to secure, so far as it would go, the debt owing to such creditor; & the creditor thereupon took possession of the furniture:—*Held*: (1) although the purchased estate was never vested at law in the debtor, yet, as he had by the contract acquired an equitable interest in it, which interest was conveyed to the trustees under the voluntary deeds of Mar. 1850, such conveyance was fraudulent as against creditors under 13 Eliz. c. 5; (2) the assignment of the furniture by the voluntary deed of Mar. 1850, was also fraudulent as against creditors; (3) as against the creditor entitled under the mtge. by the debtor of all his real & personal estate by the deed of Nov. 1851, although it did not specify in particular the purchased estate comprised in the voluntary deeds of Mar. 1850, those deeds were, as to such purchased estate, fraudulent & void, under 27 Eliz. c. 4; & that estate passed to such creditor by the mtge. deed of Nov. 1851; (4) the furniture assigned to trustees by the voluntary deed of Mar. 1850, did not pass by the assignment of all the personal estate of the debtor by the mtge. deed of Nov. 1851; & the creditor claiming under that deed did not acquire any specific lien or title to such furniture, either by the said deed or by the act of taking possession thereof.—*BARTON v. VANHEYTHUYSEN, STONE v. VANHEYTHUYSEN* (1853), 11 Hare, 126; 18 Jur. 314; 1 W. R. 429; 68 E. R. 1215.

Annotations:—As to (3) *Reid*, *Beavan v. Oxford* (1856), 6 De G. M. & G. 507; *Cadell v. Bewley* (1867), 16 L. T. 141. Generally, *Mentd.* *Nowall v. Pascoe, Thompson v. Pascoe* (1862), 31 L. J. Ch. 456.

15. Goodwill of business—& stock-in-trade.]—*FRENCH v. FRENCH*, No. 39, *post*.

16. —.]—*NEALE v. DAY*, No. 40, *post*.

17. Banknotes.]—*BARRACK v. McCULLOCH*, No. 89, *post*.

18. Policies of assurance—Judgments Act, 1838 (c. 110), s. 12.]—A debtor, during his last illness, assigned two policies of assurance on his life, for £500 & £300, to a creditor, in consideration of a debt of £174 3s. 6d. He died within a month afterwards, intestate. The policies were paid to the assignee. Upon a bill by the administrator of the intestate for the administration of the estate:—*Held*: (1) policies of assurance were securities for money, within the above sect.; (2) the assignment was voluntary & void under 13 Eliz. c. 5, & the deed could only stand as a security for the debt due to the party who obtained the assignment.—*STOKOE v. COWAN* (1861), 29 Beav. 637; 30 L. J. Ch. 882; 4 L. T. 695; 7 Jur. N. S. 901; 9 W. R. 801; 54 E. R. 775.

19. —.]—*TAYLOR v. COENEN*, No. 471, *post*.

PART I. SECT. 2, SUB-SECT. 1.

a. Gift in trust.]—Pltf.'s father leased certain mining areas to W. in Nov. 1875, with proviso for re-entry on certain conditions. In Dec. 1876, he conveyed all his estate, including all his interest in the lease & the lease itself to pltf. in trust for certain purposes in the deed mentioned. The trustee took possession in Feb. 1879, for non-payment of rent overdue. In

Oct. 1878, a distress warrant for rates was issued against the lessor, under which the property in question was sold & came into possession of deft., from whom it was replevied by pltf.:—*Held*: 13 Eliz. c. 5, did not refer to the case at all, as it made the conveyances to which it referred void only as against certain classes of persons, none of which could cover the case of deft.—*WALLACE v. LAIDLAW* (1881), 14 N. S. R. (2 R. & G.) 420.—CAN.

20. — Investment of policy money by assignee.]—Testator voluntarily assigned two policies of assurance to his niece, who on the death of testator, which happened shortly afterwards, received the policy moneys & invested them with other moneys of her own upon mtge. Testator's estate proved to be insolvent. In a creditors' administration action the validity of these assignments was impeached under 13 Eliz. c. 5, & pltf. moved for an order for payment into ct. of the policy moneys, or for a receiver:—*Held*: (1) if the fund existed in specie, it would be assets of testator, assuming the assignments to be within 13 Eliz. c. 5, & the ct. would have jurisdiction to secure the fund for the benefit of the creditors until the determination of that question; (2) there had been no such alteration in the nature of the fund as to oust the jurisdiction of the ct., the fund being still in the hands & under the control of the assignee, although not in its original shape; & accordingly, the ct. exacted an undertaking from the assignee not to receive the moneys secured by the mtges., so far as they represented the policy moneys, & not to deal with the mtges. except with the sanction of the ct.—*Re MOUAT, KINGSTON COTTON MILLS Co. v. MOUAT*, [1899] 1 Ch. 831; 68 L. J. Ch. 390; 80 L. T. 406; 47 W. R. 506; 43 Sol. Jo. 380.

Assignment of policies generally.]—See INSURANCE.

21. Fruits of an action when recovered.]—*GIEGG v. BROMLEY*, No. 133, *post*.

SECT. 2.—DISPOSITIONS WITHIN THE STATUTE.

SUB-SECT. 1.—IN GENERAL.

22. Conveyance of heriot—To defraud lord.]—Where the tenant has no beasts the lord shall lose his heriot for it is a casual thing if he have it, unless the tenure or custom be to have the best beast or such a sum; but where the tenant has conveyed the beast away & deprived his lord of his heriot by fraud, then 13 Eliz. c. 5, provides a remedy.—*SHAW v. TAYLOR* (1616), Hut. 4; 123 E. R. 1059.

23. Forfeiture by tenant for life—To reversioner.]—Tenant for life being in debt, to defraud his creditors, commits a forfeiture, to the end that he in reversion may enter, who is made privy to the contrivance.

The creditors should avoid this, as well as any fraudulent conveyance (*per CUR.*).—*ANON.* (1673), 1 Vent. 257; 86 E. R. 171.

24. Gift in trust—For children's maintenance—Children's right to resort to estate retained.]—S. having several young children, & being much in debt, conveyed part of his lands in trust for payment of his debts, & by another deed conveyed other part to trustees for maintenance of his

b. Dissolution of partnership—Assignment for partnership debts by partner—Before payment of his individual debts.]—After the dissolution of partnership a partner cannot assign his share of the firm assets for the benefit of the firm creditors until his individual debts are first paid.—*MARTIN v. EVANS* (1883), 6 O. R. 238.—CAN.

c. Fraudulent alienations—Debtor diminishing estate.]—13 Eliz. c. 5,

children. This last conveyance being voluntary, was declared void as to creditors, but good against S. himself, & therefore if his creditors should fall upon those lands for a satisfaction of their debts, & thereby strip the children of their maintenance, the children should have a recompense out of the residue of the estate which S. had reserved to himself for his own maintenance.—**SNEED v. CULPEPPER** (LORD & LADY) (1717), 2 Eq. Cas. Abr. 255; 22 E. R. 216.

25. Deed & will executed same day—Deed a testamentary act—& voluntary.]—(1) A. makes B. exor. & residuary legatee, & by deed of the same day vests £1,000 in B. to pay an annuity to A. for life, & afterwards £1,000 apiece to C. & D., & an annuity to E. if they survived, etc.; it is a voluntary & testamentary act, & void against the general creditors within 13 Eliz. c. 5.

(2) The question is, whether it is necessary to make more than the exor. party. It is truly said for plffs., that if bound to make one, they are bound to make all, even simple contract creditors parties; they having an equal right to controvert that point; for if what debt. insists upon is right, plffs. can no more claim in prejudice of one, than the other; which would be a strange rule, & must then be always done. . . .

If indeed there is a bill by a single creditor or person claiming part of the estate, as it is here, the ct. at the hearing the cause will & ought to determine it; but that is not necessary in all cases, & shows it not necessary to bring all before the ct.; the exor. in all cases sustaining the person of testator, to defend the estate for him, creditors & legatees; but if collusion, a particular case must be made of that. But here, the objection & defence made, shows no collusion between the exor. & plffs.; & there is a plain answer to the exor.'s not being able to make so good a defence (LORD HARDWICKE, C.).

As to the consequence & whether it could be good against creditors; it depends upon its being fraudulent or not. I do not mean as to the intent (although there is something like that), but a colourable fraud against creditors in the notion of this ct.; & I am of that opinion, from the Act 13 Eliz., which includes all goods & chattels; & though money has no ear-mark, yet if in trust, it is another matter, for though it be not the specific £4,000 which was paid, yet it is the profits thereof, which is equally within the words of the statute, preventing creditors from a satisfaction for their debts by taking part of the debtor's property (LORD HARDWICKE, C.).

is directed against fraudulent alienations of property whereby the debtor diminishes the estate & does not touch the case of his neglecting or refusing to enrich himself.—**BAIN v. MALCOLM** (1887), 13 O. R. 444.—CAN.

d. Voluntary conveyance—Rendering grantor insolvent.]—A voluntary conveyance of land is void under 13 Eliz. c. 5 (Imp.), as tending to hinder & delay creditors, though the vendor was solvent when it was made, if it results in denuding him of all his property & so rendering him insolvent thereafter.—**SUN LIFE ASSURANCE CO. OF CANADA v. ELLIOTT** (1900), 31 S. C. R. 91.—CAN.

e. — Grantor subsequently indebted.]—In the absence of actual fraud, a voluntary conveyance made by a person who is not indebted at the time & not contemplating the incurring

of debts, cannot be set aside merely because at some later date he happens to become indebted & has no other property wherewith to pay the debt.—**HOGG v. HOGG** (1914), 29 W. L. R. 623; 30 W. L. R. 802; 7 W. W. R. 313; 25 Man. L. R. 226; 8 W. W. R. 111; 21 D. L. R. 802.—CAN.

f. Assignment of money—By third party—No intent to defraud creditors.]—Where there is no intent to defeat or delay creditors on the part of the creditor an assignment to him of money due debtor by a third party may be upheld.—**NORTHERN COMMERCIAL CO. v. POWELL** (1911), 17 W. L. R. 297.—CAN.

g. Transfer of lands—In fraud of creditors—Limitation of title.]—A transfer of land made in fraud of creditors of the transferor will only vest the title in the transferee, subject

(4) But there is something bringing it nearer to those cases, which have been determined without any difficulty, that if there is a power of revocation in such a deed it is constant evidence of fraud (LORD HARDWICKE, C.).—**PEACOCK v. MONK** (1748), 1 Ves. Sen. 127; 27 E. R. 934, L. C.

Annotations:—Generally, Reqd. **Gale v. Williamson** (1841), 8 M. & W. 405; **Kelson v. Kelson** (1853), 1 W. R. 143. **Mentd.** **Clifford v. Turrell** (1845), 14 L. J. Ch. 390; **Leitch's Case** (1865), L. R. 1 Eq. 231.

26. Fraudulent judgment & execution.]—A fraudulent judgment & execution, though void against creditors, is not in itself an act of bkpcy.—**CLAVEY v. HAYLEY** (1776), 2 Cowp. 427; 98 E. R. 1168.

27. —.]—(1) Where goods seized under a writ, founded upon a judgment fraudulent against creditors, remain in the hands of the sheriff, or are capable of being seized by him, he is compellable, under 13 Eliz. c. 5, to seize & sell such goods under a writ afterwards received by him, & founded on a *bond fide* debt; & if he neglect to do so, having notice of the fraud, & return *nulla bond* to the latter writ, he is liable to an action for a false return.

(2) Therefore, evidence of the fraud in the previous judgment & execution is admissible in such action, in answer to a defence founded on the outstanding writ; & the conduct of the debtor in reference to the execution of the previous judgment is admissible in evidence, as a part of the fraud.—**IMRAY v. MAGNAY** (1843), 11 M. & W. 267; 2 Dowl. N. S. 531; 12 L. J. Ex. 188; 7 Jur. 240; 152 E. R. 803.

Annotations:—As to (1) Follid. **Christopherson v. Burton** (1848), 3 Exch. 160. **Reqd.** **Rommett v. Lawrence** (1850), 15 Q. B. 1004; **Shattock v. Carden** (1851), 6 Exch. 725.

28. —.]—Where goods seized under a writ of *fi. fa.* founded on a judgment fraudulent against creditors remain in the sheriff's hands, or are capable of being seized by him, he is compellable, under 13 Eliz. c. 5, to sell or seize & sell such goods under a subsequent writ founded on a *bond fide* debt; & if he neglect to do so, having notice of the fraud at the time that he ought to have executed the writ, or if he could then have discovered it by reasonable inquiry, he is responsible for neglecting to seize & sell them; nor is it necessary, in order to render the judgment void *quoad* the sheriff, on the ground of fraud, that he himself should have been a party to it. The fact that the sheriff himself had assigned the goods seized under the prior execution to a *bond fide* purchaser, innocently & in ignorance of the fraud, does not excuse him from such liability.---

to the rights of creditors; & where the transferee's title passes to the exor. of his will or to a devisee, whether directly or through the exor., the title continues to be subject to all equities existing as against testator at the time of his death.—**IMPERIAL BANK v. EKAKIN**, [1924] 2 D. L. R. 676; 2 W. W. R. 33.—CAN.

h. Settlement by tenant in tail—Not within the Act.]—A settlement by a tenant in tail by which he opens & re-settles his estate on himself for life, with remainder over, is not within the statute, which avoids only deeds which would deprive creditors of such property as they could make available without their debtor's aid.—**CLEMENTS v. ECCLES** (1847), 11 L. J. Eq. R. 229; 2 Ir. Jur. 286.—IR.

k. Conveyance to avoid creditors of a third person.]—The statute applies to the case of a conveyance to evade

Sect. 2.—Dispositions within the statute: Sub-sects.
2.]

CHRISTOPHERSON *v.* BURTON (1848), 3 Exch. 160 ; 18 L. J. Ex. 60 ; 12 L. T. O. S. 272 ; 13 J. P. 219 ; 154 E. R. 798.

*Annotations:—***Reid.** Shattock *v.* Carden (1851), 6 Exch. 725. **Mentd.** Fitcher *v.* Hinder (1858), 3 H. & N. 757 ; *Re* Pearce, *Ex p.* Crossthwaite (1885), 14 Q. B. D. 966.

29. Warrant of attorney to confess judgment—Given to prefer a creditor—Not within the Act.]—HOLBIRD *v.* ANDERSON, No. 418, *post*.

30. ——— & ratably amongst other creditors.]—After a creditor had distrained for rent the goods of his debtor, who was also under engagement with the creditor's agent for the sale of his goods, for the purpose of discharging the rent, & also certain book debts due to such creditor & his agent, debtor confessed judgment to debt., another creditor, for a large nominal sum, with a defeasance that execution should only issue for such an amount as would cover the debt of debt., & all the other creditors amongst whom a ratable distribution was to be made :—**Held :** such judgment confessed, being in fact made *bonâ fide*, & upon good consideration, was not covinous or fraudulent within 13 Eliz. c. 5, although its effect might be to delay or hinder such first mentioned creditor from recovering the whole amount of his demands. Neither could it be said to delay or hinder at all his recovering the rent due to him, & for which he had distrained, such distress having a legal priority. But it seems, that the penalty given by the third clause of the statute attaches as well upon a covinous judgment as upon a covinous bond, though the latter alone be named in that part of the clause.—**MEUX v. HOWELL** (1803), 4 East, 1 ; 102 E. R. 730.

*Annotations:—***Reid.** Tolputt *v.* Wells (1813), 1 M. & S. 395 ; Bach *v.* Meats (1816), 5 M. & S. 200.

31. Appointment under power — Executed in favour of volunteers—Assets for creditors.]—(1) Power of appointment over a sum of money, to be raised under a trust term, executed in favour of volunteers, is assets for creditors. But the equity of a purchaser from a party taking under a voluntary deed of appointment was preferred to that of general creditors, having no specific charge.

(2) A provision for debts in a voluntary settlement will support it against all future creditors. — **GEORGE v. MILBANKE** (1803), 9 Ves. 190 ; 32 E. R. 575, L. C.

*Annotations:—***As to (1) Consd.** Daubeny *v.* Cockburn (1816), 1 Mer. 626. **Expld.** Payne *v.* Mortimer (1859), 4 De G. & J. 417. **Consd.** Halifax Joint Stock Banking Co. *v.* Gledhill, [1891] 1 Ch. 31. **Reid.** Skeeles *v.* Shearly (1837), 3 My. & Cr. 112 ; Aldborough *v.* Trye (1840), 7 Cl. & Fin. 122. **Reid.** Clarke *v.* Willott (1872), L. R. 7 Exch. 313 ; Judd

v. Green (1875), 45 L. J. Ch. 108 ; Cloutte *v.* Storey, [1911] 1 Ch. 18 ; Harrods *v.* Stanton, [1923] 1 K. B. 516. **Generally, Mentd.** Houlditch *v.* Wallace (1838), 5 Cl. & Fin. 629 ; *Re* Williams & Parry's Contract (1895), 72 L. T. 869.

See, further, POWERS.

32. Purchase by wife from husband — To preserve family property from his creditors.]—ARUNDELL (LADY) *v.* PHIPPS & TAUNTON, No. 366, *post*.

33. Redemption of land tax—On wife's settled property—Merger.]—BURROUGHS *v.* ——— (1809), cited in 17 Ves. at p. 267 ; 34 E. R. 103.

34. Execution creditor purchasing from sheriff — Goods let to debtor at a rent.]—A creditor having taken in execution the goods of debt. who had confessed judgment, & having herself bought them by public auction, & taken a bill of sale for a valuable consideration from the sheriff, & let the goods to the former owner for a rent, which was actually paid, has a title which cannot be impugned as fraudulent by other creditors having executions against the same debt.—**WATKINS v. BIRCH** (1813), 4 Taunt. 823 ; 128 E. R. 555.

*Annotations:—***Reid.** Latimer *v.* Batson (1825), 4 B. & C. 652. **Mentd.** Steward *v.* Lombe (1820), 1 Brod. & Bing. 506.

35. Conveyances of equitable estate — Legal estate never vested in debtor.]—BARTON *v.* VANHEYTHUYSEN, STONE *v.* VANHEYTHUYSEN, No. 14, *ante*.

36. Assignment of furniture — To trustee for wife & children—Assignment not disclosed.]—BARTON *v.* VANHEYTHUYSEN, STONE *v.* VANHEYTHUYSEN, No. 14, *ante*.

37. Dissolution of partnership — Partnership insolvent.]—The partnership firm of W. & G. being in insolvent circumstances, a deed of dissolution was executed, whereby G. assigned to W. all his interest in the partnership assets, & W. covenanted to pay the partnership debts & indemnify G. from the liabilities of the partnership. Fourteen days afterwards W. & G. were adjudicated bkpts. :—**Held :** the deed of dissolution was fraudulent & void as against the joint creditors, & the whole of the partnership property, as it existed at the date of the deed, still continued to be joint property.

Taking the principle of the common law which is embodied in the statute of 13 Eliz., & applying that to the transaction, I think it was idle for the one to make, or for the other to accept, an assignment of that description (LORD WESTBURY, C.).—*Re* EDWARDS-WOOD, *Ex p.* MAYOU (1865), 4 De G. J. & Sm. 664 ; 34 L. J. Bcy. 25 ; 12 L. T. 254 ; 11 Jur. N. S. 433 ; 13 W. R. 629 ; 46 E. R. 1076, L. C.

*Annotation:—***Distd.** Pearce *v.* Bulteel, [1916] 2 Ch. 544.

the creditors of a third person, as well as a conveyance to evade the creditors of debtor himself.—**BLENNERHASSET v. MONSELL** (1852), 19 L. T. O. S. 36.—**IR.**

1. Merger of charge.]—Merger of a charge by expression of intention is a disposition of property within the statute, & would be void & inoperative if fraudulent, as against creditors.—*Re* GODLEY'S ESTATE, [1896] 1 L. R.

m. Application of statute — On ———.]—13 Eliz. c. 5, is not now law under the Ontario statute, & a mtge. may be set aside as to part & maintained as to the remainder.—**v. PATTERSON, MADER v.**

. 2nd ed. 122.—**CAN.**

n. — [Alberta.]—Stat. 13 Eliz. is not in force in Alberta, the of the province having legislated with the subject-matter dealt with therein, this legislation being now found in Fraudulent Preferences Act, R. S. A. 1922, c. 149. The Legislature has limited the class of persons, conveyances by whom may be declared to be fraudulent & void if made to defeat, etc., their creditors, to insolvent persons or those who are unable to pay their debts in full or are on the eve of insolvency ; it has extended the scope of the Act to include all property, & makes the transactions void only as against creditors. It has

fully dealt with the matter, & has so far modified, varied & affected 13 Eliz. c. 5, that it has by implication declared it not to be in force in the province.—**ARNOLD v. FLEMING**, [1923] 1 D. L. R. 1026 ; 1 W. W. R. 706.—**CAN.**

o. — India.]—Whether or not 13 Eliz. c. 5, is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, its principles, & those of the common law for avoiding fraudulent conveyances, have received effect in the Indian Cts., & have properly guided the decisions of the cts. in administering law according to justice, equity, & good conscience.—**ABDUL HYE v. MAHOMED MOZAFFAR HOSSEIN**

38. No intent to defraud creditors.]
PEARCE v. BULTEEL, No. 99, *post*.

Fraudulent execution.]—See EXECUTION, Vol. XXI., pp. 472, 473, Nos. 527–529, 537–540.

SUB-SECT. 2.—ASSIGNMENTS OF BUSINESS AND GOODWILL.

39. Assignment by insolvent trader—Annuity to assignor & his wife—Contingent annuity to wife.]—A trader, being in insolvent circumstances, agreed to sell his business & stock-in-trade in consideration of a money payment, & that the purchaser should, during the joint lives of the trader & his wife, pay the former an annuity equal to one-fourth of the profits, & a contingent annuity to the wife if she survived her husband equal to one-sixth of the profits. The trade having died, & a creditor's suit having been instituted for the administration of his assets:—*Held*: (1) the annuity to the wife was void as against creditors under 13 Eliz. c. 5; (2) it was quite competent for the creditor to impeach the annuity without seeking to set aside the whole transaction of which it was a part, & there was a provision in the decree that it was to be without prejudice to any claim of the widow upon the estate of her husband if there should ultimately be a surplus after payment of creditors.—FRENCH v. FRENCH** (1855), 6 De G. M. & G. 95; 25 L. J. Ch. 612; 26 L. T. O. S. 172; 2 Jur. N. S. 169; 4 W. R. 139; 43 E. R. 1166, L. C.; *subsequent proceedings, sub nom.* **SHEE v. FRENCH**, **FRENCH v. FRENCH** (1857), 3 Drew. 716.**

Annotations:—As to (1) **Consd.** **Barrack v. McCulloch** (1856), 3 K. & J. 110. **Distd.** **Wakefield v. Gibbon** (1857), 1 Giff. 401. **Foll.** **Neale v. Day** (1858), 28 L. J. Ch. 45. **Refd.** **Re Cameron & Wells** (1887), 37 Ch. D. 32. *Generally, Mentd.* **Re Stephenson, Ex p. Official Receiver** (1888), 20 Q. B. D. 540.

40. Assignment by indebted solicitor—Annuity to his wife—After her death to himself.]—A solr., being indebted at the time, transferred his business of a solr., business debts & office effects, in consideration of a sum in cash, & of an annuity secured by the bond of the purchaser, to a trustee. By this bond an annuity of £100 was made payable to the solr.'s wife for her separate use, & after her death to the solr. himself. On a bill by the judgment creditors seeking to set aside the transaction as being void under 13 Eliz. c. 5, as being made with the "intent to delay, hinder & defraud creditors":—*Held*: even on the older authorities it was within the purview of the statute, & the recent case of **French v. French, No. 39, *ante*, bound the ct. to hold the transaction bad as against pltf. & other creditors of the solr. who had registered judgments.—**NEALE v. DAY** (1858), 28 L. J. Ch. 45; 32 L. T. O. S. 143; 4 Jur. N. S. 1225; 7 W. R. 45.**

41. Assignment to company—General rule—Substantially whole property assigned.]—Re HIRTH, Ex p. TRUSTEE, No. 250, *post*.

42. — Assignment by sole trader—After judgment.]—Re HIRTH, Ex p. TRUSTEE, No. 250, *post*.

43. — Intention to defraud creditors—Company with notice.]—A builder, in embarrassed circumstances, against whom numerous creditors had obtained judgments, entered into an agreement on July 29, 1921, with an agent on behalf of a co. to be formed, whereby he agreed to sell to the co. all his property, including his business, with certain exceptions of inconsiderable value, in consideration of £30,000 to be satisfied by the allotment to the vendor or his nominee of 30,000 fully paid £1 shares in the capital of the co., the appointment of the vendor as governing director at a salary of £2,500 a year, & an undertaking by the co. with the vendor to pay & discharge the business debts & liabilities of the vendor & indemnify him against the same. The co. having been incorporated & having adopted the agreement, the vendor & his solr. became the directors & were the only shareholders of the co. They allotted to the vendor 10,000 shares & to his solr. 20,000 shares, being the whole of the issued capital. That allotment to the solr. was in pursuance of a prior agreement made in Mar. 1921, whereby the vendor agreed to allot those shares to his solr. in satisfaction of the amount alleged to be owing to him by the bkpt. on an account stated. The vendor was adjudicated bkpt. on Apr. 11, 1922, on a judgment creditor's petition. On an application by the trustees in the vendor's bkpey. impeaching the agreement of July 29, 1921, under 13 Eliz. c. 5:—*Held*: (1) the facts showed that the whole object of the agreement was, under the cloak of a co., to remove the assets of bkpt. from the reach of his creditors & to retain for the bkpt. the benefit of them & thereby defeat & delay his creditors within the statute; (2) the fact that one of the creditors incidentally obtained a benefit from the transaction did not prevent the transaction from being void under the statute.—Re FASEY, Ex p. TRUSTEES**, [1923] 2 Ch. 1; 92 L. J. Ch. 400; 129 L. T. 132; [1923] B. & C. R. 8, C. A.**

44. — Assignment by partnership—After judgment against the partner.]—In Nov. 1907, separate creditors of debtor, a partner in a solvent partnership manufacturing caramel, obtained judgment against him in an action for an injunction restraining him from manufacturing caramel & for damages & costs. Immediately afterwards debtor & his partner sold & assigned the partnership business as a going concern for fully paid shares to the C. co., ltd., which was formed for that purpose, & debtor's partner, being entitled to manufacture caramel, became the managing director of that co. At the same time another limited co. was formed to deal in caramel, & debtor became its managing director. Both cos. were formed by the same solr., & in each case debtor & his partner were two of the signatories to the memorandum of association of the co., the other signatories for £1 each being either clerks in the

(1884), 1 L. R. 10 Calc. 616 L. R. 11 Ind. App. 10.—IND.

PART I. SECT. 2, SUB-SECT. 2.

41 i. Assignment to company—General rule—Substantially whole property assigned.]—H., on entering into partnership with B., assigned to B. all his stock-in-trade, in consideration of B. accepting a bill drawn by H. upon B. in favour of H.'s bankers, &

handed them in part payment of H.'s overdraft with them. The partnership having been formed, B. assumed control of H.'s stock-in-trade assigned to him & applied the proceeds towards meeting the acceptance given to the bank. Subsequently H.'s old stock-in-trade was assigned to the firm, & an acceptance of the firm, falling due on the same date & for the same amount as that given by B. to the bank, was

substituted for this latter with the bank. Rather more than three months after the formation of the partnership & the original assignment to B., both H. & B. & their firm became bkpt.:—*Held*: the transactions were not fraudulent as against the separate creditors of H. under 13 Eliz. c. 5, the transfers of possession not having been colourable merely.—Re HARPER, BLACK & Co.** (1872), Mac. 944.—N.Z.**

Sect. 2.—Dispositions within the statute: Sub-sects. 2 & 3, A. & B.]

employ of the solr. or friends. Shortly afterwards the debtor assigned his shares in both cos. for value. More than six months afterwards debtor was adjudicated bkpt. on his own petition. He had no assets, & his judgment creditors were substantially his only creditors. The trustee in bkpcy. brought an action against each co. impeaching the above transactions under 13 Eliz. c. 5:—*Held*: the formation of the two cos. was a scheme to defeat & delay the creditors of the debtor, & the assignment of the partnership business to the first named co. was fraudulent & void under the statute & must be set aside.—*GONVILLE'S TRUSTEE v. PATENT CARAMEL CO., LTD., GONVILLE'S TRUSTEE v. GONVILLE, JARVIS & CO., LTD.*, [1912] 1 K. B. 599; 81 L. J. K. B. 291; 105 L. T. 831; 19 Mans. 37.

45. ——— No intention to defraud — Creditors taking debentures as security.]—Two debtors trading in partnership, whose liabilities amounted to £20,000, & who were unable to meet their engagements as they fell due, assigned their business as a going concern with the approval of the majority of their creditors to a private co. for £5,000 in fully paid-up shares, & £20,000 in debentures. By the arts. of assocn. of the co. the two debtors were made permanent directors of the co. at fixed salaries & did not vacate office if they became bkpt. The debentures were a floating charge in common form for five years, but became immediately enforceable if the usual events happened. The majority of the creditors accepted debentures as security for their debts. Within three months the debtors became bkpt., & the trustee in bkpcy. claimed that the assignment to the co. was void as against him under 13 Eliz. c. 5:—*Held*: the assignment was not void under the statute, for it was made in good faith & for valuable consideration & was not in fact fraudulent or entered into with a fraudulent intent.—*Re DAVID & ADLARD, Ex p. WHINNEY*, [1914] 2 K. B. 694; *sub nom. Re DAVID & JOHNSON, Ex p. WHINNEY*, 83 L. J. K. B. 1173; 110 L. T. 942; 30 T. L. R. 366; 58 Sol. Jo. 310; 21 Mans. 148.

Annotations:—*Reid. Re Davies, Ex p. Miles*, [1921] 3 K. B. 628. *Mentd. Re Gunsbourg*, [1920] 2 K. B. 426.

—— **Whether act of bankruptcy.]**—See *BANKRUPTCY*, Vol. IV., pp. 70, 71, Nos. 595–601.

—— **Whether formation of company can be impeached.]**—See *COMPANIES*, Vol. IX., pp. 62, 63.

SUB-SECT. 3.—CREDITORS' TRUST DEEDS.

A. For Creditors generally.

46. General rule.]—A person residing in India & trading there, & in the course of that trading drawing bills upon England for the value of other bills sent thither, upon which he got a profit by the exchange, & in the course of that sort of dealing

contracting debts in England, is a trader within bkpt. laws, & a commission of bkpt. may issue upon an act of bkpcy. committed by him in England, after he had quitted India. But an assignment of all his effects in trust for creditors, in certain proportions, executed by him while resident in India, is not an assignment fraudulent & void in itself, being intended honestly at the time, & assented to by the generality of the creditors.—*INGLISS v. GRANT* (1794), 5 Term Rep. 530; 101 E. R. 298.

47. Assignment pendente lite.]—Where G., a debtor to pltf., being sued by pltf., pending the suit & before execution, being insolvent executed an assignment of all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken:—*Held*: the assignment was not fraudulent, within 13 Eliz. c. 5, although made with the intent to delay pltf. of his execution.—*PICKSTOCK v. LYSTER* (1815), 3 M. & S. 371; 105 E. R. 650.

Annotations:—*Consd. R. v. Watson* (1816), 3 Price, 6; *Goss v. Neale* (1820), 5 Moore, C. P. 19. *Appl. Wolverhampton & Staffordshire Banking Co. v. Marston* (1861), 7 H. & N. 148. *Reid. Bell v. Robinson* (1824), 2 L. J. O. S. K. B. 192; *Marshall v. Barkworth* (1833), 4 B. & Ad. 508; *James v. Whitbread* (1851), 11 C. B. 406. *Mentd. Hickman v. Cox* (1857), 3 C. B. N. S. 523; *Clapham v. Atkinson* (1864), 4 B. & S. 730.

48. ———.]—B., on Dec. 3, 1862, in pursuance of a resolution passed on Nov. 25, 1862, at a meeting of his creditors, executed an assignment of the whole of his property to pltf., as trustees to pay & discharge ratably all the debts due & owing from B. to his creditors, being such persons as would have been entitled to rank as creditors in bkpcy. if the said B. had been adjudged bkpt. upon a petition for that purpose filed on Nov. 25, 1862:—*Held*: the deed was not void & fraudulent as against creditors within 13 Eliz. c. 5.—*EVANS v. JONES* (1864), 3 H. & C. 423; 5 New Rep. 95; 34 L. J. Ex. 25; 11 L. T. 636; 11 Jur. N. S. 784; 159 E. R. 595.

49. Assignment after judgment obtained.]—Replication to a plea, in bar to an extent in aid, that deft. was trustee under a prior deed of assignment for the general benefit of all insolvent creditors; that prosecutor of the extent was indebted to the Crown before & at the time of executing the deed; that insolvent then carried on trade, & was not then seized of lands, etc.; that insolvent was then indebted to prosecutor; that prosecutor had not executed the assignment, held bad on general demurrer. Such an assignment is not fraudulent against such a creditor, unless there have been a commission of bkpt. sued out; nor can such a deed be avoided by the effect of an extent, as a commission of bkpt. may.—*R. v. WATSON* (1816), 3 Price, 6; 146 E. R. 174.

Annotation:—*Reid. Giles v. Grover* (1832), 9 Bing. 128.

50. ———.]—An extrix., after probate & after judgment, recovered against her for a debt due from her testator, by deed assigned all his property & effects to trustees for the benefit of his creditors:—*Held*: the assignment was valid, as against

PART I. SECT. 2, SUB-SECT. 3. A.

47i. Assignment pendente lite.]—Where trustees claim under a deed of assignment expressed to be for the general benefit of creditors, & executed just before the signing of a judgment, & the intent of which was to prevent the property being taken under the execution upon such judgment; the

question is whether the transaction is *bona fide*, & really for the benefit of creditors, or a mere pretext or cover to protect the property for the benefit of the debtor.—*HAYWARD v. WHITE* (1843), 4 N. B. R. (2 Kerr) 304.—*CAN.*

47 ii. ———.]—A voluntary assignment in good faith by debtor for the

benefit of creditors is valid though it defeats the expected judgment of a particular creditor.—*DOUGLAS v. SANBORN* (1895), 1 N. B. Eq. Rep. 122.—*CAN.*

p. At discretion of trustees.]—The execution of a deed of assignment for the benefit of creditors, which, by reason of giving to the trustees of the

judgment creditor.—*WOLVERHAMPTON & STAFFORDSHIRE BANKING CO. v. MARSTON* (1861), 7 H. & N. 148; 30 L. J. Ex. 402; 4 L. T. 524; 7 Jur. N. S. 1040; 9 W. R. 790; 158 E. R. 428.

51. Assignment after execution issued.]—The occupier of a farm, upon the coming in of two executions & a distress for rent, notoriously assigned all his property, except a lease, to two persons in trust, to satisfy those executions & the distress, & to pay his creditors ratably, & all the rates & taxes, & in trust to pay the surplus, if any, to himself, whereupon the sheriff left his premises. The overseer & constable afterwards distrained for poor rates:—*Held*: the assignment was good in law.—*BELL v. ROBINSON* (1824), 2 L. J. O. S. K. B. 192.

52. At discretion of trustees — All creditors paid.]—*NUNN v. WILSMORE*, No. 74, *post*.

53. Possession taken by trustee.]—*PICKSTOCK v. LYSTER*, No. 47, *ante*.

54. — Knowledge of creditors.]—A. executed *bonâ fide* a deed assignment of all his property to B., in trust for such of A.'s creditors as should come in & execute the deed. B., who was not a creditor of A., took possession. C., a creditor of A., applied to B. for an explanation, & having received one, said he was satisfied, & took no steps to obtain payment:—*Held*: enough had taken place to create the relation of trustee & *cestui que trust* between B. & C., & consequently that the deed was not void against an execution creditor as being voluntary.—*HARLAND v. BINKS* (1850), 15 Q. B. 713; 20 L. J. Q. B. 126; 15 L. T. O. S. 344; 14 Jur. 979; 117 E. R. 629.

Annotations:—*Consd. Siggers v. Evans* (1855), 5 E. & B. 367. *Reid. Janes v. Whitbread* (1851), 11 C. B. 406; *Biron v. Mount* (1857), 24 Beav. 642; *Hobson v. Thellusson* (1867), 8 B. & S. 476; *Re Sanders' Trusts* (1878), 47 L. J. Ch. 667; *Runtz v. Longbourne* (1892), 8 T. L. R. 568; *Sier v. Bullen* (1915), 84 L. J. K. B. 1288. *Mentd. Forbes v. Limond* (1853), 1 Sm. & G. 554.

55. Void in bankruptcy only.]—A conveyance by a debtor, who afterwards becomes insolvent,

deed a discretion as to the extent to which they will recognise preferential claims, is not necessarily void under 13 Eliz. c. 5, as being made with intent to delay, hinder or defraud creditors. To make it void under the statute, evidence *dehors* the deed must be given to show the intent.—*DAVEY v. DANBY* (1887), 13 V. L. R. 957.—*AUS.*

56 i. Surplus for debtor.]—An assignment for benefit of creditors provided for distribution of assets by the assignee & to pay the balance remaining after distribution to the assignor:—*Held*: as the deed contained a resulting trust in favour of debtor, it was void under 13 Eliz. c. 5.—*WHITMAN v. UNION BANK OF CALIFAX* (1888), 16 S. C. R. 410.—*CAN.*

56 ii. —.]—A resulting trust in favour of debtors, after all creditors have been paid in full contained in a creditor's deed, does not render it fraudulent & void.—*TRUEMAN v. WOODWORTH* (1894), 1 N. B. Eq. Rep. 83.—*CAN.*

q. Intention to defeat other creditors.]—A debtor, by deed, reciting that he had become embarrassed, assigned all his property, including land worth about \$1,500, in trust to pay first the parties named, being those to whom he had become indebted on his own account, whose claims did not exceed \$110; & secondly, the other

for the benefit of his creditors, is only void as against the assignees, & is not fraudulent, though made with the object of defeating or postponing persons claiming under a decree.—*LEE v. GREEN* (1856) 6 De G. M. & G. 155; 25 L. J. Ch. 269; 26 L. T. O. S. 302; 2 Jur. N. S. 170; 4 W. R. 270; 43 E. R. 1190, L. C.

Annotation:—*Mentd. Punchard v. Tomkins* (1882), 31 W. R. 286.

56. Surplus for debtor.]—A trader insured his stock-in-trade & other effects. These were destroyed by fire. He assigned the policies to trustees on trust to pay & divide the moneys received thereunder among all his creditors ratably, & to pay the balance, if any, to himself:—*Held*: the assignment was not void under 13 Eliz. c. 5, at the suit of a creditor whose debt was under £50.—*GREEN v. BRAND* (1884), Oab. & El. 410; 1 T. L. R. 79.

57. Deed accepted by majority.]—Deed held not fraudulent against creditors.—*HORBERY v. WHITWHAM* (1887), 3 T. L. R. 758, D. C.

58. Intention to defeat particular creditor—Consideration past debt.]—A deed in favour of creditors, given for a past consideration, in order to defeat a particular creditor, is not invalid, if it is *bonâ fide* & not unreasonable as regards creditors, & not a mere cloak for retaining a benefit to the grantor.—*MASON v. BRITON MEDICAL & GENERAL LIFE ASSOCN., LTD.* (1888), 4 T. L. R. 755, C. A.

B. Colourable Deeds.

59. General rule.]—A farmer, S., gave a bill of sale of all his farming stock to secure a debt; the agent of the vendee, B., took possession, & resided on the farm while he converted the stock, but the vendor also continued to reside on the farm, & exercised acts of ownership over parts of the stock:—*Held*: the debt being *bonâ fide* due, & the bill of sale taken with a view to recover that debt, the jury were warranted in finding the bill of sale good against a judgment creditor taking the stock in execution.

\$2,877, & were due by about 160 debtors, & the lands formed the most valuable portion of the assets:—*Held*: the assignment was fraudulent & void as against creditors, the chief objection being that the sale of the land was postponed till after collection of the debts.—*CORNWALL v. GAULT* (1863), 23 U. C. R. 46.—*CAN.*

t. Assignment of land in trust for creditors.]—O., debt., claimed under a sheriff's deed given under an execution against lands & also under a deed from M. At the time execution issued, under which O. purchased, one of the parties to the suit was dead & the interest of the others had passed to M. by conveyance in trust to sell & apply the proceeds to pay creditors & the deed from M. was a breach of trust by M. with O.'s knowledge:—*Held*: a deed of assignment of lands in trust for creditors, in the circumstances of this case, was not void under 13 Eliz. c. 5.—*MENAB v. PEER* (1882), 32 C. P. 545.—*CAN.*

u. Power reserved for trustee—To carry on business for benefit of creditors.]—*ROBINSON v. HUSTON* (1886), 4 Man. L. R. 71.—*CAN.*

PART I. SECT. 2, SUB-SECT. 3.—B.

b. What assignments are colourable—Assignments benefitting debtor—Bail for assignor in case of arrest.]—A

creditors who should execute the assignment. There was no evidence of debts except about £150:—*Held*: there was nothing in the nature of the trusts created for which the deed could be held void in law; but the ct. granted a new trial, considering that there was much ground for suspecting that the few direct claims had been made a pretence for tying up all debtor's property, & defeating other creditors.—*BALKWELL v. BEDDOME* (1858), 16 U. C. R. 203.—*CAN.*

r. Benefit restricted to certain creditors.]—When property is conveyed in trust to pay debts, it cannot be considered as a fraudulent conveyance against creditors not included with the creditors for whom the trust is declared.—*DOE d. LAURASON v. CANADA CO.*, (1843), 6 O. S. 428.—*CAN.*

s. Power of assignee to defer realisation.]—A retail merchant assigned all his property real & personal to a trustee, then his clerk. The assignment provided that the assignee should collect the debts, & sell so much of the goods, as should not be required to wind up the business, & afterwards should sell the lands. With the money he was directed, after paying expenses of the assignment, salaries, etc., & retaining ten per cent. for his own trouble, to pay the creditors ratably. The debts to be collected amounted to

Sect. 2.—Dispositions within the statute: Sub-sect. 3, B. & C.]

I left it to the jury whether this possession of B.'s was an honest one, for that if the bill of sale to B. were attended with a possession, there being a debt honestly due to B., S. had a right to make this conveyance to B. for securing his debt. . . . I told them also this, that even if there was a *bond fide* debt, due from S. to pltf., yet if they thought that, beyond that debt, the conveyance was meant to colour & protect the residue of the property from S.'s other creditors, it was void for the excess (GIBBS, C.J.).—BENTON v. THORNHILL (1816), 7 Taunt. 149; 2 Marsh. 427; 129 E. R. 60.

Annotation:—*Refd.* Martindale v. Booth (1832), 3 B. & Ad. 498.

60. ——]—If a person, expecting a *fi. fa.* will be sued out against him, make an assignment by deed of his goods to trustees for the benefit of his creditors, & the goods be afterwards taken under the *fi. fa.*, & an action of trover for them be brought against the sheriff by the assignees, it will be a question for the jury under all the circumstances, whether the deed was fraudulent or not, that is, whether it was *bond fide* meant to convey the goods to the trustees for the benefit of the creditors generally, or whether it was a pretext only, & the goods were, notwithstanding the deed, really to belong to the assignor, & this is a question of fact, & not a question of law. The fact that a deed of this kind, was executed with intent to avoid a particular execution, does not in point of law make it void, neither will the fact of the assignor remaining in possession, according to the terms of the deed, set it up if the jury think that the deed was a fraud.—RICHES v. EVANS (1840), 9 C. & P. 640, N. P.

61. ——]—MASON v. BRITON MEDICAL & GENERAL LIFE ASSOCN., LTD., No. 58, *ante*.

62. What assignments are colourable—Question of fact.]—RICHES v. EVANS, No. 60, *ante*.

63. —— **Deed concealed from creditors.]—**ANON. (circa 1660), cited in Freem. Ch. at p. 237; 22 E. R. 1182.

Annotations:—*Distd.* Leukener v. Freeman (1699), Freem. Ch. 236. *Refd.* Hungerford v. Earle (1692), Freem. Ch. 120.

64. —— **Whether concealment presumed.]—**LEUKENER v. FREEMAN (1699), Freem. Ch. 236; 22 E. R. 1182; *sub nom.* LEWKNER v. FREEMAN, Prec. Ch. 105; 1 Eq. Cas. Abr. 149.

65. —— **Assignments benefiting debtor—Half to debtor—Residue to creditors.]—**ESTWICK v. CAILLAUD, No. 423, *post*.

66. —— **Freedom from molestation for limited period.]—**Where A. by deed assigned all his effects at W. to trustees, for the benefit of certain creditors for four years, & the trustees were empowered to sell at the expiration of two years, or sooner, if A. should direct, & apply the proceeds of the sale in discharge of the debts of such creditors, who covenanted that A. might continue at home or abroad, & that they would not molest him for two years from the date of the deed:—*Held*: such assignment was valid, & not within 13 Eliz. c. 5, & the property was thereby pro-

tected against a judgment creditor, who had sued out execution against A. after the deed was executed.—GOSS v. NEALE (1820), 5 Moore, C. P. 19.

67. —— **Power to employ debtor in winding up business.]—**An assignment of all a trader's effects, *bond fide* executed, to a trustee for the general benefit of all his creditors, is not void, either at common law or under 13 Eliz. c. 5, though it contains a clause empowering the trustee to employ the grantor "or any other person or persons, in winding up the affairs of the grantor, & in collecting & getting in his estate & effects thereby assigned, & in carrying on his trade, if thought expedient by him"—if it appears from the whole scope of the deed, that the carrying on the trade was merely subsidiary to the general purpose of sale & distribution.—JANES v. WHITBREAD (1851), 11 C. B. 406; 20 L. J. C. P. 217; 17 L. T. O. S. 155; 15 Jur. 612; 138 E. R. 530.

Annotations:—*Folld.* Coates v. Williams (1852), 7 Exch. 205. *Consd.* Mason v. Briton Medical & General Life Assn. (1888), 4 T. L. R. 755. *Refd.* Cox v. Hickman (1860), 8 H. L. Cas. 268. *Mentd.* Hidson v. Barclay (1864), 3 H. & C. 361.

68. —— **No intention to make future profits.]—***Seemle*: an assignment by deed to a trustee, for the benefit of creditors, which empowers the trustee to employ debtor or other person "in winding up his affairs & collecting & getting in his estate, & carrying on his trade," is not void as against creditors, if it appears upon the instrument that the main object of the parties to it was to wind up debtor's business for the benefit of the creditors, & not to carry on the business with a view to future profits.—COATES v. WILLIAMS (1852), 7 Exch. 205; 21 L. J. Ex. 116; 155 E. R. 918.

Annotation:—*Refd.* Hickman v. Cox (1857), 3 C. B. N. S. 523.

69. —— **Assignment to one creditor—Protection from remainder.]—**SMITH v. HURST, No. 427, *post*.

70. —— **Trust of surplus.]—**It is said that the deed [of arrangement] was in fraud of creditors, because it contains an ultimate trust for the debtor himself. But an assignment of all a man's property is not necessarily fraudulent; it is *prima facie* good. If there be anything making it fraudulent it must be proved, & nothing of the kind is shown here (KELLY, C.B.).—JOHNSON v. OSENTON (1869), L. R. 4 Exch. 107; 38 L. J. Ex. 76; 19 L. T. 793; 17 W. R. 675.

Annotations:—*Mentd.* *Re Prior, Ex p.* Osenton (1869), 4 Ch. App. 690; Exchange Bank of Yarmouth v. Blethen (1885), 10 App. Cas. 293.

—— **Dividends of creditors not executing within limited time—Payable to debtor.]—**SPENCER v. SLATER, No. 80, *post*.

72. —— **Maintenance payable at discretion of trustees.]—**BOLERO v. LONDON & WESTMINSTER DISCOUNT CO., No. 81, *post*.

73. —— **Not conclusive of intention to delay.]—**MASKELYNE & COOKE v. SMITH, No. 425, *post*.

74. —— **Benefit reserved for debtor's wife—Trust of surplus—Wife separated from husband.]—**A deed of trust conveyed the lease of a farm, &

clause in the deed of assignment, whereby the trustees agree to become bail for the assignors in case they are arrested, or their security for the gaol

limits, & are to be indemnified out of the trust property, is not fraudulent; such clause, though the terms are general, will be necessarily confined to

arrests for debts existing at the time of the assignment.—BURNHAM v. WHITE (1844), 4 N. B. R. (2 Kerr) 571.—CAN.

all the grantor's effects, & the trustees, in consideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, & out of the produce to reimburse the trustee the sum advanced by him to the grantor, & all other the trustee's demands upon him, & then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife, whose property the bulk of it originally was, as a separate maintenance for her in consequence of a separation between them, on account of her husband's ill usage:—*Held*: such deed was not fraudulent or void as against creditors, it appearing to have been made *bond fide* at the time, & all the creditors of the grantor known at the time had, upon application to the trustees, received payment of their debts.—*NUNN v. WILSMORE* (1800), 8 Term Rep. 521; 101 E. R. 1524.

Annotations:—*Refd.* *Doe d. Otley v. Mannin* (1807), 9 East, 59; *Bach v. Meats* (1816), 5 M. & S. 2. *Mentd.* *Westmeath v. Westmeath* (1821), Jac. 126.

75. ——— & children—Conveyance irrevocable.]—*GODFREY v. POOLE*, No. 219, *post*.

76. ——— Assignor remaining in possession—Under provisions of deed.]—*RICHS v. EVANS*, No. 60, *ante*.

77. ——— Possession terminable on execution.]—*ALTON v. HARRISON, POYSER v. HARRISON*, No. 252, *post*.

78. ——— For purpose of paying debts by instalments.]—A trader unable to pay his debts executed a deed whereby he conveyed & assigned to a trustee for his creditors all his estate & effects, including his freehold dwellinghouse & shop where he carried on his business, upon trust to permit him to carry on his business for the purpose of paying off his debts by certain instalments which he thereby covenanted to pay; & upon default in the payment of such instalments the trustee was empowered to enter into possession of the whole of the property & sell the same, & pay the creditors ratably out of the proceeds; & the trader thereby appointed the trustee his attorney for executing every document necessary or expedient for carrying into effect the trusts & provisions of the deed which was registered under Deeds of Arrangement Act, 1887 (c. 57). Five months after the date of the deed the trader made default in payment of the instalments, & the trustees entered into possession of the property comprised therein, & a month after such entry into possession by the trustee the trader was adjudged bkpt. Two months after the trader's bkpcy., the trustee under the deed sold the trader's house & shop by auction, & the purchaser required the concurrence of the trustee in bkpcy. in the conveyance of the property to him by the trustee under the deed. It was admitted that all the creditors of the trader did not assent to the deed:—*Held*: although the deed was not void under 13 Eliz. c. 5, as there was nothing to show that the trader thereby intended to defeat, hinder, or delay his creditors, yet the purchaser was right in his

contention that the concurrence of the trustee in bkpcy. in the conveyance to him was necessary to confer a good title to the property, as otherwise he would be liable to legal proceedings at the instance of such trustee.—*Re POPPLETON & JONES' CONTRACT* (1896), 74 L. T. 582; 40 Sol. Jo. 478.

C. Deeds Imposing Obligations on Creditors.

79. Deed creating partnership—Between executing creditors & debtor.]—An assignment to trustees for the benefit of all creditors who may execute the deed, is not valid, as against creditors who do not execute, if it authorise the trustees to carry on debtor's trade, & contain such terms that the creditors subscribing would become partners in the business.

The deed imposed such terms as might have constituted a partnership among the persons executing it; & those were terms to which creditors were not bound to submit (*LORD DENMAN, C.J.*).—*OWEN v. BODY* (1836), 5 Ad. & El. 28; 2 Har. & W. 31; 6 Nev. & M. K. B. 448; 5 L. J. K. B. 191; 111 E. R. 1077.

Annotations:—*Expld.* *Re Stanton Iron Co., Re Winding up Acts* (1855), 21 Beav. 164. *Consd.* *Cox v. Hickman* (1860), 8 H. L. Cas. 268. *Distd.* *Wheatcroft v. Hickman* (1860), 9 C. B. N. S. 47. *Refd.* *Coates v. Williams* (1852), 7 Exch. 205; *Siggers v. Evans* (1855), 5 E. & B. 367; *Gooch v. Deakin* (1862), 1 New Rep. 95; *Evans v. Jones* (1864), 3 H. & C. 423; *Hidson v. Barclay* (1864), 3 H. & C. 361; *Greenberg v. Ward* (1866), 12 Jur. N. S. 524; *Mason v. Briton Medical & General Life Assoon.* (1888), 4 T. L. R. 755.

80. Creditors executing deed to indemnify trustees—Against personal loss or risk.]—Debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees on trust to carry on his business, or get in & realise his estate in the manner they might deem expedient, & apportion the residue of the proceeds after payment of expenses, etc., according to an equal pound rate among his creditors. It was provided by the deed that a dividend should only be payable to a creditor on his executing or assenting to the deed; & that, if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustees to the debtor. The deed also provided that the executing & assenting creditors should indemnify the trustees against any personal loss or risk they might sustain, otherwise than by their own wilful negligence or default, by reason of their proceedings under the deed:—*Held*: the deed was fraudulent & void under 13 Eliz. c. 5, as tending to defeat or delay creditors.

The creditors, in order to get their dividends, must enter into obligations not required of them in the ordinary course of law (*MELLOR, J.*).—*SPENCER v. SLATER* (1878), 4 Q. B. D. 13; 48 L. J. Q. B. 204; 39 L. T. 424; 27 W. R. 134, D. C.

Annotations:—*Distd.* *Boldero v. London & Westminster Loan & Discount Co.* (1879), 5 Ex. D. 47. *Apprvd.* *Maskelyne & Cook v. Smith*, [1903] 1 K. B. 671. *Refd.* *Green v. Brand* (1884), Cab. & El. 410; *Re Adamson, Ex p. Viney* (1894), 2 Mans. 153.

In respect of negotiable instrument endorsed to them by debtors—Intention to sell business as going concern.]—Debtors in insolvent

PART I. SECT. 2, SUB-SECT. 3.—C.

c. Creditors executing deed releasing debtor in full.]—An assignment for the benefit of creditors is fraudulent as against non-executing creditors if it exacts a release in full from those who execute.—*MAULSON v. TOPPING* (1859), 17 U. C. R. 183.—CAN.

d. ———.]—A deed exacting a release is not bad in this province.—*MAGUIRE v. HART* (1897), 28 S. C. R. 272.—CAN.

e. ——— Subsequent waiver.]—B. on Mar. 31, 1859 (after 22 Vict. c. 96), assigned all his personal estate to trustees in trust for all his creditors;

the assignment contained a release to him from all further liability. The deed was executed by B. & the trustees, both of whom were creditors. Afterwards, & before execution was placed in the sheriff's hands, B. executed a deed-poll, authorising the trustees to pay all creditors unconditionally without requiring them to execute the

Sect. 2.—Dispositions within the statute: Sub-sect. 3, C., D., E. & F.; sub-sects. 4, 5, 6, 7, 8, 9 10. Sect. 3: Sub-sect. 1.]

circumstances executed a deed by which they conveyed all their estate to trustees on trust to sell in such manner as they might think proper, & to divide the residue of the proceeds after paying expenses ratably among the creditors parties to the deed, & if the trustees thought fit, creditors who refused or neglected to execute, & if the trustees thought proper, but not otherwise, to pay the dividends on debts due to non-assenting creditors to debtors. The deed provided for the payment of maintenance to debtors if the trustees thought fit, & the executing creditors respectively indemnified debtors & the trustees in respect of the bills of exchange & promissory notes made or indorsed to them respectively by debtors in respect of the scheduled debts:—*Held*: the deed was not void under 13 Eliz. c. 5.

Here the primary object was a transfer for purposes of sale as a going concern, & not for the purpose of carrying on the business (*POLLOCK, B.*).—*BOLDERO v. LONDON & WESTMINSTER DISCOUNT CO.* (1879), 5 Ex. D. 47; 42 L. T. 56; 28 W. R. 154, D. C.

Annotations:—*Reid. Green v. Brand* (1884), Cab. & El. 410; *Maskelyne & Cook v. Smith*, [1903] 1 K. B. 671.

D. Revocable Deeds.

82. General rule.]—(1) A. conveys lands to the use of himself for life, with power to mortgage such part as he shall think fit, remainder to trustees to sell to pay all his debts, & afterwards becomes indebted by judgments, bonds & simple contract. This is fraudulent, as against the judgment creditors, & they shall not be compelled to take a satisfaction in average with the other creditors, having no notice of the settlement.

(2) A. makes a voluntary settlement, reserving to himself a power to mortgage what part he pleased. This amounts in effect to a power of revocation, & therefore fraudulent as against creditors by judgment.—*TARBACK v. MARBURY* (1705), 2 Vern. 510; 1 Eq. Cas. Abr. 148; 23 E. R. 926.

Annotation:—*Reid. Leukener v. Freeman* (1699), Freem. Ch. 236.

83. —.]—*SMITH v. HURST*, No. 427, *post*.

84. Deed revocable in effect—Power reserved to debtor to mortgage.]—*TARBACK v. MARBURY*, No. 82, *ante*.

Whether deeds revocable.]—*See, generally, BANKRUPTCY*, Vol. V., pp. 1179 *et seq.*

Power or interest reserved to grantor—As evidence of fraudulent intent.]—*See, generally, Part I., Sect. 4, sub-sect. 10, post.*

E. Intent to Defeat or Delay Creditors.

See No. 58, *ante*, & Sect. 4, sub-sect. 11, *post*.

assignment or discharge him:—*Held*: the assignment was void as against execution creditors, & its validity was not restored by the second deed.—*BURRITT v. ROBERTSON* (1859), 18 U. C. R. 555.—CAN.

PART I. SECT. 2, SUB-SECT. 3.—D.

82 i. General rule.]—A deed which the grantor has power to revoke & which he attempts to use as a shield against creditors cannot be otherwise than fraudulent & void against creditors.—*LEACOCK v.* (1886), 3 Man. L. R. 645.—CAN.

i. — Revocable until assented to by creditors.]—An assignment of goods to a trustee for the benefit of certain specified creditors gives no legal right to those creditors unless assented to by them, but the property remains subject to the control of the assignor, who may at any time revoke the trust.—*FALCONER v. SAWYER* (1851), 2 N. S. R. (James) 277.—CAN.

ment for the benefit of creditors—voluntary & revocable until communicated to, & expressly or implicitly assented to, by the creditors or some of

F. Preference or Exclusion of Creditors.

See Sect. 4, sub-sect. 11, *post*.

SUB-SECT. 4.—MARRIAGE SETTLEMENTS.

See Sect. 3, sub-sect. 3, *post*.

SUB-SECT. 5.—SEPARATION DEEDS.

See HUSBAND & WIFE.

SUB-SECT. 6.—PURCHASES IN JOINT NAMES.

85. Purchase in joint names of father & son.]—*STILEMAN v. ASHDOWN*, No. 291, *post*.

SUB-SECT. 7.—PURCHASES IN NAMES OF THIRD PARTIES.

86. Trust for purchaser for life—Remainder to volunteer—Purchase of leasehold.]—A. purchases a lease of a house in the name of B. & takes a declaration of trust to permit A. to enjoy for life, & then in trust for one who, lived with him as his wife, & was so reputed. *Semble*: this lease is not assets of A. nor liable to his creditors after his death; for when a man purchases, he may settle the estate as he pleases.—*FLETCHER v. SEDLEY (LADY)* (1704), 2 Vern. 490; 1 Eq. Cas. Abr. 148; 23 E. R. 913.

Annotations:—*Consd. Barrack v. M'Culloch* (1856), 3 K. & J. 110. *Reid. Peacock v. Monk* (1748), 1 Ves. Sen. 127; *Glaister v. Hower* (1802), 8 Ves. 195.

87. Purchaser indebted to nominee.]—*PROCTOR v. WARREN*, No. 124, *post*.

88. Purchase by way of advancement—Purchaser indebted at time of purchase—Purchase of leasehold.]—*PROCTOR v. WARREN*, No. 124, *post*.

89. — — — Since Judgments Act, 1838 (c. 110)—Purchase of stock.]—Money & bank-notes, being liable under sect. 12 of above Act to be attached by creditors, are goods & chattels within 13 Eliz. c. 5. Since the passing of Judgments Act, 1838 (c. 110), an investment of money in the purchase of stock in the names of trustees, upon trust for the children of the settlor, he not having at the time sufficient property besides the money so invested to pay the debts he then owed, is void under 13 Eliz. c. 5; because, by Judgments

them.—*BRIGHAM v. MORTON* (1877), 4 N. Z. Jur. N. S. 6.—N.Z.

PART I. SECT. 2, SUB-SECT. 7.

h. Purchase by way of advancement—Purchaser not indebted at time of purchase.]—A. conditionally purchased land in Sept. 1874, in the name of his daughter, deft., then an infant 2 years old, & built a house on it. He was not in debt at the time of the selection, nor did the deposit money comprise all his property. He got into difficulties in 1878-9, & was made insolvent in Jan. 1880. His official assignee filed

Act, 1838 (c. 110), s. 12, the money or stock may be taken in execution, & therefore the effect of such a settlement would now be to delay, hinder, or defraud the creditors of the settlor.

For the same reason, any purchase of property by a settlor so indebted, in the name of a child or other person, would now be void under 13 Eliz. c. 5.—**BARRACK v. M'CULLOCH** (1856), 3 K. & J. 110; 26 L. J. Ch. 105; 28 L. T. O. S. 218; 3 Jur. N. S. 180; 5 W. R. 38; 69 E. R. 1043.

Annotations:—**Reid**. Neale v. Day (1858), 7 W. R. 45; R. v. Smith (1870), L. R. 1 C. C. R. 266. **Mentd.** Stephens v. Heathcote (1860), 1 Drew. & Sm. 138; Lumley v. Timms (1873), 28 L. T. 608; Birkett v. Birkett (1908), 98 L. T. 540; *Re Mackenzie*, Mackenzie v. Edwards-Moss, [1911] 1 Ch. 578; Montgomery v. Blows, [1916] 1 K. B. 899.

SUB-SECT. 8.—PURCHASER BY WAY OF ADVANCEMENT.

90. Whether within statute.—A purchase by way of advancement is not within 27 Eliz. c. 4, & *semble*, not within 13 Eliz. c. 5.—**DREW v. MARTIN** (1864), 2 Hem. & M. 130; 3 New Rep. 637; 33 L. J. Ch. 367; 10 L. T. 291; 10 Jur. N. S. 356; 12 W. R. 547; 71 E. R. 411.

Annotations:—**Mentd.** Nicholson v. Mulligan (1869), 17 W. R. 659; *Re Whitehouse*, Whitehouse v. Edwards (1887), 37 Ch. D. 683.

Purchase in name of third party.—*See* Sub-sect. 7, *ante*.

Purchase in joint names.—*See* Sub-sect. 6, *ante*.

SUB-SECT. 9.—GIFTS.

See Sect. 4, sub-sect. 2, C., *post*.

SUB-SECT. 10.—UNDISCLOSED CONVEYANCES.

See Sect. 4, sub-sect. 6, *post*.

a bill against the daughter, praying that she might be declared a trustee for the creditors:—**Held**: the evidence was insufficient to justify a declaration that the conditional purchase was void against A's creditors under 13 Eliz. c. 5.—**STEPHEN v. STALLWORTHY** (1881), 2 N. S. W. Eq. 55.—**AUS.**

PART I. SECT. 3, SUB-SECT. 1.

k. General rule.—A conveyance executed by a debtor in satisfaction of or as security for a debt, if intended to operate between the parties, is valid, though obtained in order to gain priority to an expected claim of the Crown under a recognisance.—**A.-G. v. HARMER** (1869), 16 Gr. 533.—**CAN.**

l. —.—A conveyance by an insolvent debtor in good faith & for valuable consideration, though made with intent to defeat, creditors, to the knowledge of the purchaser, is not void under 13 Eliz. c. 5.—**WHITE v. HAM** (1904), 24 C. L. T. Occ. N. 244; 2 N. B. Eq. Rep. 575.—**CAN.**

m. —.—A conveyance will not be set aside where the evidence shows that the sale was made *bond fide* for a valuable consideration with the intent to pass the property, & in such case it is immaterial whether or not there was an intention to defeat or defraud a creditor.—**DYER v. MCGUIRE** (1909),

4 N. B. Eq. Rep. 203; 7 E. L. R. 260.—**CAN.**

n. —.—Where it is sought to set aside a conveyance as being fraudulent under 13 Eliz. c. 5, & the conveyance was made for valuable consideration, the ct. will not act unless it be shown that there existed an intention to defraud creditors as distinct from a mere desire to prefer one set of creditors to another.—**PERKINS ELECTRIC CO. v. ORPEN** (1922), 70 D. L. R. 397.—**CAN.**

o. —.—A genuine sale made for good & valid consideration to one creditor, even if effected to delay & defeat another, apart from cases in which either insolvency or bankruptcy is involved, is not void.—**SUBA BIBI v. BALGOBIND DASS** (1886), 1 L. R. 8 All. 178.—**IND.**

p. —.—In a proceeding to set aside a conveyance of property under stat. 13 Eliz. c. 5, if the conveyance is voluntary, the intention of the grantor only can be considered; but, if it is founded upon valuable consideration, then before it can be set aside it must be shown that the grantee had express or implied knowledge of the fraudulent intention of the grantor, & that there was an actual & express intent to defeat, or delay, or defraud creditors in the parties to the conveyance.—*Re HUME, Ex p. OFFICIAL ASSIGNEE* (1909), 28 N. Z. L. R. 793.—**N.Z.**

SECT. 3.—PROTECTION OF BONÂ FIDE PURCHASERS FOR VALUE.

SUB-SECT. 1.—IN GENERAL.

91. Against what debts—Crown debt.—(1) A sale by a debtor to the King, of a lease for years is good; such lease shall not be extended in the hands of the purchaser for the King's debt.

(2) A sale of chattels *bond fide* is good after judgment, but not after execution awarded.—**FLEETWOOD'S CASE** (1610), 8 Co. Rep. 171 a; 77 E. R. 731.

Annotations:—*As to* (1) **Consd.** R. v. Smith (1810), Wight. 34. **Reid**. Harwood v. Phillips (1663), O. Bridg. 464; R. v. Baden (1694), Show. Parl. Cas. 72; R. v. Curtis (1750), Park. 95; Giles v. Grover (1832), 9 Bing. 128. **Generally, Reid**. Westbrook v. Blythe (1854), 3 E. & B. 737; Carter v. Hughes (1858), 27 L. J. Ex. 225. **Mentd.** Audley v. Halsey (1629), Oro. Car. 148; Manby v. Scot (1663), 1 Keb. 361.

92. What interests protected—Legal or equitable.—By a settlement void against creditors under 13 Eliz. c. 5, s. 2, a reversionary life interest was reserved to the settlor, which he subsequently charged by way of equitable mtge. to a person who advanced his money without notice that the settlement was fraudulent:—**Held**: sect. 5 protected a subsequent purchaser, without notice, of any interest under such a settlement, whether the interest was legal or equitable, & the deed impeached was not void in respect of his interest.—**HALIFAX JOINT STOCK BANKING CO. v. GLEDHILL**, [1891] 1 Ch. 31; 60 L. J. Ch. 181; 63 L. T. 623; 39 W. R. 104; 7 T. L. R. 46.

Annotations:—**Reid**. *Re Williams & Parry's Contract* (1895), 72 L. T. 869; Harrods v. Stanton, [1923] 1 K. B. 516.

93. Purchaser without notice—Conveyance in satisfaction of statute acknowledged.—**CHURCHILL v. GROVER** (1663), Nels. 89; 1 Cas. in Ch. 35; Freeman. Ch. 176; 21 E. R. 797.

Annotation:—**Reid**. Smithson v. Thompson (1730), 1 Atk. 520.

94. Of intention to delay creditors.—In order to set aside a sale of goods, *quoad* the purchaser, on the ground that it was made with the intention of defrauding the creditors of the seller, it must be shown that the purchaser was aware of

q. What interests protected—Innocent parties.—An innocent party can retain no benefit under a fraudulent conveyance unless there is some valuable consideration proceeding from him to the assignee, so that the parties cannot be placed in their original position.—**COX v. WORRALL** (1894), 20 N. S. R. 366.—**CAN.**

94 i. Purchaser without notice—Of intention to delay creditors.—In order to avoid a sale under the provisions of 13 Eliz. c. 5, as being made with the intention of defrauding, defeating, & delaying creditors, it is necessary that good consideration shall not have been given & that the person to whom the property is assigned shall not have received it *bond fide*, & with notice of the fraud of the assignor.—**ASKEW v. DANBY** (1892), 18 V. L. R. 335.—**AUS.**

94 ii. —.—A conveyance is valid where an actual sale takes place & claimant bought *bond fide*, although there was fraudulent intent on the part of the debtor.—**STEELE v. RAMSAY** (1885), 3 Man. L. R. 305; 1 Terr. L. R. 1.—**CAN.**

94 iii. —.—A transfer of property made to certain creditors fraudulently & in contemplation of the insolvency of the transferor is not voidable at the suit of another creditor

Sect. 3.—Protection of bond fide purchasers for value: Sub-sect. 1.]

that intention, & that he conspired with the seller to carry it into effect.—*BENTLIFFE v. GARNETT* (1844), 1 Car. & Kir. 326.

95. — Mortgagee from original purchaser.]

—A trader in embarrassed circumstances, possessed of freehold property subject to a mtge. sold the same on Mar. 17, to his brother, in consideration of the money paid to the mtgee., & in consideration of a further sum then due from the vendor to the purchaser, the conveyance stating the whole consideration as money paid at the time.

The purchaser, on Apr. 15, mortgaged the property to a third party. On Sept. 11, the trader became bkpt. On a bill filed by his assignees to set aside the sale, on the ground of fraudulent preference with a view to defeat the creditors, & against the mtgee. on the ground of notice to the mtgee. of the state of embarrassment of the vendor at the time of the sale; the ct. considered that the question as to the validity of the sale was more than strong enough for further inquiry, & directed an issue to try whether the deed of Mar. 17 was fraudulent; but, as to the mtgee., that pltf. had failed in making any case against him.—*FOLLETT v. WESLEY* (1846), 10 Jur. 327.

96. — — — By registered bill of sale.]—W., by bill of sale, registered under 17 & 18 Vict. c. 36, conveyed goods to M. M., in W.'s presence, assigned the goods to B. to secure an advance made *bond fide*. W. had been a colliery agent, but for six months before the date of the bill of sale had been out of employment. There was evidence that the conveyance to M. was fraudulent & void as against W.'s creditors under 13 Eliz. c. 5:—*Held*: the conveyance to B. being *bond fide* & without notice, his title was good as against such creditors.—*MOREWOOD v. SOUTH YORKSHIRE RAILWAY & RIVER DUN CO.* (1858), 3 H. & N. 798; 28 L. J. Ex. 114; 157 E. R. 600; *affg.* S. C. *sub nom.* *MOREWOOD & BAINE v. SOUTH EASTERN RY. CO.*, 1 F. & F. 508.

Annotations:—*Apld.* *Harrods v. Stanton*, [1923] 1 K. B. 516. *Reid.* *Richards v. Johnson* (1859), 28 L. J. Ex. 322; *Karet v. Koshor Meat Supply Assoon.* (1877), 46 L. J. Q. B. 548; *Hopkins v. Gudgoun*, [1906] 1 K. B. 690; *Re Hart, Ex p. Green*, [1912] 2 K. B. 257. *Mentd.* *Beales v. Tennant* (1860), 29 L. J. Q. B. 188; *Smith v. Cheese* (1875), 1 C. P. D. 60.

97. — — Mortgagee of interest under fraudulent settlement.]—*HALIFAX JOINT STOCK BANKING CO. v. GLEDHILL*, No. 92, *ante*.

98. — — Under bill of sale.]—A man who was in debt executed a deed of gift of his furniture in favour of his wife, who thereafter granted a bill of sale upon the furniture to a person who took for value & without notice. Subsequently the deed of gift was declared void under 13 Eliz. c. 5, as being in fraud of creditors. The furniture having been taken in execution by a judgment creditor the bill of sale holder claimed the furniture under the bill of sale. Interpleader proceedings were instituted in which the execution creditor alleged that the bill of sale was void under sect. 5 of Bills of Sale, 1878, Amendment Act, 1882

(c. 43), on the ground that grantor was not the "true owner" of the furniture at the time of the execution of the bill of sale:—*Held*: until the deed of gift was set aside the donee thereunder was the "true owner" of the furniture, & as she had conveyed the furniture for value without notice before the deed of gift was set aside the claimant obtained a good title under the bill of sale.—*HARRODS, LTD. v. STANTON*, [1923] 1 K. B. 516; 92 L. J. K. B. 403; 128 L. T. 685; [1923] B. & C. R. 70, D. C.

99. — — Mortgagee from insolvents — No intent to delay creditors—Intention of carrying on business & paying creditors.]—The partnership deed of a banking business provided that the whole of the capital of the business as appearing in the private ledger of the bank belonged to the senior partner, T. B., & that on his death the surviving partners should have the option of purchasing his share of the business at its net value after providing for the liabilities of the business. The capital as appearing in the private ledger included the R. & S. estates, both freeholds; the legal estate of R. was in T. B. & the legal estate of S. was in T. B. & D. jointly, D. being a former partner. In 1908 T. B. died, & by his will appointed P. & F. B., his partners, & R. his exors., & devised & bequeathed to them all his real & personal estate upon trust for sale & thereout to pay his debts & testamentary & funeral expenses & to hold the net balance upon trust for F. B. At the death of T. B. the banking business was insolvent, its liabilities largely exceeded its assets, & he had no separate estate. The surviving partners concealed the insolvency of the bank by making false statements in their affidavit for probate of T. B.'s will, gave notice in Feb. 1909, to acquire the share of T. B., & continued to carry on the bank in the hope of restoring its solvency. By a deed dated Apr. 29, 1912, the three exors. of T. B., after reciting untruly that the debts of T. B. had been paid, conveyed as trustees to F. B. in fee simple the real estate of T. B., & by another deed dated Apr. 30, 1912, after untrue recitals to the effect that T. B. at his death was absolutely entitled to the S. estate, the outstanding legal estate in S. was conveyed by D. to F. B. in fee simple. F. B. then mortgaged the R. & S. estates for £25,000, which sum was applied in the reduction of the then overdraft of the surviving partners at their London agents. In negotiating the mtge. the title was deduced through T. B. & his will, the partnership deed & the insolvency of the bank not being disclosed. In 1914 the continuing partners became bkpt., & at that date there were creditors of the bank who were creditors at the death of T. B. & were still unpaid. The trustee in bkpcy. sued the three exors. of T. B. & the mtgees., alleging that the R. & S. estates were part of the assets of the bank, that the deeds of Apr. 1912, were fraudulent & void under 13 Eliz. c. 5, & claiming priority over the mtgees. for the creditors of the bank:—*Held*: (1) the legal estate in R. & S. passed by the deeds of Apr. 1912, & the mtgees., being entitled by the terms of those deeds to suppose the trusts of T. B.'s will were at

if the transferees were purchasers in good faith & for consideration.—*GOPAL v. BANK OF MADRAS* (1893), 1 L. R. 16 Mad. 397.—*IND.*

r. — — Of intention to defeat execution.]—The fact that a sale was made for the express purpose of

defeating an expected execution is not sufficient to make it void under the statute, if the sale was *bond fide* & for a fair consideration.—*PENNY v. FULL-JAMES*, [1920] 1 W. W. R. 555; 50 D. L. R. 553.—*CAN.*

—Where there is a

real transaction between the parties for valuable consideration, whether it be by way of sale or mtge., the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution.—*SANKA RAPPA v. KAMAYTA* (1866), 3 Mad. 231.—*IND.*

an end, & having the legal estate & being purchasers for value without notice of the real facts, were unaffected by any antecedent equities of the creditors of the bank; (2) the deeds of Apr. 1912, were not void under 13 Eliz. c. 5, for they were not made with intent to defeat & delay the creditors of the bank, but with the object of carrying on the business & of paying them by that means; (3) the notice of Feb. 1909 was carried into effect, & the two estates in question became assets of the surviving partners, who could deal with them.—PEARCE v. BULTEEL, [1916] 2 Ch. 544; 85 L. J. Ch. 677; 115 L. T. 291; 32 T. L. R. 723; [1916] H. B. R. 147.

100. Purchaser with notice.] — ANON. (1572), Dal. 79, pl. 14; 123 E. R. 289.

101. —.]—BENTLIFFE v. GARNETT, No. 94, ante.

102. — Distribution inter vivos obtained by debtor's children—No provision for debts.]—A distribution by debtor, when in a weak state of mind & body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, & partly by pecuniary gifts:—Held: void as against creditors under 13 Eliz. c. 5, the ct. being satisfied on the evidence that the children were aware at the time that the creditors' claims would be defeated though it did not appear that debtor had any such intention.

In this case I think the sons & daughters all knew the position of their father's health & circumstances, & that the object was to obtain a fair distribution of their father's property without any regard to the claims of his creditors. I think also that the consideration of the annuity of £20 does not render the transaction valid (LORD ROMILLY, M.R.).—CORNISH v. CLARK (1872), 1 L. R. 14 Eq. 184; 42 L. J. Ch. 14; 26 L. T. 191; 20 W. R. 897.

Annotation:—Reid. Re Doble, Ex p. Doble (1878), 38 L. T. 183.

103. Sale by trustee after assent by executor—Estate insolvent.]—Trustee of a term after assent of the exor. sells it *bonâ fide*, if good against creditors.

If after such assent, J., the son, had sold the leases to a third person *bonâ fide*, this had defeated the creditors, for he had a good title in law, & the purchaser should not be prejudiced by this trust for the creditors (FINCH, LORD KEEPER).—CHAMBERLAIN v. CHAMBERLAIN (1675), 1 Cas. in Ch. 256; Freem. Ch. 141; 22 E. R. 788.

Annotation:—Folld. Doe d. Saye & Sele v. Guy (1802), 3 120.

104. Against subsequent sequestration.]—A sequestration prevails against a prior conveyance designed to defeat it; not against prior conveyances for valuable consideration, or *bonâ fide*.—

100 i. Purchaser with notice.]—A *bonâ fide* purchase from a grantee who had given no consideration, & who had taken a conveyance fraudulent against creditors under 13 Eliz. c. 5, was valid, notwithstanding such *bonâ fide* purchaser had notice of the former fraud, & purchased the property with a view of carrying out the intent to defeat creditors.—DALGLISH v. MCCARTHY (1872), 19 Gr. 578.—CAN.

100 ii. —.]—Where there is good consideration, a mtge. comprising the whole of debtor's property will not be set aside, notwithstanding that the

mtgor. is in insolvent circumstances to the knowledge of the mtgee. & that the effect of the mtge. is to defeat, delay & prejudice the creditors, if there is pressure.—ADAMS & BURNS v. BANK OF MONTREAL (1899), 8 B. C. R. 314; 32 S. C. R. 719.—CAN.

100 iii. —.]—Where the transaction was a real sale & not a mere pretence & it is found to have been *bonâ fide* for full value, it is not void, notwithstanding the knowledge of the purchaser.—WAGNER v. HARTOWS, [1922] 3 W. W. R. 1050; [1923] 1 D. L. R. 186; 16 Sask. L. R. 177.—CAN.

COULSTON v. GARDINER (1680), 3 Swan, 279, n.; 36 E. R. 863; *sub nom.* COLSTON v. GARDNER, 2 Cas. in Ch. 43, L. C.

Annotations:—Reid. Cook v. Cook (1739), 2 Com. 712; Wharam v. Broughton (1748), 1 Ves. Sen. 180.

105. Assignment by sheriff under *fi. fa.*—Judgment obtained by friendly creditor on real debt—To preserve property for debtor.]—An assignment from the sheriff under a *fi. fa.* on a judgment obtained by a friendly creditor, with intent to preserve the use of the property to the debtor & defeat another execution, although the transaction will be of no greater force than an assignment from debtor, will be valid, provided there was a real debt, & the assignment by the sheriff was *bonâ fide*. A bill of sale or warrant signed by a deputy of the under-sheriff is valid.

Under an execution the judgment creditor may take an assignment of the goods on a fair valuation; if it were unfair the transaction would be set aside; and if there was no debt, and the transaction was merely a sham, then it would not stand. Although the object was to defeat the defendant's execution, the proceeding would be valid (WILLES, J.).—COOKSON v. FRYER (1858), 1 F. & F. 328.

106. Purchase of reversion—For full consideration—Settlement at direction of purchaser—For benefit of vendor until alienation or bankruptcy.]—By an indenture dated May 14, 1880, after reciting that A. had contracted with B., his son, for the absolute sale to him of B.'s reversionary interests in certain property, amounting to about £18,000, for the sum of £2,500 cash, & an annuity of £300, & also reciting that, in consideration of natural love & affection, A. had agreed to settle the reversions in manner thereafter expressed, it was witnessed that, in pursuance of the agreement, an annuity of £300 was settled by A. upon B., until he should become bkpt. or attempt to alienate the same, with trusts in either of such events in favour of B.'s wife & children, if any. For these considerations B., by the same deed assigned to trustees all his said reversionary interests, which were resettled by A. upon B. & his wife & children, in a similar manner to the annuity of £300. The consideration money of £2,500 for the payment of B.'s debts proved insufficient for that purpose, & upon the application of a creditor, whose debt was unprovided for, B. was adjudicated a bkpt. The trustee in bkpcy. having applied to the county ct., the deed was declared void under 13 Eliz. c. 5:—Held: the transaction being a purchase by the father of his son's reversionary interest for full consideration, it was reasonable & lawful that the father should prescribe the terms when consenting to resettle it upon the son, & the deed having been entered into in good faith, & for valuable consideration was not impeachable under 13 Eliz. c. 5.—Re FYRE, Ex p. FYRE (1881), 44 L. T. 922.

Annotations:—Folld. Denny's Trustee v. Denny & Warr,

t. Alienation in pursuance of prior contract—Vendor having become insolvent.]—Where a sale was made *bonâ fide*, for just & valuable consideration, & at a time when C., the vendor, was not in insolvent circumstances, the mere fact that formal transfer was not passed till shortly before C.'s insolvency, & at a time when his liabilities exceeded his assets, would not work a cancellation of such transfer, as it was *bonâ fide* passed in completion of the previous sale.—CELLIERS' TRUSTEES v. CELLIERS (1896), 13 S. C. 68; 6 C. T. R. 91.—S. AF.

Sect. 3.—Protection of bona fide purchasers for value: Sub-sects. 1 & 2, A. & B. (a).]

[1919] 1 K. B. 583. *Consd. Re Wombwell* (1921), 37 T. L. R. 625. *Reid. Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111.

SUB-SECT. 2.—THE CONSIDERATION.

A. In General.

What amounts to consideration.]—See, generally, CONTRACT, Vol. XII., pp. 176 et seq.

107. Transaction considered as whole—Settlement supported by other deeds of even date.]—

(1) The question, whether several deeds are part of the same transaction, or are separate & distinct transactions, depends on the surrounding circumstances, & not simply upon the fact whether the deeds are, or are not, by express reference grafted into or connected with each other. Evidence of surrounding circumstances on which the ct. held a settlement, that standing alone would have been fraudulent against creditors, to be connected with & part of the same transaction with several purchase deeds of even date, to which some only of the same persons were parties.

(2) The release & assignment by a married woman of her life interest in her separate estate, although fettered by a restriction against anticipation, was held to form a consideration for a settlement by another person; for, though the married woman could not pass her future interest, she might & did thereby release her past income; & the question of consideration moreover depended, not upon the point whether her assignment passed her interest, but upon the question whether her concurrence enabled the settlement to be made.

(3) An agreement by a creditor not to take proceedings against debtor during his life, nor against debtor's estate during the life of his wife, if she should survive him, construed, as to the latter clause, to mean that any beneficial interest which the wife might take in the property of the husband should not be disturbed during her life, & not to be an agreement that the creditor should be debarred from suing the personal representative of the husband; & therefore the creditor obtained a decree for an account against the wife as the personal representative of the husband, with a declaration that the interest of the wife was not to be disturbed during her life.

Parties to a series of deeds considered as stipulating according to the rights which they had.

(4) Consideration for a settlement being found to exist, it was held to extend to the whole & not

to a part only of the property which was the subject of it.

A deed, though made for valuable consideration, may be affected by *mala fides*.—*HARMAN v. RICHARDS* (1852), 10 Hare, 81; 22 L. J. Ch. 1066; 68 E. R. 847.

Annotations:—As to (4) Reid. Carter v. Hind (1853), 22 L. T. O. S. 116; *Holmes v. Penney* (1856), 3 K. & J. 90; *Re Johnson, Golden v. Gillam* (1881), 20 Ch. D. 389; *Generally, Reid. Geisse v. Taylor & Hartland, Weston, Claimant* (1905), 93 L. T. 534.

108. Presence of consideration—As evidence of bona fides.]—(1) A. indebted to B. in £400, & to C. in £200, being sued in debt by C., pending the writ, made a secret assignment of all his goods & chattels to B. generally, without exception, in satisfaction of his debt, but still continued in possession, & sold some sheep, & set his mark on others:—*Held*: this was a fraudulent gift within 13 Eliz. c. 5, because the gift was general, without exception of his apparel, etc.; the donor continued in possession, & used them as his own; it was made in secret, pending the writ; there was a trust between the parties; & the deed contained an unusual clause, that it was made *bona fide*, etc. A good consideration is not sufficient to take a case out of the statute, unless the deed be made *bona fide* also.

(2) A conveyance made with a power of revocation is fraudulent as against a purchaser, though the power be future, or to be exercised with the assent of another person. So if the power be afterwards extinguished by fine, to defraud a purchaser, the fine is void as to him.

(3) None but *bona fide* purchasers for a valuable & not inadequate consideration, can take advantage of 27 Eliz. c. 4.—*TWYNE'S CASE* (1602), 3 Co. Rep. 80b; 76 E. R. 809; *sub nom. CHAMBERLAIN v. TWYNE*, Moore, K. B. 638.

Annotations:—As to (1) Distd. Manton v. Moore (1796), 7 Term Rep. 67. *Appld. Graham v. Furber* (1854), 14 C. B. 410. *Reid. Hutchins v. Player* (1663), O. Bridg. 272; *Freeman v. Barnes* (1670), 1 Vent. 55; *Teynham v. Mullins* (1674), 1 Mod. Rep. 119; *Unwin v. Grosvenor* (1739), West temp. Hard. 647; *Taylor v. Jones* (1743), 2 Atk. 600; *Brown v. Heathcote & Martyn* (1746), 1 Atk. 160; *Bennet v. Musgrove* (1750), 2 Ves. Sen. 51; *Clavey v. How* (1750), 2 Ves. Sen. 19; *Ryall v. Rowles* (1750), 1 Ves. Sen. 348; *Worseley v. Demattos & Slader* (1758), 1 Burr. 467; *Wilson v. Day* (1759), 2 Burr. 827; *Mace v. Cadell* (1774), 1 Cowp. 232; *Law v. Skinner* (1775), 2 Wm. Bl. 996; *Devon v. Watts* (1779), 1 Doug. K. B. 86; *Estwick v. Caillaud* (1793), 5 Term Rep. 420; *Holbird v. Anderson* (1793), 5 Term Rep. 235; *Kidd v. Rawlinson* (1800), 2 Bos. & P. 59; *Arundell v. Phipps & Taunton* (1804), 10 Ves. 139; *Ex p. Williams* (1805), 11 Ves. 3; *Dawson v. Wood* (1810), 3 Taunt. 256; *Dutton v. Morrison* (1810), 17 Ves. 193; *Reed v. Blades* (1813), 5 Taunt. 212; *Dearle v. Hall* (1828), 3 Russ. 1; *Ex p. Castle* (1842), 3 Mont. D. & De G. 117; *Ward v. Audland* (1847), 16 M. & W. 862; *Muttyloll Seal v. O'Dowda* (1848), 4 Moo. Ind. App. 382; *Kelson v. Kelson* (1853), 1 W. R. 143; *Stone v. Van Heythuysen, Barton v. Van Heythuysen* (1853), 18 Jur. 344; *Cook v. Walker* (1855),

PART I. SECT. 3, SUB-SECT. 2.—A.

108 i. Presence of consideration—As evidence of bona fides.]—A security taken for a *bona fide* loan of money to enable the borrower to leave the country in order to escape creditors is not fraudulent & void.—*HALL v. (1853)*, 11 U. C. R. 9.—*CAN.*

108 ii. —.]—A person indebted to his housekeeper in \$600, conveyed to her some land in satisfaction of the debt, the consideration being not inadequate. On a bill by another creditor to set aside the conveyance as fraudulent & void:—*Held*: valid.—*MOORE v. DAVIS* (1869), 16 Gr.

108 iii. —.]—In 1893 debt.

his son entered into a parol agreement that debt. should convey his farm to the son, & that the son should labour upon the farm & support his parents. The farm was not conveyed to the son until Oct. 2, 1895. Before that date plff. warned debt. of her intention to bring an action against him for slander. She did so & obtained a verdict. At the date of the conveyance debt. was not in debt. In a suit to set the conveyance aside as fraudulent & void against plff.:—*Held*: the conveyance was not within Stat. Eliz.—*GORMAN v. (2 N. B. Eq. Rep.)*

108 iv. —.]—One of the debts., when threatened with an action on behalf of plff. to recover damages

for slander, conveyed his farm to his co-debt., his son, the alleged consideration being the son's agreement, entered into several years before, to maintain the grantor & his wife for life. Plff. brought the threatened action & obtained judgment for damages & costs & then attacked the deed, & in that action it was proved that such an agreement had in good faith been made:—*Held*: the previous agreement, although not proved with sufficient clearness to have enabled either party to it to enforce specific performance, was an answer to the charge of fraud.—*MONTGOMERY v. CORBIT* (1895), 24 A. R. 311.—*CAN.*

108 v. —.]—Action for price of goods sold, & to set aside transfer of

3 W. R. 357; *Holmes v. Penney* (1856), 3 K. & J. 90; *Stansfeld v. Cubitt* (1858), 2 De G. & J. 222; *Corlett v. Radcliffe* (1860), 14 Moo. P. C. C. 121; *Re Mortimer, Ex p. Pearson* (1873), 42 L. J. Bcy. 44; *Re Wilson, Ex p. Wilson* (1874), 29 L. T. 860; *Re Bamford, Ex p. Games* (1879), 12 Ch. D. 314; *M'Bain v. Wallace* (1881), 6 App. Cas. 588; *Cookson v. Swire* (1884), 9 App. Cas. 653; *Sinclair, Ex p. Chaplin* (1884), 26 Ch. D. 319; *Re Telescriptor Syndicate*, [1903] 2 Ch. 174; *Murgatroyd v. Wright, Bannister, Claimant* (1907), 76 L. J. K. B. 747; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334. *As to* (2) *Apld. Cramphorne v. —* (1827), 6 L. J. O. S. Ch. 91. *Generally, Mentd. Morton v. Syms* (1613), Moore, K. B. 856; *Kinaston v. Clark* (1741), 2 Atk. 204; *Ex p. Martin* (1815), 19 Ves. 491.

109. ———.]—*ARUNDELL (LADY) v. PHIPPS & TAUNTON*, No. 366, *post*.

110. ———.]—*HARMAN v. RICHARDS*, No. 107, *ante*.

111. ———.]—*GLEGG v. BROMLEY*, No. 133, *post*.

Absence of consideration—Whether conclusive if illegal intent.]—*See Sect. 4, sub-sect. 2, post*.

B. Sufficiency of Consideration.

(a) In General.

112. **Advance by wife to husband—Promise to leave money by will—Subsequent bond in performance of promise.]—**A. promises to leave his wife £400 if she will sell her land & let him have the money, his obligation for the £400 is not fraudulent. —*CLERK v. NETTLESHIP* (1675), 2 Lev. 148; 83 E. R. 492.

113. **Arrears accrued under voluntary bond.]—***r. LOCKE*, No. 137, *post*.

Surrender of voluntary bond.]—Voluntary bond, though void against creditors, being valid as between the parties, its surrender is a consideration, that will sustain a substituted bond against creditors, unless with a fraudulent design; as by an insolvent to substitute a valid for an invalid security against creditors.—*Ex p. BERRY* (1812), 19 Ves. 218; 34 E. R. 499, L. C.

Annotations:—Consd. Re Gundry, Ex p. Hookins (1849), 3 De G. & Sm. 549. *Apld. Carter v. Hungerford*, [1917] 1 Ch. 260.

land as a fraudulent conveyance:—*Held*: evidence did not show an actual express intent to defraud or delay creditors, & as the transfer was for valuable consideration, there was no preference.—*MANITOBA BREWING & MALTING CO. v. McDONALD* (1909), 11 W. L. R. 313.—*CAN.*

108 vi. ———.]—*MYERS v. LEINSTER (DUKE)* (1844), 7 I. Eq. R. 146.—*IR.*

PART I. SECT. 3, SUB-SECT. 2. — B. (a).

a. **Advance by wife to husband—Mortgage as security not a voluntary deed.]—**Where a wife, having separate property, lends money to her husband upon an informal memorandum of agreement to give security, a subsequent mtge. executed by him with the intention of fulfilling such agreement, but not in complete conformity with it, is not a voluntary deed, but may be for valuable, as well as good consideration within 13 Eliz. c. 5.—*SMITH v. HOPK* (1883), 9 V. L. R. 217.—*AUS.*

b. ——— **Transfer of stock & indemnity against personal liabilities.]—**B., a married woman, in order to carry out an agreement between her husband & his creditors consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of

the stock & other personal property on it & of indemnity against her personal liability on a mtge. against said farm:—*Held*: the transaction was an honest one, & B. entitled to the goods & to indemnity against the mtge.—*BOULTON v. BOULTON* (1898), 28 S. C. R. 592.—*CAN.*

c. ——— **When drawn from income—Proof of loan.]—**In an action to set aside a conveyance from a husband to his wife as fraudulent wherein the wife contends that her husband was indebted to her in respect of money lent to him by her in a sum more than the consideration expressed in the conveyance, but it is shown that such moneys came from her income & not from the corpus of her separate estate, the presumption is that such moneys were her contributions for the support of the family & the onus is upon her to prove that he received the moneys as a loan.—*UNION BANK v. MURDOCK*, [1917] 3 W. W. R. 820; 37 D. L. R. 522; 28 Man. L. R. 229.—*CAN.*

d. **Release by wife of life interest—Proof of value of interest.]—**Where the alleged consideration was the interest of the wife in other property sold or controlled by the husband, & the value of her interest, though not ascertained, appears to have been substantial, this may be sufficient for a finding of good or valuable consideration. In the

115. **Release by wife of life interest—Interest subject to restraint on anticipation—Part income released.]—***HARMAN v. RICHARDS*, No. 107, *ante*.

See, generally, CONTRACT, Vol. XII., pp. 182 *et seq.*

116. **Payment of debts by third party—On condition of settlement of debtor on family.]—***HOLMES v. PENNEY*, No. 158, *post*.

117. ——— **Family arrangement.]—**Upon a bill filed by creditors to impeach a complicated family arrangement between a father who subsequently became insolvent & his son:—*Held*: the latter having assumed certain burdens for the relief of his father, had acquired the right to stipulate as a creditor for the carrying out of the arrangement in question. Bill dismissed accordingly.—*WAKEFIELD v. GIBBON* (1857), 1 Giff. 401; 26 L. J. Ch. 505; 29 L. T. O. S. 50; 3 Jur. N. S. 353; 5 W. R. 479; 65 E. R. 971.

118. **Assumption of liability—Support of grantor's family.]—***GALE v. WILLIAMSON*, No. 135, *post*.

119. **For rent & covenants—Voluntary assignment of leaseholds.]—**In 1872 R. gave to the W. Bank a guarantee to secure the balance due from his son H. on his banking account to the extent of £1,000. On May 25, 1877, H.'s account was overdrawn by £1,515. On that day R. made a voluntary settlement of a leasehold property worth £200, a year, which he held at a rent of £3 10s. His only other property was furniture worth less than £200, & a debt of £1,500 due to him from H. In 1880 H., whose account was then overdrawn by £1,313, went into liquidation & paid a dividend of 3s. in the pound. There was some general evidence that H. was solvent at the date of the settlement. R. having died, the bank took proceedings to set aside the settlement & to have the leasehold treated as assets of R. in a suit for administration of his estate in which the bank had been admitted creditors for £1,000 on the guarantee:—*Held*: (1) the settlement was invalid as against creditors, for that under the circumstances the liability under the guarantee ought to have been regarded as a substantial one; R. had

case of husband & wife, or members of a family, the same particularity is not expected as where the transaction is between strangers, & the transfer may be upheld even though in it or the affidavits accompanying it the exact transaction is not shown, but the consideration is expressed as of a certain sum of money which appears to the ct. to be the fair value of the land.—*BANQUE D'HOUELAGA v. POTVIN*, [1924] 1 D. L. R. 678; 1 W. W. R. 488.—*CAN.*

117 i. **Payment of debts by third party—Family arrangement.]—***DELES-DEBRIER v. BURTON* (1866), 12 Gr. 569.—*CAN.*

e. **Transfer of whole of property—To secure maintenance of grantor.]—**S. was induced to sign an accommodation note in favour of plffs., on plffs. undertaking that he would never be called upon for payment. Two days later, in fulfilment of an understanding which had existed long previously, S. executed a deed of real estate, being the only property he possessed, to his two daughters, defts., in consideration of natural love & affection, & for the maintenance of himself & in further consideration of one dollar. At the time of execution of the deed, as an additional consideration, defts. agreed to pay a debt which S. owed to one B. Plffs. having recovered a judgment

Sect. 3.—Protection of bond fide purchasers for value: Sub-sect. 2, B. (a) & (b).]

no right to treat the £1,500 due from H. as a good debt; the settlement must therefore be looked upon as a settlement of all his property, leaving him nothing out of which he could meet his liability under the guarantee, & an intention to defeat or delay creditors must be inferred; (2) the settlement was not a settlement for value within 13 Eliz. c. 5, the doctrine of *Price v. Jenkins*, No. 597, *post*, not being applicable to cases under that statute.

[The] statute excepts from its operation estates & interests conveyed "upon good consideration & bond fide." What was the meaning of "good consideration" in that exception? It could not mean that if some obligations attaching to the property went to the new owner in exoneration of the settlor that made the conveyance a conveyance for valuable consideration. Consider the consequences of such a proposition. Suppose a man transfers £10,000 worth of railway shares or bank shares which are not fully paid up, is that prevented from being a voluntary transfer by the mere fact that the transferor is exonerated from the liability to calls, & the transference becomes subject to it? If a man makes a settlement of a large freehold estate along with a small leasehold, is the settlement made for valuable consideration within the meaning of this statute because the grantee becomes liable to the rent of the leasehold in exoneration of the settlor? Whatever may be held under 27 Eliz. c. 4, the undertaking the liability to rent is not a good consideration within the meaning of the statute now before us (*JESSEL, M.R.*).—*Re RIDLER, RIDLER v. RIDLER* (1882), 22 Ch. D. 74; 52 L. J. Ch. 343; 48 L. T. 396; 47 J. P. 279; 31 W. R. 93, C. A.

Annotations:—As to (1) *Reid*. *Green v. Paterson* (1886), 32 Ch. D. 95. As to (2) *Consd.* *Green v. Paterson* (1886), 32 Ch. D. 95. *Reid*. *Re Lulham, Brinton v. Lulham* (1884), 53 L. J. Ch. 928; *Harris v. Tubb* (1889), 42 Ch. D. 79.

120. — Existing debts—& support of debtor.]

—A., an old bedridden woman, conveyed her farm, & assigned the farm stock & household goods for the benefit of her two daughters, who covenanted to pay the farming debts, & to provide a home, with food, clothes, & medicine, for their mother. The donor had no other property, but there were other debts besides the farming debts:—*Held*: the transaction was, upon the face of it, a bond fide one; there was no evidence of any intention to defeat creditors; &, therefore, the transaction could not be upset.—*GOLDEN v. GILLIAM* (1882), 51 L. J. Ch. 503, C. A.; *affg.* S. C. *sub nom.* *Re JOHNSON, GOLDEN v. GILLIAM* (1881), 20 Ch. D. 389.

Annotations:—*Consd.* *Re Facey, Ex p. Trustees*, [1923] 2 Ch. 1. *Reid*. *Re Maddever, Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523; *Hance v. Harding* (1887), 4 T. L. R. 185.

See, generally, CONTRACT, Vol. XII., pp. 187, 188.

against S. on the note, sought to have the deed to the daughters set aside, as made fraudulently & with intent to defeat, defraud & delay creditors:—*Held*: the deed was made for valuable consideration & bond fide, & without any fraudulent intent.—*FORSYTH v. SUTHERLAND* (1886), 19 N. S. R. (7 R. & G.) 450; 8 C. L. T. 15.—CAN.

f. — — —.]—Where the consideration of a conveyance of land is an agreement to support the grantor,

the conveyance being of all the grantor's property, & it is made bond fide, with no intention to defeat or delay creditors, & the grantee has no knowledge that the grantor is indebted at the time, such a deed is good, even though the effect of it may be to prevent creditors getting their pay.—*DOR d. KEITH v. COREY* (1890), 29 N. B. R. 287.—CAN.

g. — — —.]—In 1891 S., a farmer, since deceased, agreed with two of his sons, in consideration of their

121. Waiver of equity to a settlement—Money lent to husband—Covenant for settlement.]—H. was married to his wife in 1864, & she subsequently became entitled to certain moneys under the wills of her father & grandfather. These moneys she lent to her husband for the purposes of his business, upon the terms that he would execute a settlement of the moneys upon her, which was done. Upon the bkpcy. of H. a proof was tendered upon the settlement & rejected on five grounds, three of which were discussed, the remainder being abandoned. The first ground was, that this deed was voluntary within 13 Eliz. c. 5; the second, that it was a voluntary settlement within the meaning of sect. 91 of Bkpcy. Act, 1869 (c. 71); the third that the circumstances were covered by sect. 3 of Married Women's Property Act, 1882 (c. 75):—*Held*: the settlement was not covinous or fraudulent within 13 Eliz. c. 5, & there had been a good consideration by reason of the fact that the wife had waived her equity to a settlement.—*Re HOME, Ex p. HOME* (1885), 54 L. T. 301.

See, generally, CONTRACT, Vol. XII., pp. 182 *et seq.*

122. Transfer of whole of property—& covenant to reform mode of life.]—A father, being anxious to save his son, who was of extravagant & dissolute habits, from moral & financial ruin, entered into a deed under which the son transferred such property as he had to the father, the father agreed to pay all the son's debts, amounting to more than £1,000, to redeem & hand over to him all the articles pawned, of the value of more than £500, & to pay bkpt. an annuity of £800 a year, on certain conditions contained in the deed, namely, that the son (a) did not become bkpt. or do or suffer any act or thing whereby the annuity if belonging absolutely to him would become vested in or charged in favour of some other person or persons, & that he would not make any composition or arrangement with his creditors. (b) Amended & reformed his mode of life & ways of living, & consistently continued in such amendment & reform.

Subsequently the son was made bkpt. on the petition of a moneylender, who was the chief creditor. In an action brought by the trustee in bkpcy. of the son for (*inter alia*) a declaration that the deed was void & of no effect as against pltf. as being against public policy & also as contravening 13 Eliz. c. 5, & alternatively for a declaration that the annuity of £800 a year payable by the father to the son had become payable to pltf.:—*Held*: the action failed on all points. Covenant (a) was not invalid. By the deed the son sold his property, the price being (1) payment of his debts; (2) payment of a conditional annuity. Covenant (b) was not against public policy. As to 13 Eliz. c. 5, the deed was made bond fide & for good consideration. It neither hindered nor delayed nor defrauded

remaining on the farm & supporting him & their mother, & paying to their two sisters \$1,000 each, that the farm & his personal property should be theirs. The farm consisted of adjoining pieces of land, each worth about \$3,200. Subsequently the sons paid more than \$3,000 in paying off balance of purchase money due on the farm, paid \$2,000 to the sisters, & supported the father & mother. In July, 1899, the father conveyed the farm to the sons for an expressed consideration of

creditors, nor was it intended to hinder, delay or defraud them. Its object was to pay all the creditors, & this object was achieved.—*DENNY'S TRUSTEE v. DENNY & WARR*, [1919] 1 K. B. 583; 88 L. J. K. B. 679; 120 L. T. 608; 35 T. L. R. 238; [1918-19] B. & C. R. 139.

123. Forbearance by creditor.]—The doctrine that a conveyance of property to trustees in favour of creditors operates as a mere power to mandatories or agents, revocable until communicated to or assented to by the creditors, does not apply where the trustee himself takes a beneficial interest under the deed. *Semble*: where a deed of assignment has been executed to a stranger as trustee for creditors, a communication of the trust to a creditor, by reason of which he may not have pursued his remedy, or his position may have been altered, will render the deed irrevocable by the assignor, without any actual assent by any creditor. The rule of law, that a deed of conveyance *prima facie*, passes the property to the party to whom it is conveyed, subject to the right of disclaimer, without any act of assent on his part, applies equally where the deed creates an onerous trust.

A., on Aug. 19, *bonâ fide* executed a deed of assignment to pltf., who was a creditor of A., as trustee for the benefit of such of his creditors as should sign the deed, & placed it in the hands of his own attorney, undertaking to communicate himself with pltf. Accordingly, on Aug. 22, A. wrote to pltf., informing him that he had executed the deed & asking him to act as trustee. This letter was received by pltf. on Aug. 23 about 1 o'clock, p.m. & on Aug. 24, pltf. replied, accepting the trust, & on Aug. 30 executed the deed. About 4 o'clock, p.m. on Aug. 23, a *fi. fa.* at the of debt. against A., was delivered to the

sheriff:—*Held*: (1) the assignee being a creditor taking a beneficial interest under the deed, & not a mere mandatory, the deed did not operate as a voluntary conveyance, revocable by A., until the assent of some third party as creditor; (2) the title to the property vested in pltf. immediately upon the execution of the deed, & therefore prevailed against debt.'s execution.—*SIGGERS v. EVANS* (1855), 5 E. & B. 367; 3 O. L. R. 1209; 24 L. J. Q. B. 305; 25 L. T. O. S. 213; 1 Jur. N. S. 851; 119 E. R. 518.

Annotations:—*As to* (1) *Consd.* *Johns v. James* (1878), 8 Ch. D. 744; *Roberts v. Jones*, *Re Roberts*, *Garnishee* (1892), 61 L. J. Q. B. 523; *Ellis v. Cross*, [1915] 2 K. B. 654. *Reid.* *Biron v. Mount* (1857), 24 Beav. 642; *Re Sanders' Trusts* (1878), 47 L. J. Ch. 667; *London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Runtz v. Longbourne* (1892), 8 T. L. R. 568; *Mallott v. Wilson*, [1903] 2 Ch. 494. *As to* (2) *Appl.* *Hobson v. Thelluson* (1867), L. R. 2 Q. B. 642. *Consd.* *Standing v. Bowring* (1885), 31 Ch. D. 282. *Reid.* *Graham v. Van Diemen's Land Co.* (1856), 26 L. J. Ex. 73. *Generally, Mentd.* *Muller's Margarine v. I. R. Comrs.* (1899), 69 L. J. Q. B. 291.

See, generally, CONTRACT, Vol. XII., pp. 180 *et seq.*

(b) Existing Debt.

See, generally, CONTRACT, Vol. XII., pp. 211 *et seq.*

124. General rule.]—A man has a term originally transferred to his daughter-in-law, & after grows indebted; this shall not be fraudulent as to debts after contracted.

It would be very extraordinary to subject this to debts not then contracted; but I do not know that it has ever been determined, that a man indebted, minding to provide for his children, has an estate originally conveyed to them, that that should be subject to debts. But that is not the present case, for here is proof that this daughter

\$1. At that time he was not in debt, but he was surety with others for loans amounting to \$14,000 to a company, of which he & they were directors, the last loan being for \$3,000 made in June, 1899. In May, 1901, the company went into liquidation, & the amount for which the directors were sureties was paid by them except S. A suit by them to set aside the conveyance as fraudulent & void under 13 Eliz. c. 5, was dismissed.—*BAIRD v. SLIPP* (1906), 3 N. B. Eq. Rep. 258; 26 C. L. T. 467.—CAN.

123 i. Forbearance by creditor.]—The existence of a debt is not in itself a good consideration under 13 Eliz. c. 5, for the purpose of excepting a conveyance from the operation of s. 1 of the Act, but there must be in addition an agreement for forbearance either express or to be inferred from the circumstances.—*REEVES v. OFFICIAL ASSIGNEE v. PATERSON*, [1918] N. Z. L. R. 623.—N.Z.

h. Release of wife's dower.]—The release of a wife's dower to a purchaser is a good consideration for the grant of a reasonable compensation to the wife; & such a grant made *bonâ fide* is valid against the husband's creditors.—*FORREST v. LAYCOCK* (1871), 18 Gr. 611.—CAN.

k. —.]—A wife barred her dower in a mtge., under an agreement with her husband that he would convey other property to her. Upon this claim being reiterated on the sale of the equity of redemption, & the refusal of the wife to join in the conveyance unless the promise of the husband was fulfilled, the husband conveyed other land to a trustee for

her:—*Held*: the conveyance to the wife's trustee was not voluntary; & as the transaction had been found to have been *bonâ fide*, & without intent to defraud creditors, it could not be impeached under 13 Eliz. c. 5.—*BEAVIS v. MAQUIRE* (1882), 7 A. R. 704.—CAN.

l. —.]—Money paid to a wife by her husband to secure her execution of a mtge. of lands of which she is dowable, under an agreement that she is to receive half of the money advanced, is not money received by the wife from her husband during coverture, within C. S. N. B. c. 78, s. 4, s.s. 2, 1903, & if it is an honest & *bonâ fide* transaction, entered into in good faith, cannot be impeached as a fraud against the husband's creditors.—*CORMIER v. ARSENEAU* (1907), 3 E. L. R. 203; 38 N. B. R. 44.—CAN.

m. Settlement by debtor & other members of family—Valuable consideration.]—A. having entered into business, joined with his brothers & sisters in a settlement, the effect of which was to transfer all their undivided interest in their father's estate to trustees for the benefit of their mother. A. subsequently became insolvent:—*Held*: there was no fraudulent intent, & the agreement to execute & the execution by the other members of the family was a valuable consideration for the settlement.—*RANDALL v. DOPP* (1892), 22 O. R. 422.—CAN.

n. Past services—Coupled with partial payment.]—A conveyance to a child for voluntary past services for which, however, partial payment had been made is void.—*UNION BANK OF*

CANADA v. MURDOCK, [1917] 2 W. W. R. 112; *revid.* 3 W. W. R. 820; 37 D. L. R. 522.—CAN.

o. —.]—A reversionary lease, voluntarily granted partly for past services, which had been remunerated otherwise, & partly for an inadequate rent & a small fine, was set aside; no confidential relation between the parties having been proved.—*WYSE v. LAMBERT* (1865), 16 I. Ch. R. 378.—IR.

p. Natural affection.]—By indenture of Oct. 30, 1900, testator purported, for natural love & affection, to assign his interest in a fund to his three daughters, pltf's. By a further deed of Dec. 28, 1900, the daughters for a consideration of £90, agreed to pay the premiums payable to the bank on foot of the fund. Testator died in 1904, having by his will bequeathed to his widow, debt., £100 out of the fund:—*Held*: the indenture of Oct. 30, 1900, was an incomplete disposition in favour of volunteers & could not be enforced.—*VIZE v. FITZMAURICE* (1905), 39 I. L. T. 123.—IR.

q. —.]—Natural affection for one's daughter is not a lawful consideration in terms of Law 13, s. 33, 1895.—*SCHARFF'S TRUSTEE v. SCHARFF* (1915), T. P. D. 463.—S. AF.

r. Consideration ex post facto.]—Where an *ex post facto* consideration relates back to the original voluntary promise & turns it into an enforceable contract as from the date of the promise & subsequent transfer, being for valuable consideration, is not void within 13 Eliz. c. 5.—*Re HUME, Ex p. OFFICIAL ASSIGNEE* (1909), 28 N. Z. L. R. 793.—N.Z.

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had money owing to her, which was paid to the father-in-law (LORD KING, C.).—PROCTOR v. WARREN (1729), Cas. temp. King, 78; 25 E. R. 232, L. C.

125. —.]—BENTON v. THORNHILL, No. 59, ante.

126. —.]—The mere existence of an antecedent debt is not valuable consideration for a security given by a debtor.

H. was entitled to a policy of assurance for £5,000 on his own life subject to conditions which made the policy void "if the lives assured died by their own hands . . . but without prejudice to the bond fide interests of third parties based on valuable consideration." He was indebted to W. in sums exceeding £15,000. W. had pressed for payment or reduction of the debt. H. executed a deed of assignment of the policy to W. by way of mtge. to secure all moneys owing to him from H., & delivered the deed duly executed to his solrs., telling them to use their own discretion whether they should inform W. of the assignment or not. The solrs. obtained time from W. for payment of the debt without producing the deed, & acting on H.'s instructions, destroyed it. H. shortly afterwards died by his own hand. No notice of the existence of the assignment was given to W. or the insurance society during H.'s life. After his death his estate was being administered in ct., & the fact of the assignment was discovered & communicated to W.'s firm, who had taken in a claim. Notice of the assignment was then given to the insurance society, & the exors. of W., who had died, brought this action to recover the policy moneys:—*Held*: there was no valuable consideration for the assignment within the saving clause in the policy, & the action therefore failed.—WIGAN v. ENGLISH & SCOTTISH LAW LIFE ASSURANCE ASSOCN., [1909] 1 Ch. 291; 78 L. J. Ch. 120; 100 L. T. 34; 25 T. L. R. 81.

—*Consd.* Glegg v. Bromley, [1912] 3 K. B. 474. *Reid.* *Re* Cozens, Green v. Brisley, [1913] 2 Ch. 478; Hambleton v. Brown, [1917] 2 K. B. 93.

127. Coupled with present advance.]—MARTINDALE v. BOOTH, No. 315, post.

128. —.]—Seventeen months before his bkpcy., a trader assigned by deed all his estate & effects by way of security for the repayment of a sum then due, & of a further advance of a moderate amount:—*Held*: in the circumstances, the deed was not void under 13 Eliz. c. 5, or as an act of bkpcy.—ALLEN v. BONNETT (1870), 5 Ch. App. 577; 23 L. T. 437; 18 W. R. 874, L. C. & L. J.

Annotations:—*Consd.* *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. App. 636; *Re* Bamford, *Ex p.* Games (1879), 12 Ch. D. 314. *Reid.* *Re* Tweddell, *Ex p.* Reed & Steel (1873), L. R. 14 Eq. 586.

Compare, BANKRUPTCY, Vol. V., pp. 889 *et seq.*; ILLS OF SALE, Vol. VII., pp. 44 *et seq.*

129. Coupled with agreement for future advances.]—A bill of sale of all the grantor's then

existing & after acquired property, by way of mtge. to secure an existing debt & future advances, is not necessarily void under 13 Eliz. c. 5. It will only be void if it is not made *bond fide*, i.e., if it is a mere cloak for retaining a benefit to the grantor.

The mtgor. had a right to sell all his property & pay this particular creditor, & he had an equal right to give him all his existing property as security for the debt. . . . It appears to me that the deed was nothing more nor less than a preference of this particular creditor, & it was made more than a year before the bkpcy. I see no evidence of any fraud upon the creditors (JAMES, L.J.).—*Re* BAMFORD, *Ex p.* GAMES (1879), 12 Ch. D. 314; 40 L. T. 789; 27 W. R. 744, C. A.

Annotations:—*Consd.* Glegg v. Bromley (1911), 81 L. J. K. B. 334; *Re* Gunsbourg, *Ex p.* Trustee No. 2, [1919] B. & C. R. 108. *Reid.* *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769.

Compare, BANKRUPTCY, Vol. V., pp. 889 *et seq.*

130. Arrears under voluntary bond.]—GILHAM v. LOCKE, No. 137, post.

131. —.]—A person gave a bond for £5,000 to his sister, but failing to pay the interest due on that bond, gave her another bond to secure the arrears of interest. He afterwards deposited with his sister the title deeds of his real estates "as a collateral security for the bond debts." Subsequently, in contemplation of the marriage of the sister, the two bonds were, with the consent & privity of the obligor, settled upon trusts for the benefit of the intended husband & wife; no reference, however, being made in the settlement to the deposit of title deeds. The marriage took effect, & about four years after, the obligor became bkpt.:—*Held*: assuming the consideration for the first bond to have been voluntary, yet there being no fraud suggested against any party, or insolvency proved against the obligor, the settlement was a valuable security; & by virtue of the bonds, the instrument of deposit, & the settlement, the trustee of the settlement was equitable mtgee. of the real estate for the moneys due on the bonds.—MEGGISON v. FOSTER (1843), 2 Y. & C. Ch. Cas. 336; 12 L. J. Ch. 415; 7 Jur. 546; 63 E. R. 148.

132. Debt greater than value of security.]—B., a trader, being indebted to debt. in £570 upon a balance of accounts for goods sold & delivered, & being pressed for payment, as an inducement for forbearance, executed a deed on Apr. 5, 1854, by which he mortgaged to debt. the public-house in which he carried on business, & assigned to him his trade & other fixtures & movable property in the house other than his stock-in-trade; with a covenant for payment of the sum due, with interest by instalments, the period for payment extending over several months, & a proviso that on due payment of the instalments the deed was to become void, but on default in any such payment debt. might enter & sell. The value of the property mortgaged was between £300 & £400. B.'s assets at the time amounting to £1,200 & his debts to £4,000. After the execution of the deed, B. continued his business, receiving supplies of goods

PART I. SECT. 3, SUB-SECT. 2.—B. (b).

127 i. Coupled with present security, not only to cover the indebtedness arising from the desired transaction, but to cover past indebtedness:—*Held*: to be given for valuable consideration & *bond fide*, & also under pressure, & therefore an action on behalf of other creditors attacking the

security was dismissed with costs.—BANQUE D'HOUELAGA v. JEANNOTTE, [1923] 1 W. W. R. 28; 16 Sask. L. R. 523.—CAN.

127 ii. —.]—MOTILAL RAVICHAND v. UTAM JACIVANDAS (1889), 1 L. R. 13 Bom. 434.—IND.

s. Money lent.—Agreement to mortg.—In 1869 C. lent money to N.

on an express agreement that it was to be secured by mtge. on certain property; & on July 3, following, the mtge. was given accordingly; & on August 2, the mtgor. became insolvent:—*Held*: the mtge. was valid.—ALLAN v. CLARKSON (1870), 17 Gr. 570.—CAN.

t. Debt not recognised.—Paternal duty.]—Where a transfer by bill of

& advances from debt. & making various payments to creditors, until July 22, when he became bkpt.:—*Held*: the deed was not void by 13 Eliz. c. 5, as being made without valuable consideration or for a consideration fraudulently inadequate; because it was given to secure a debt of greater amount than the value of the property assigned.—*HALE v. ALINUTT* (1856), 18 C. B. 505; 25 L. J. C. P. 267; 2 Jur. N. S. 904; 4 W. R. 637; 139 E. R. 1467.

Conveyance not disclosed.]—See Sect. 4, sub-sect. 6, *post*.

133. Assignment by way of further security.]—Mrs. G. was pltf. in an action against H. for false representation, & was also pltf. in the present action against debt. for slander. Mrs. G. being at the time largely indebted to her husband, on May 21, 1910, executed in his favour a deed of assignment, whereby, after reciting that he had requested her to give him further security which she had agreed to do, she assigned to him "all that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of any verdict, compromise, or agreement which she may obtain, or to which she may become party in or consequent upon the action or otherwise howsoever, under or by reason of same, to hold same . . . subject to redemption on payment of all moneys due to him." Subsequently the action brought by Mrs. G. against H. was dismissed, with costs amounting to £218, but the action brought by Mrs. G. against debt. resulted in a verdict for pltf. for £200 with costs. H. thereupon instituted garnishee proceedings against debt. to attach the amount of damages recovered by Mrs. G. in satisfaction of the costs due to him in the first action, & in these proceedings Mrs. G.'s husband also claimed to be entitled to those damages under the assignment from his wife to him:—*Held*: (1) the assignment was made for good consideration; (2) the assignment was not an assignment of a mere expectancy, or of a cause of action, but was an assignment of property, i.e. of the fruits of an action as & when recovered, & it was consequently not void under 13 Eliz. c. 5.

(3) This is an action in which a judgment creditor, H., seeks to attach a debt alleged to be due from B. to Mrs. G., the judgment debtor. Mr. G., the judgment debtor's husband, resists the attachment on the ground that the debt sought to be attached was before the date of the garnishee proceedings assigned by a deed dated May 21, 1910, by Mrs. G., to him for good consideration, & that the judgment creditor stands exactly in the shoes of the judgment debtor, & that if the judgment debtor cannot impugn the deed as between herself as assignor & her husband as assignee, neither can the judgment creditor impugn it. *LORD COLERIDGE, J.*, in his judgment in the Div. Ct. agrees that this is good law, at all events in a case where the assignment is not voluntary, but for good consideration, which in my opinion is the case here. . . . I have already said that H. stands exactly in the shoes of the judgment

debtor, & that if as between her & the assignee, Mrs. G., she could not have questioned his right as against her to this debt, so neither can H. assert anything which Mrs. G., his judgment debtor, could have been prevented from asserting (*VAUGHAN WILLIAMS, L.J.*).

(4) The covinous assignments referred to in 13 Eliz. c. 5 are mock assignments whereby in some form or other the assignor reserves some benefit to himself, but an out & out assignment by way of charge to secure an actual existing creditor is not within the class of assignments which are affected by that statute (*FLETCHER MOULTON, L.J.*).

(5) The scheme of the statute is this: by it all conveyances & assignments made with intent to hinder & delay creditors are rendered void against all creditors hindered or delayed by their operation. There is, however, a proviso for the protection of a purchaser for good consideration without notice of the illegal intention. The illegal intent under the operative part is a question of fact for the jury or the judge sitting as a jury. On the one hand the want of consideration for the conveyance or assignment is a material fact in considering whether there was any illegal intent, but it is not conclusive that there existed any such intent. In the same way consideration was by no means conclusive that there was no illegal intent (*PARKER, J.*).—(*GREGG v. BROMLEY*, [1912] 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825, C. A.

Annotations:—As to (1) Consd. *Hambleton v. Brown*, [1917] 2 K. B. 93; *Hosack v. Robins* (1918), 62 Sol. Jo. 520. *Reid. Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478. *As to (2) Consd.* *Wells v. Wells* (1914), 30 T. L. R. 437; *German v. Yates* (1915), 32 T. L. R. 52; *Ellis v. Torrington*, [1920] 1 K. B. 399. *Reid. County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251. *As to (5) Reid. Denny's Trustee v. Denny & Warr*, [1919] 1 K. B. 583.

Compare BANKRUPTCY, Vol. V., pp. 893 et seq.

(c) *The Marriage Consideration.*

See Sub-sect. 3, post.

C. *Proof of Consideration.*

134. Transaction regarded as a whole.]—HARMAN v. RICHARDS, No. 107, ante.

135. Admissibility of extrinsic evidence—To prove consideration.]—Where a father, by deed, assigned to his son, "in consideration of natural love & affection," his dwelling house & all his personal estate, in an action by the son against the sheriff, for levying on goods, part of such estate, under a *fi. fa.* against the father:—*Held*: it was competent to pltf. to prove that by a bond, bearing even date with the deed of assignment, he bound himself to maintain his father's wife & children; & the jury having found that it was a part of the same transaction, & that the assignment was *bond fide*, it was not void against creditors under 13 Eliz. c. 5.—*GALE v. WILLIAMSON* (1841), 8 M. & W. 405; 10 L. J. Ex. 446; 151 E. R. 1096.

Annotations:—Reid. Levy v. Creighton (1874), 31 L. T. 1; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

sale was made without the knowledge or consent of pltf. in the absence of any person representing him, & the consideration was a debt alleged to have been incurred some nine years before for board to debtor's wife & children, & sundry articles & services such as a father might naturally contribute to his daughter's comfort without expectation of payment:—*Held*: the verdict establishing fraud

in the transfer could not be set aside as against evidence.—*MCDONALD v. FERROUSEON* (1879), 13 N. S. R. (1 R. & G.) 70.—CAN.

PART I. SECT. 3, SUB-SECT. 2.—

135 i. Admissibility of extrinsic evidence—To prove consideration.]—Where the statement of the consideration in the conveyance is untrue, the

onus is upon the grantee to prove beyond reasonable doubt that there was some other good consideration, & his own unsupported statement that such existed is insufficient, & the conveyance must be treated as voluntary, & therefore void under 13 Eliz. c. 5.—*GIGNAC v. ILER* (1898), 29 O. R. 147; 25 A. R. 393.—CAN.

a. *Evidence of bond fide dealings.]*

Sect. 3.—Protection of bona fide purchasers for Sub-sect. 2, C.; sub-sect. 3, A.

.]—A deed of settlement, in form voluntary, but appearing from extrinsic evidence to have been made for valuable consideration, supported against creditors.

A person who was *in loco parentis* to a married woman, devised to her a rentcharge for her life, & bequeathed certain personal property to her for her separate use. The will being inoperative both as to the real & personal estate, the heir-at-law & next of kin of testator made a partial sacrifice of their interests in order to carry testator's intentions into effect; the property given up by them being invested in the funds & afterwards settled upon the woman & her children. At the time of the investment the husband of the woman was insolvent in his circumstances, & about three months after the date of the settlement he became bkpt.:—*Held*: the settlement was for valuable consideration, & was good against the husband's creditors.—*POTT v. TONHUNTER* (1845), 2 Coll. 76; 5 L. T. O. S. 144; 9 Jur. 589; 63 E. R. 644.

Annotation:—*Reid. Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

Sec, generally, DEEDS, Vol. XVII., pp. 335, 336.

SUB-SECT. 3.—MARRIAGE SETTLEMENTS.

A. In General.

Sec, generally, SETTLEMENTS.

137. The marriage as consideration — Must be valid marriage.]—(1) Voluntary bond, though given under a strong moral obligation, a marriage contracted, & property received, as husband, by a man, having a wife living at the time, void as against creditors.

(2) Arrears, accrued under a voluntary bond, a valuable consideration, sustaining a conveyance against creditors.—*GILHAM v. LOCKE* (1804), 9 Ves. 612; 32 E. R. 741.

Annotations:—A. to (1) *Reid. Whitaker v. Wright* (1843), 10 E. R. 100; *Reid. Carter v. Hungerford*, [1917]

--A. by deed of April 14, 1843, conveyed to B. certain lands, the consideration being expressed in the deed as £62 10s., but £12 10s. only was paid. At the execution of such deed A. was embarrassed, a *fi. fa.* having been issued against his goods in Feb. 1843. In Sept. 1846, the sheriff conveyed the premises to debt. by deed, reciting an execution against the lands of A., tested July, 1845; & upon this deed debt. rolled, treating the conveyance to B. as voluntary & void as against creditors:—*Held*: the question of the deed to B. being voluntary, & as such fraudulent, having been submitted to the jury, & they having found that it was *bona fide* & for value, there was no sufficient reason to disturb such verdict.
r. *GUICHARD* (1856), 6

b. —.]—Where the evidence showed that a husband had received moneys from his wife, for which she claimed to be his creditor, these moneys having in great part been produced by sale of her lands, & she subsequently obtained moneys from her husband, which she expended in the purchase of land, a bill filed on behalf of the creditors of her husband seeking to enforce their claim against

the property so purchased, was dismissed, the ct. being satisfied with the *bona fides* of the dealings between the husband & wife, although there were some slight discrepancies in their evidence.—*FAIR v. YOUNG* (1879), 26 Gr. 544.—CAN.

c. —.]—To support against creditors a deed, voluntary on its face, the proof of valuable consideration must be clear, & free from suspicion.—*GRAHAM v. O'KEEFE* (1864), 16 I. Ch. R. 1.—IR.

PART I. SECT. 3, SUB-SECT. 3.—A.

d. *General rule.*]—Although the consideration of marriage is one of the most valuable, still a settlement upon the marriage either of the settlor or his child is, like any other conveyance, liable to be impeached as void under 13 Eliz. c. 5, on the ground of having been made to hinder & delay creditors.—*COMMERCIAL BANK OF CANADA v. COOKE* (1862), 9 Gr. 524.—CAN.

137 i. *The marriage as consideration — Must be valid marriage.]—*A conveyance of land given by a man to the woman he marries, in consideration of the marriage, will be set aside, at the suit of the grantor, on proof that the

Must be effective marriage — *Recelebration after informal but valid marriage.]—*A settlement, after a marriage in Scotland, not supported against creditors in bkpcy., as upon valuable consideration, by a recelebration of the marriage in England; but it was sustained as the consideration of an agreement to settle by the parent of the other party.—*Ex p. HALL* (1812), 1 Ves. & B. 112; 35 E. R. 44; *sub nom. Re DICKENSON, Ex p. HALL*, 1 Rose, 30, L.C.

What constitutes lawful marriage.]—*Sec, generally, HUSBAND & WIFE.*

Absence of consideration—Whether alone sufficient to avoid settlement.]—*See Sect. 4, sub-sect. 2, B., post.*

B. Ante-Nuptial Settlements.

139. *General rule.]—*One being indebted, by settlement before marriage, in consideration of the marriage, & of £10,000, his wife's portion, which was supposed to be more than the amount of his debts at that time, conveyed all his real estate, & likewise his household goods, his real estate, alone, not being thought an adequate settlement in trust for himself for life, remainder to his wife for life, remainder to his first & other sons in strict settlement. The lady being a ward of Chancery, the settlement was approved of by the master, & the goods enumerated in a schedule. A. after the marriage, continued in possession of the goods; after which a creditor at the time of the settlement, having obtained judgment, took them in execution:—*Held*: the settlement was good against creditors, & the trustees entitled to the possession of the goods.

An argument however is drawn from the possession, as a strong circumstance of fraud: but it does not hold in this case. It is a part of the trust that the goods shall continue in the house; & for a very obvious reason: because the furniture of one house will not suit another; & it was the business of the trustees to see the goods were not removed (*LORD MANSFIELD, L.J.*).

Here there was no intention to defraud, & there is a good consideration. Therefore, I am of opinion it could not be left to the jury to find

woman had a husband living at the time of the marriage, & that the grantor was ignorant of it.—*WILCOX v. WILCOX* (1914), 27 W. L. R. 359.—CAN.

e. —.]—Where it was shown that G. & his wife before the marriage, were living on the most intimate terms short of the intimacy of husband & wife, & that she would have accepted a proposal of marriage without hesitation, or any condition as to a marriage settlement, & that he was in insolvent circumstances, of which fact she must have been aware, & that the settlement was purely voluntary on his part, & that she knew nothing of it until she was asked to sign the deed:—*Held*: the settlement was not the consideration, or part of the consideration of the marriage, & it must be set aside as fraudulent & void against creditors.—*THOMPSON v. GORE* (1886), 12 O. R. 651.—CAN.

f. *Power of donor to revoke.]—*A donation by one spouse to another *ante nuptial* is as a general rule of no force or effect as against the donor or his or her creditors, & the donor has the right to recover property so given, & can cede this right to his creditors.—*VAN DER BYL'S ASSIGNEES v. VAN DER BYL* (1886), 5 S. C. 170.—S. AF.

the settlement fraudulent, merely because there were creditors (LORD MANSFIELD, C.J.).—**CADOGAN v. KENNETT** (1776), 2 Cowp. 432; 98 E. R. 1171.

Cross v. Glode (1797), 2 Esp. 574.
L. Doe d. Otley v. Manning (1807), 9 East, 59; **Doe d. Dixon v. Willis** (1829), 3 Moo. & P. 24. **Reid. Edwards v. Harben** (1788), 2 Term Rep. 587; **Jarman v. Woolton** (1790), 3 Term Rep. 618; **Holbird v. Anderson** (1793), 5 Term Rep. 235; **Arundell v. Phipps**, **Arundell v. Taunton** (1804), 10 Ves. 139; **Dewey v. Bayntun** (1805), 6 East, 257; **Dawson v. Wood** (1810), 3 Taunt. 256; **Hartley v. Smith** (1819), Buck, 368; **Simpson v. Forrester** (1829), 1 Knapp, 231; **Doe d. Richards v. Lewis**, **Richards v. Lewis** (1852), 11 C. B. 1035; **Clarke v. Wright** (1861), 6 H. & N. 849; **Wright v. Dickenson** (1861), 4 L. T. 21. **Mentd. Farr v. Newman** (1792), 4 Term Rep. 621; **Gordon v. East India Co.** (1797), 7 Term Rep. 228; **Montfort v. Cadogan** (1811), 17 Ves. 485.

140. —.]—Purchase in the name of another, not a child or wife, a trust for the person advancing the money; unless the presumption from that circumstance is repelled by evidence. Under a covenant upon marriage by the husband with the trustees, in case his wife should survive him, to pay her a sum of money, she is a creditor within 13 Eliz. c. 5.—**RIDER v. KIDDER** (1805), 10 Ves. 360; 32 E. R. 884, L. C.

Annotations :—**Consd. Barrack v. McCulloch** (1856), 3 K. & J. 110; **Ayerst v. Jenkins** (1873), L. R. 16 Eq. 275. **Reid. George v. Bank of England** (1819), 7 Price, 646; **Dummer v. Pitcher**, **Pitcher v. Dummer** (1833), 2 My. & K. 262; **Sims v. Thomas** (1840), 12 Ad. & El. 536; **Freeman v. Tatham** (1846), 5 Hare, 329; **Phillips v. Probyn** (1899), 68 L. J. Ch. 401; **Re Polley No. 6402**, of Scottish Equitable Life Assoc. Soc., [1902] 1 Ch. 282.

141. —.]—The title of an assignee, under the compulsory clause of Debtors Imprisonment Act, 1759 (c. 28), s. 16, only commences from the time when the insolvent was brought up & discharged.

A person had, by his marriage settlement, covenanted to pay £1,000 to his children at any time during the coverture, or within a month after his wife's death. After her death he went to prison for debt; & while in prison, he gave an authority to his son & to his daughter's husband to sell all his property towards paying that sum. They did so, & received £346. After that the person was brought up under the compulsory clause of the above Act, & executed an assignment :—**Held** : on these facts, the assignee under the above Act could not recover this sum of £346.

The question is, was this sum paid *bonâ fide*, or was this merely a colour for the debtor to keep it for his own use, & to prevent the other creditors from having it. If you are of opinion that it was as honest transaction, & that it was in discharge of the marriage debt, debt. has made out his defence. If, on the other hand, it was not *bonâ fide*, but only a mode of converting it for the insolvent's own benefit, it remained in substance in his hands, & passed to pltf. under the assignment (COLERIDGE, J.).—**MOORE v. EDDOWES** (1835), 7 C. & P. 203.

142. **Settlement of leaseholds — Breach of covenant after settlement.**—An underlessee of a dwelling house bequeathed all his residuary personal estate in trust for his daughter on her marriage absolutely. By a settlement made prior to marriage the whole fund was settled, part of it for the husband for life, remainder to the wife for life in the usual manner, & the rest for the separate use of the wife for life, with remainder in case she should survive her husband for herself absolutely. Some years after the settlement a breach of the covenants in the lease was committed, & a claim in respect of it was made by the representative of the original lessor against pltf.,

the under-lessor. Pltf. filed a bill for the purpose of having the damage in respect of the breach made good by the husband, or by the fund settled to the separate use of the wife :—**Held** : the consideration of marriage protected the whole fund from pltf.'s claim.—**DILKES v. BROADMEAD** (1860), 2 De G. F. & J. 566; 30 L. J. Ch. 268; 3 L. T. 605; 7 Jur. N. S. 56; 9 W. R. 238; 45 E. R. 740, L. C.

Annotations :—**Apld. Adamson v. Hammond** (1873), L. R. 3 P. & D. 141. **Reid. Ridgway v. Newstead** (1861), 3 De G. F. & J. 474. **Mentd. Re Hedgely**, **Small v. Hedgely** (1886), 35 W. R. 472; **Graham v. Drummond**, [1896] 1 Ch. 968.

143. **Settlement of whole property — Settlor solvent at date of settlement.**—Debtor shortly before his marriage executed an agreement by which, after reciting his intended marriage, he conveyed & assigned to claimant, as trustee, all the personal chattels & effects he then possessed upon certain trusts for the benefit of his wife. At the time of his marriage the debtor had sufficient money to pay his creditors in full, but shortly afterwards judgment was recovered against him, & his furniture was seized :—**Held** : the expression "personal chattels & effects" used in the agreement included the furniture of debtor, & as the debtor was solvent at the time of executing the agreement, & had no intention of defrauding his creditors, the agreement was not void as a fraud upon his creditors.—**WENMAN v. LYON & Co.**, [1891] 1 Q. B. 634; 60 L. J. Q. B. 223; 64 L. T. 88; 39 W. R. 301; 7 T. L. R. 219, D. C.; *affd.*, [1891] 2 Q. B. 192, C. A.

Annotation :—**Consd. Re Reals, Ex p. Clough**, [1904] 2 K. B.

144. **Settlement of all after-acquired property.**—A trader, in Apr. 1868, executed a settlement upon his marriage, by which he settled certain specific chattels upon trust for the benefit of his wife & the issue of the marriage. The settlement also contained a covenant by the settlor with the trustees that all future real or personal estate which he should at any time during the coverture be possessed of, or entitled to, or should otherwise acquire by devolution, gift, devise, bequest, purchase, accumulation, or otherwise howsoever, should be conveyed & assigned to the trustees upon the trusts thereby declared. In 1870 the settlor bought some shares in a joint stock co. In Feb. 1873, he was adjudicated bkpt. At this time the shares were still standing in his name, but the certificates were in the possession of his wife's father, & they were afterwards delivered to the trustees of the settlement. It was shown that the settlor was solvent at the date of the settlement :—**Held** : the covenant was void as against the creditors, & the trustee under the bkpcy. was entitled to the shares.—**Re OLINT, Ex p. BOLLAND** (1873), L. R. 17 Eq. 115; 43 L. J. Bcy. 16; 29 L. T. 543; 22 W. R. 152.

Annotations :—**Dbtd. Re Reals, Ex p. Clough**, [1904] 2 K. B. 769. **Mentd. Re Wilcoxon, Ex p. Griffith** (1883), 52 L. J. Ch. 717.

145. — **Except business assets.**—In 1870, lt., by his marriage settlement covenanted to transfer all his after-acquired property, except business assets, to the trustees of the settlement upon trust for the benefit of his wife & children :—**Held** : the marriage settlement was not a fraudulent conveyance within 13 Eliz. c. 5.

In order to succeed upon the contention that the covenant was void, under the statute of Elizabeth, against creditors, it is necessary to show that the

Sect. 3.—Protection of bona fide purchasers for value: Sub-sect. 3, B.]

wife was party or privy to the fraud (COZENS-HARDY, L.J.).—*Re REIS, Ex p. CLOUGH*, [1904] 2 K. B. 769; 73 L. J. K. B. 929; 91 L. T. 592; 53 W. R. 122; 11 Mans. 229; *sub nom. Re REIS, Ex p. SAMUEL*, 20 T. L. R. 547; *sub nom. Re REIS, Ex p. TRUSTEE*, 48 Sol. Jo. 506, C. A.; *sub nom. on appeal CLOUGH v. SAMUEL*, [1905] A. C. 442, H. L.

Annotations:—Reid. Re Magnus, Ex p. Salaman, [1910] 2 K. B. 1049. *Mentd. Re Hart, Ex p. Green*, [1912] 3 K. B. 6; *Re Midgley* (1913), 108 L. T. 45; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

146. Exceptions to general rule—Bond enforceable in certain conditions only—“If misfortunes happen to husband.”—Bond was given to the father-in-law of the future husband for £500 payable at a day certain but defeasanced not to be put in suit but for the security of the daughter in case any misfortunes should happen to the husband, to be paid before other creditors:—*Held*: fraudulent on the face of it to disappoint creditors.—*WISE'S CASE* (1725), *Cas. temp. King*, 46; 25 E. R. 211, L. C.

147. ——— Bankruptcy of husband—Wife's fund.]—Settlement on marriage of the wife's fortune, in case of bkpcy. of the husband, though in the form of a bond by him: but as his bond, affecting his property, it is void as against the creditors.—*Ex p. HODGSON* (1812), 19 Ves. 206; 34 E. R. 495, L. C.

Annotations:—Reid. Ex p. Shute (1833), 3 Deac. & Ch. 1; *Macintosh v. Pogose*, [1895] 1 Ch. 505.

148. ——— Settlor indebted at date of settlement.]—*BISCOE v. KENNEDY* (1762), 1 Bro. C. C. 17, n.; 28 E. R. 961.

Annotations:—Apld. Chubb v. Stretch (1870), L. R. 9 Eq. 555. *Mentd. Bolton v. Williams* (1793), 2 Ves. 138; *Francis v. Wigzell* (1816), 1 Madd. 258.

149. ——— Whether settlement rendered fraudulent.]—*CADOGAN v. KENNETT*, No. 139, *ante*.

150. ——— Fund set aside for payment of debts.]—*RICHARDSON v. HORTON*, No. 272, *post*.

151. ——— Knowledge of wife.]—Deft., pending an action against him for the recovery of a debt, married a woman with whom he had cohabited for several years, & in consideration of the marriage executed a settlement of all his property. The ct., upon the suit of the creditor, finding that the wife had knowledge of the facts, declared the settlement fraudulent & void.—*BULMER v. HUNTER* (1869), L. R. 8 Eq. 46; 38 L. J. Ch. 513; 20 L. T. 942.

Annotation:—Apld. Re Pennington, Ex p. Pennington (1888), 5 T. L. R. 29.

152. ——— Effect of false recitals—As to ownership of property.]—Settlement sustained by the consideration of marriage against creditors; notwithstanding false recitals, that the property was the wife's; protecting also voluntary expenditure by the husband after the marriage in improvement by building & enfranchising copyholds; but not jewels & furniture, purchased by him after

the marriage, & given to her.—*CAMPION v. COTTON* (1810), 17 Ves. 263; 34 E. R. 102.

Annotations:—Apld. Fraser v. Thompson (1859), 4 De G. & J. 659. *Reid. Re M'Burnie, Ex p. M'Burnie's Trustees* (1852), 16 Jur. 807; *Colombine v. Penhall, Penhall v. Miller* (1853), 1 Sm. & G. 228; *Re Reis, Ex p. Clough* (1904), 73 L. J. K. B. 929.

153. ——— That settlor indebted to intended wife.]—C., who carried on the business of a flax spinner at the S. mills in partnership with R., by a settlement made in contemplation of his marriage, after reciting that he was indebted to his intended wife in a sum of £20,000, covenanted to pay the sum of £20,000 to the trustees of the settlement, upon trust that as soon as he should become owner in fee simple of the S. mills estate, which he had agreed to purchase, they should advance the sum of £20,000 to him on the security of the same estate; & it was declared that the trustees should stand possessed of the sum of £20,000 & the securities for the same upon trust to pay the income of his intended wife for life for her separate use, & after her death to C. during his life or until he should become bkpt., with remainder in trust for the children of the marriage, & in default of children, for his wife absolutely. The recital that C. was indebted to his intended wife was entirely false, & C. was at the time of the marriage in insolvent circumstances; but the wife had no knowledge of the insolvency of her husband, & understood nothing about the recitals or the arrangements as to the £20,000, except that that sum was to be settled. C. subsequently purchased the S. mills estate, & mortgaged it to the trustees of the settlement for securing £20,000, but no money actually passed between the parties. C., & also his firm, afterwards become bkpt., & a bill was filed by the trustee in C.'s bkpcy. against C. & his wife, the trustees of the settlement, & the trustees in the bkpcy. of the firm, praying that the settlement & the mtge. might be set aside as fraudulent against the creditors; & that the rights of all parties might be declared:—*Held*: notwithstanding the falsity of the recitals, the settlement & the mtge. deed were valid against the creditors so far as concerned the interests of the wife & the children.—*KEVAN v. CRAWFORD* (1877), 6 Ch. D. 29; 46 L. J. Ch. 729; 37 L. T. 322; 26 W. R. 49, C. A.

Annotations:—Consd. Macintosh v. Pogose, [1895] 1 Ch. 505. *Reid. Re Reis, Ex p. Clough*, [1904] 2 K. B. 769.

154. ——— Settlement fraudulent—Both husband & wife must be parties to fraud.]—To avoid an ante-nuptial marriage settlement as a fraud upon creditors, it must be shown that both husband & wife were parties to the fraud.—*PARNELL v. STEDMAN* (1883), *Cab. & El.* 153.

155. ——— ——— ———.]—*Ex p. CLOUGH*, No. 145, *ante*.

156. ——— Intention to defeat creditors—Question of fact.]—*MOORE v. EDDOWES*, No. 141, *ante*.

157. ——— ——— ———.]—(1) A solr. & money scrivener, being in insolvent circumstances, upon his marriage with a woman with whom he had for seven years previously cohabited, by a deed of

PART I. SECT. 3, SUB-SECT. 3.—B.

157 A. Exceptions to general rule—Settlement fraudulent—Intention to defeat creditors.]—Pltf. obtained damages against deft., W., in an action

for breach of promise of marriage; & judgment was entered for pltf. on Jan. 26, 1907. Early in Oct. 1906, W. had proposed marriage to C., who, on Jan. 16, 1907, wrote him a letter alluding to the trouble he was in, &

accepted his proposal on condition that he should settle upon her & her children, if any, \$2,500 in money or property. On Jan. 28 he instructed a solicitor to prepare a marriage settlement, which was executed by W., C., & the trustees

settlement & arts. of agreement executed prior to the marriage, conveyed & assigned the whole of his real & personal estate to trustees, upon certain trusts, for his wife, with a joint power of appointment among the children of the marriage, including an illegitimate daughter, but reserving no interest to himself; immediately after the marriage, the power was exercised in favour of the illegitimate daughter. The property remained under the control of the husband; & within two months after the marriage, a fiat in bkpcy. was issued against him. On a bill filed by the wife to establish the settlement:—*Held*: the settlement was itself an act of bkpcy., & void as against the assignees.

(2) In the same case, it being objected that the fiat was no proof of bkpcy. as against the wife:—*Held*: the fiat, being the adjudication of a ct. of competent jurisdiction, is, until set aside, proof of the bkpcy. against all parties.

(3) Where there is evidence of an intent to defeat & delay creditors, & to make the celebration of a marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement (STUART, V.-C.).—*COLOMBINE v. PENHALL, PENHALL v. MILLER* (1853), 1 Sm. & G. 228; 1 W. R. 272; 65 E. R. 98.

Annotations:—As to (3) *Distd. Carter v. Hind* (1853), 22 L. T. O. S. 116; *Fraser v. Thompson* (1859), 1 Giff. 49. *Apld. Bulmer v. Hunter* (1869), L. R. 8 Eq. 46; *Re Pennington, Ex p. Pennington* (1888), 5 T. L. R. 29. *Reid. Goldsmith v. Russell* (1855), 5 De G. M. & G. 547; *Acraman v. Corbett* (1861), 1 John. & H. 410; *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769. *Generally, Mentd. Black v. Jones* (1851), 20 L. J. Ex. 152; *Whelan v. Palmer* (1888), 36 W. R. 587.

158. ————.]—(1) A settlement, for valuable consideration, made with the intention of defrauding creditors, is void under 13 Eliz. 5.

(2) The mere fact of a settlement being voluntary is not sufficient to render it void against creditors; but if the settlor was at the time of making the settlement, not necessarily insolvent, but so largely indebted as to induce the ct. to believe that the intention of the settlement was to defraud his creditors, & some of those debts are still unpaid, the settlement may be set aside.

Qu.: whether such a settlement can be treated as void at the suit of subsequent creditors.

(3) A voluntary settlement, by which the settlor gives to the trustees of his property an absolute discretion to apply it in the maintenance & support of himself, his wife, & children or any of them, in such manner as they should think fit, is not fraudulent against subsequent creditors. *A fortiori* is such a settlement valid if for valuable consideration. A., being entitled to a life interest in the dividends of £9,000 consols, & being largely indebted, his brother agreed to pay all debts not charged on A.'s life interest, upon condition that such life interest should be settled so as to be applicable for the maintenance of A., his wife,

& children, or any of them, at the absolute discretion of the trustees. This transaction having been carried into effect:—*Held*: such settlement was valid against subsequent creditors, & also against a person who was a creditor of A., at the time of making the settlement, & whose debt was concealed by A. from his brother, & was the only one not paid by him.

I will in this case first consider whether a deed, merely voluntary, is fraudulent against subsequent creditors, from the fact that it contains a trust to apply the interest of the property in such manner as the trustees should think fit, towards the benefit of the settlor or his wife or children. In such a case, the instrument being merely voluntary, the intention may have been to take the property from the creditors, & it may be requisite to have the transaction fully investigated; but, supposing the settlor to have parted *bond fide*, by the deed, with all the control over his property, & to have vested it in the trustees, in order to give them the absolute power to deal with it as they please for the benefit of himself or his wife or children, that could not be held to be fraudulent against subsequent creditors of the settlor, any more than if it were a settlement simply for the benefit of the wife & children of the settlor. The distinction is too thin to authorise the ct. to decide, that, because the settlor may possibly derive some benefit under it, the settlement must therefore be fraudulent (WOOD, V.-C.).

(4) During the negotiation which preceded this arrangement, the solr. of A.'s brother wrote to A., "The only object of your brother is to save your life interest, in case anything happens to you, & to effect this, he was willing to pay your debts," & again he wrote to A.'s solr., "The income will of course be paid to A. as long as this can safely be done; but our conveyancer states, that it will be quite impossible to give A. any interest, however slight, without such interest passing to creditors in the case of bkpcy., or insolvency":—*Held*: these letters did not amount to a secret trust for A.'s benefit; & that, therefore, they could not affect the validity of the settlement.

(5) The discretion of the trustees being absolute:—*Held*: the ct. could not apportion the income between A., his wife, & children, so as to make A.'s part of it available for his creditors.—*HOLMES v. PENNEY* (1856), 3 K. & J. 90; 26 L. J. Ch. 179; 28 L. T. O. S. 156; 3 Jur. N. S. 80; 5 W. R. 132; 69 E. R. 1035.

Annotations:—As to (3) *Apld. Re Eyre, Ex p. Eyre* (1881), 44 L. T. 922; *Re Johnson, Golden v. Gillam* (1881), 20 Ch. D. 389. *Reid. Freeman v. Pope* (1870), 5 Ch. App. 538; *Re Ashby, Ex p. Wroford*, [1892] 1 Q. B. 872; *Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111. *Generally, Reid. Re Sinclair, Ex p. Chaplin* (1884), 26 Ch. D. 319. *Mentd. A.-G. v. Heywood* (1887), 19 Q. B. D. 326.

159. ———— Sole purpose of marriage.]—Where there is evidence of an intent to defeat & delay creditors & to make the celebration of a

on the following day. The property included in the settlement was practically the whole of W.'s property. The marriage took place on the same day. In an action to declare the settlement fraudulent & void:—*Held*: there were circumstances of grave suspicion surrounding the transaction; if the letter were part of a scheme, the fact that W. was in difficulty, & that the action was pending against him, & that the effect of making the transfer of the property would be to prevent

recovery by plff. upon her judgment, would make the transaction void under 13 Eliz. c. 5; but, the trial judge having found that there was an honest offer of marriage, that the letter was genuine, & the wife, C., honest in her statement of the condition upon which she would accept the offer, plff. could not succeed.—*FALLIS v. WILSON* (1907), 10 O. W. R. 121, 605; 15 O. L. R. 55.—CAN.

g. Bill of sale of household goods

—*Valid transfer in consideration of marriage.*]—L., a few days before his marriage, in 1865, executed to his intended wife a bill of sale of his furniture & household goods, & had it duly filed. It recited the intended marriage & that it had been agreed that the goods should be assigned to make some provision for the support of the intended wife, & purported to be made in pursuance of the said agreement & in consideration of 6s.:—*Held*: the bill of sale was not a contract or settlement

Sect. 3.—Protection of bond fide purchasers for value: Sub-sect. 3, B. & C. (a).]

marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement.

An ante-nuptial settlement, therefore, will be set aside under 13 Eliz. c. 5, if the ct. comes to the conclusion on the evidence that the marriage was entered into & the settlement executed for the purpose of defeating the creditors of the settlor.—*Re PENNINGTON, Ex p. PENNINGTON* (1888), 5 T. L. R. 29; 5 Morr. 268, C. A.; *affg.*, S. C. *sub nom. Re PENNINGTON, Ex p. COOPER*, 59 L. T. 774.

Annotation:—*Reid. Re Reis, Ex p. Clough* (1904), 73 L. J. K. B. 929.

— **Limitation over on bankruptcy.**—*See* BANKRUPTCY, Vol. V., pp. 656, 657, Nos. 5854 *et seq.*

Settlements of wife's property --To separate use.]
—*See* HUSBAND & WIFE.

(C. Post-Nuptial Settlements.

(a) In Pursuance of Ante-Nuptial Agreement.

160. General rule.]—A settlement after marriage in pursuance of a bond or agreement before marriage is as good against creditors as a settlement before marriage.—*LLOYD v. FOX* (1670), 2 Keb. 700; 84 E. R. 441.

161. Presumption of ante-nuptial agreement.]—A settlement after marriage recited to be in consideration of a portion secured, shall be presumed to be in pursuance of an agreement previous to the marriage, though no proof of it, & so good against bond creditors.—*ANON.* (1699), Prec. Ch. 101; 24 E. R. 49.

162. Agreement of settlement with ante-nuptial agreement—How far necessary.]—A settlement made after marriage on the wife & children, pursuant to arts. entered into previous to the marriage, though not exactly agreeing with them, not voluntary nor fraudulent against bond creditors.—*BRUNSDEN v. STRATTON* (1719), Prec. Ch. 520; 2 Eq. Cas. Abr. 52, 200; 24 E. R. 233.

163. ——— Lands settled not bound by agreement.]—D., by arts., in consideration of his intended marriage, bearing date in 1796, covenants to settle certain lands, to be purchased with a certain sum of money, to uses, in strict settlement. In 1808 he enters into bonds to the Crown. In 1812 he purchases lands, generally, in fee, & a mtge. term is assigned to a trustee to attend the inheritance, & the estate is then settled, in strict settlement, to the uses declared by the said arts. under which D. himself takes only a life interest: — *Held*: the term does not protect the inheritance of the fee against the Crown's debt due from B., on the bonds, the settlement being voluntary, & the particular estate not being specifically bound by the deed of 1796.—*R. v. ST. JOHN* (1816), 2 Price, 317; 146 E. R. 109.

within the meaning of C. S. U. C. c. 73, s. 1, but was a valid transfer of the goods to the intended wife before marriage, & in consideration of it; & that her title to the goods was therefore, when the marriage took place, protected by the statute, notwithstanding her coverture.—*LEYS v. McPHERSON* (1860), 17 C. P. 266.—**CAN.**

PART I. SECT. 3. SUB-SECT. 3.—
C. (a).

161 i. Presumption of ante-nuptial agreement.]—Letters form a pre-nuptial contract, enforceable in spite of their destruction, upon satisfactory evidence of their contents being given.—*STUART v. THOMSON* (1893), 23 O. R. 503.—**CAN.**

164. ——— Effect of non-agreement — Ante-nuptial agreement by infant heiress—Assets not withdrawn from creditors.]—A covenant by an infant heiress & her intended husband, in marriage arts., to settle the descended estate on the issue of the marriage, though effectual to defeat any alienation by the husband & wife during the coverture, inconsistent with the arts., is not in itself an alienation of the estate, & therefore, has not the effect of withdrawing it from the claims of the ancestor's creditors in a suit subsequently instituted by them for payment of his debts. *Qu.*: whether a settlement executed pursuant to such arts. after the institution of such suit would have that effect.—*PIMM v. INSALL* (1849), 1 Mac. & G. 449; 1 H. & Tw. 487; 19 L. J. Ch. 1; 15 L. T. O. S. 177; 14 Jur. 357; 41 E. R. 1338, L. C.

Annotations:—*Reid. Dilkes v. Broadmead* (1860), 2 Giff. 113. *Mentd. Morley v. Morley, Harland v. Morley* (1855), 5 De G. M. & G. 610; *Re Mouat, Kingston Cotton Mills Co. v. Mouat*, [1899] 1 Ch. 831.

165. Ante-nuptial parol agreement—Unenforceable under Statute of Frauds—Post-nuptial settlements voluntary.]—Prior to his marriage, a husband entered into a parol contract to settle his intended wife's property. The property was not settled until after the marriage:—*Held*: (1) the ante-nuptial parol contract was inoperative under the above statute, & the marriage was not a part performance; (2) the post-nuptial settlement was voluntary, & the husband being greatly indebted at the time, the settlement was void as against the husband's creditors.

Distinction between an ante-nuptial parol contract between husband & wife in consideration of marriage, & an ante-nuptial parol contract between a third party & the husband for other valuable consideration. The ct. will enforce the latter after the marriage, but not the former.—*WARDEN v. JONES* (1857), 2 De G. & J. 76; 27 L. J. Ch. 190; 30 L. T. O. S. 206; 4 Jur. N. S. 269; 6 W. R. 180; 44 E. R. 916, L. C.

Annotations:—*As to (1) Expld. Trowell v. Shenton* (1878), 8 Ch. D. 318. *Consd. Re Whitehead, Ex p. Whitehead* (1885), 14 Q. B. D. 419; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Reid. Goldieutt v. Townsend* (1860), 28 Beav. 445; *M'Askie v. M'Cay* (1868), 16 W. R. 1187. *As to (2) Reid. Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

— — — — —.]—*See, generally, SETTLEMENTS.*

166. ——— Recited in settlement.]—Settlement after marriage of the wife's property, reciting a parol agreement before marriage to such settlement. The creditors of the husband cannot set aside such settlement.—*DUNDAS v. DUTENS* (1790), 2 Cox, Eq. Cas. 235; 1 Ves. 196; 30 E. R. 109, L. C.

Annotations:—*Consd. Warden v. Jones* (1857), 23 Beav. 487; *Goldieutt v. Townsend* (1860), 28 Beav. 445; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Reid. Shaw v. Jakeman* (1803), 4 East, 201; *Randall v. Morgan* (1805), 12 Ves. 67; *Lassence v. Tierney* (1849), 1 Mac. & G. 551; *Surcome v. Pinniger* (1853), 17 Jur. 196; *Warden v. Jones* (1857), 6 W. R. 180; *Trowell v. Shenton* (1878), 8 Ch. D. 318. *Mentd. Rider v. Kidder* (1805), 10 Ves. 360; *Sims v. Thomas, Strachan v. Thomas* (1840), 12 Ad. & El. 536; *Bligh v. Trudgett* (1851), 5 De G. & Sm. 74; *Norton v. Cooper, Re Manby & Hawksford*,

b. ——— Evidence of parties.]—S., upon the treaty for marriage with deft., at her suggestion, verbally agreed to make a settlement for her benefit, & proposed the purchase of a particular property for that purpose. After the marriage in 1870, the property referred to was sold, but producing a larger sum than was anticipated, S. did

Ex p. Bittleston (1856), 3 Sm. & G. 375; *Nurse v. Durnford* (1879), 13 Ch. D. 764; *Williams v. Preston* (1882), 51 L. J. Ch. 927; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426; *British Mutoscope & Biograph Co. v. Homer*, [1901] 1 Ch. 671.

167. Whether sufficient memorandum.]—(1) By a post-nuptial settlement dated in 1873, to which the testamentary guardians of the wife, then an infant, were parties, after a recital that previously to the marriage the husband agreed to make such settlement of the wife's fortune as was thereafter contained, it was witnessed that the husband, being entitled in right of his wife to a reversionary interest in personalty, subject to the contingency of his predeceasing her without reducing it into possession, covenanted that on the fund falling into possession he & his wife would assign it to the trustees on the usual trusts for the wife, husband, & issue of the marriage, the husband's life interest being determinable on bkpcy. The husband was not indebted at the time, nor was he contemplating embarking in trade. In 1877 the wife died. In 1898 the husband was adjudicated bkpt. In 1899 the fund fell into possession. There was issue of the marriage:—*Held*: the settlement was good against the trustee in bankruptcy, on the grounds that there was no evidence of its having been made with intent to defeat creditors so as to render it void under 13 Eliz. c. 5, & no such intent ought, in the circumstances, to be inferred; & that the deed was not voluntary, but, taken as a whole, constituted such a note or memorandum of the recited parol ante-nuptial contract in consideration of marriage as satisfied Stat. Frauds, s. 4, & enabled the contract to be enforced both against the settlor who signed it & against his trustee in bkpcy., the recital of the contract being admissible in evidence as against the trustee setting up the statute.

(2) FARWELL, J., has decided on the authority of *Re Pearson, Ex p. Stephens*, No. 412, *post*, that the fact that the settlement contains a clause providing that [the settlor's] beneficial interest should continue until he should become a bkpt., or assign, or attempt or affect to assign, is conclusive to make the settlement fraudulent within the statute of Elizabeth. I do not think that the decision of *Re Pearson, Ex p. Stephens*, No. 412, *post*, is right (VAUGHAN WILLIAMS, L.J.).

(3) In each case you must look at the whole of the circumstances surrounding the execution of the conveyance & then ask yourself the question whether the conveyance was in fact executed with the intent to defeat or delay creditors (VAUGHAN WILLIAMS, L.J.).

(4) I cannot draw the inference that this settlement was fraudulent, or made with intent to defeat or delay creditors, in the absence of evidence of either indebtedness by the husband at the date of the settlement or of an intention by the husband at the date of the settlement to enter upon a speculative business likely to result in insolvency (VAUGHAN WILLIAMS, L.J.). *Re*

Pearson, Ex p. Stephens, No. 412, *post*, *overd.*—*Re HOLLAND, GREGG v. HOLLAND*, [1902] 2 Ch. 360; 71 L. J. Ch. 518; 86 L. T. 542; 50 W. R. 575; 18 T. L. R. 563; 46 Sol. Jo. 483; 9 Mans. 259, C. A.

Annotations:—*As to* (1) *Consd. Re Davies, Ex p. Milos*, [1921] 3 K. B. 628. *As to* (3) *Reid. Carruthers v. Peake* (1911), 55 Sol. Jo. 291; *Re Gillespie, Knapman v. Gillespie* (1913), 20 Mans. 311.

168. —.]—A parol ante-nuptial contract is not a good consideration to support a post-nuptial settlement as against creditors.—*GOLDICUTT v. TOWNSEND* (1860), 28 Beav. 445; 54 E. R. 437.

169. Post-nuptial settlement—Resettlement—Intention to defraud creditors.]—By settlement on the marriage of J. T. & I., afterwards his wife, a moiety of certain lands was conveyed to trustees, to the use of J. T. & his assigns for his life; remainder to the use of I. & her assigns for her life; remainder to the use of the first & other sons of J. T. by I. successively in tail male; remainder to the use of the daughters of J. T. by I. as tenants in common in tail general, with cross remainders between them; remainder to the use of the settlor, A. the father of I., his heirs & assigns for ever. J. T. was seised in fee of the other moiety. By indentures executed after the marriage, in 1815, & to which, J. T., his said wife, & J. C. T. his eldest son (then of age) were parties, the settled moiety was conveyed to a tenant for the purpose of suffering a recovery, & the unsettled moiety, with other lands of which J. T. was seised in fee, were conveyed to trustees & their heirs; & the uses of the respective conveyances were declared as follows: as to the first mentioned moiety, to the use of J. C. T. & his heirs during the life of J. T.; remainder to the use of I. & her assigns for her life; & as to the same moiety after the determination of the life estates, & also as to the moiety & lands secondly above mentioned from & immediately after the execution of this conveyance, to the use of J. C. T. & his assigns for his life, remainder to the use of the first & other sons of J. C. T. successively, in tail male; remainder to the use of E. T. the younger son of J. T. & his assigns for his life; remainder to the use of the first & other sons of the same E. T. successively in tail male; remainder to the use of the first & other sons thereafter to be born to J. T. by I. or any future wife successively in tail male; remainder to the use of M., the only daughter of T., & her assigns for her life; remainder to the use of the first & other sons of M. successively in tail male; remainder to the use of the first & other daughters thereafter to be born of J. T. by his then present or any future wife successively in tail male; remainder to the use of the first & other sons of the body of J. C. T. successively in tail general; remainder to the use of the first & other sons thereafter to be born of the body of J. T. by his then present or any future wife successively in tail general; remainder to the use of the first & other sons of the body of M. (the then only daughter) successively in tail general; remainder to the use of the first & other daughters to be born

not buy. Afterwards, between Apr. 1872, & June, 1873, S. purchased amongst other properties four parcels of land, for the alleged purpose of the proposed settlement; some of the conveyances it was alleged were in error taken to S. himself, who, two years afterwards, conveyed the same in trust for his wife, but the deed was not registered until three years after its date. S. became insolvent, & the

assignee impeached the conveyance in trust as a fraud upon creditors:—*Held*: an agreement, though oral, had been made by the parties prior to the marriage, although the only evidence was that of the parties themselves, & that the conveyances of the parcels to S. had been so made by mistake, & deft. entitled to hold the lands in settlement.—*BOUSTEAD v. SHAW* (1879), 27 Gr. 280.—CAN.

k. Post-nuptial settlement—In exercise of power under ante-nuptial settlement—By bill of sale.]—Where nothing had been done to carry out the covenants in the marriage settlement for nearly two years until the execution of a bill of sale, which the husband gave to his wife two days after the service of a writ in an action against him; he was then insolvent & gave the bill in order to protect her

Sect. 3.—Protection of bona fide purchasers for value: Sub-sect. 3, C. (a) & (b) i.]

of the body of J. T. by his then present or any future wife, successively in tail general; remainder to the use of J. T. in fee. The recovery was suffered; A. B. being demandant, C. D. tenant, & I. & J. O. T. vouches, who vouched the common vouchee. J. T. was a trader, within the bkpt. laws, & executed the conveyances of 1815 with intent to delay & defraud his creditors; but J. O. T., his son, was not privy to that intention. J. T. became bkpt.; & his assignees filed a bill in equity to set aside the deeds of 1815, & the recovery; & a decree was made, declaring the same void as against the creditors, & the assignees entitled to the lands; it was also ordered that the indentures should be given up to the assignees to be cancelled, which was done. The assignees afterwards agreed to sell their interest in J. T.'s estates to J. C. T.: & by indentures of July, 1821, made for the purpose of barring all estates tail, remainders, etc., in & expectant on the first mentioned moiety, & for limiting the same as after mentioned, J. C. T., & the assignees, at the request & for the accommodation of J. C. T., bargained, sold & re-leased, etc., the first mentioned moiety to C. D., in order that he might be tenant to & suffer a recovery, which was declared to enure to the use of the assignees during the life of J. T. the father, & from & after his decease, to the use of J. C. T. in fee; the release to be void on non-payment of purchase-money by J. C. T. The recovery was suffered accordingly, J. C. T. being vouchee, & afterwards, by indentures of Mar. 1823, reciting payment of the said purchase-money, the assignees bargained, sold & released, etc., to J. C. T. the life estate of J. T. in the first mentioned moiety, & the fee simple in the other moiety. Afterwards, J. T. & his wife died; & J. C. T. sold, & in 1849, conveyed by deed, the fee simple of the entirety to a purchaser for value. On a case stated for the opinion of this Ct., whether the eldest son of J. C. T. had any & what estate or interest in the first mentioned moiety:—*Held*: (1) the deed of 1815 was made by J. T. without consideration, & was fraudulent & void as against creditors by 13 Eliz. c. 5, & nothing passed by it to J. C. T.; (2) if the release of 1815 was, under these circumstances, wholly vitiated, the recovery of 1815 operated, not to the former uses, but as a simple recovery without any deed to lead uses; & J. C. T. thereupon became tenant in fee; & even if he had continued tenant in tail, his estate became a fee simple by the recovery & deeds of 1821 & 1823, & consequently, his eldest son had now no interest; (3) whatever order might have been made by the Ct. of Ch., if J. C. T. had interposed to prevent the deed of 1815 (to lead uses) from being entirely cancelled, the recovery, as the case now stood, enured to the use of J. T. for life (which interest

passed to his assignees), with remainder to J. C. T. in fee; all the uses declared by the deed of 1815 being void; (4) even if, under that deed, J. C. T. had become tenant for life, in remainder with remainder to his first son in tail, yet the conveyance by that deed was a voluntary conveyance within 27 Eliz. c. 4., & void (notwithstanding the recovery in 1821) as against a purchaser for value; & on the conveyance to such a purchaser in 1849, the interest of J. C. T., having become by the recovery of 1815 (for want of a deed to lead uses) a fee simple interest, was, by the conveyance of 1849, transferred to the purchaser.—*TARLETON v. LIDDELL* (1851), 17 Q. B. 390; 20 L. J. Q. B. 507; 17 L. T. O. S. 211; 15 Jur. 1170; 117 E. R. 1329; *subsequent proceedings*, 4 De G. & Sm. 538.

170. In exercise of power under ante-nuptial settlement.]—*ACRAMAN v. CORBETT*, No. 175, *post*.

(b) Where No Ante-Nuptial Agreement.

i. Settlements of Husband's Property.

171. General rule.]—*TUCKER v. COSH* (1651), Sty. 288; 82 E. R. 717.

Annotations:—*Reid. Glalster v. Hower* (1803), 9 Ves. 12; *Re Player, Ex p. Harvey* (1885), 15 Q. B. D. 682.

172. —.]—Settlement after marriage voluntary & void against creditors.—*BEAUMONT v. THORPE* (1747), 1 Ves. Sen. 27; 27 E. R. 869, L. C.

173. —.]—*RUSSEL v. HAMMOND*, No. 275, *post*.

174. —.]—A husband who had £1,733 stock devised to him after marriage, vests it in trustees, for the benefit of himself for life, of his wife for life, & afterwards for the benefit of his children. The settlement is void both as to creditors before & after the marriage; & the trust estate was decreed to be sold, & applied to the payment of the husband's debts.—*TAYLOR v. JONES* (1743), 2 Atk. 600; 26 E. R. 758.

Annotations:—*Consd. Graham v. Furber* (1854), 14 C. B. 410. *Reid. Dundas v. Dutens* (1790), 2 Cox, Eq. Cas. 235; *Legard v. Johnson* (1797), 3 Ves. 352; *Rider v. Kidder* (1805), 10 Ves. 360.

175. Settlement on eve of insolvency.]—(1) By an ante-nuptial settlement, the wife's property was settled according to the joint appointment of the husband & wife, & subject thereto to the husband in fee. The wife joined in appointments to raise the purchase-money for other property which was settled on her & her husband:—*Held*: this second settlement was not voluntary.

(2) A husband, being on the eve of insolvency, joined with his wife in settling property after their decease on their children at twenty-one, with a power of revocation, with the consent of the trustees, in the event of the birth of another

as a creditor, & without any solicitation or pressure from her:—*Held*: the onus was upon claimant, & both the bill of sale & the ante-nuptial settlement were void as against pltf.—*BROWN v. FRACE* (1897), 11 Man. L. R. 409.—CAN.

PART I. SECT. 3, SUB-SECT. 3.—
C. (b) i.

171 i. General rule.]—A husband, not being in debt or engaged in or contemplating becoming engaged in business, bought certain land & stock from

C., the purchase money comprising nearly all the husband's means, & procured C. to make the conveyance & assignment direct to the wife, who had been married to her husband in 1860 without any marriage contract or settlement. The wife mtgd. the property to pltf. In an interpleader action between pltf. & defts., subsequent execution creditors of the husband, to try the title to the above stock:—*Held*: the husband, being in a position to make such voluntary gift or settlement, the conveyance was good, & the property in question was

the wife's equitable separate estate.—*O'DOHERTY v. ONTARIO BANK* (1882), 32 C. P. 285.—CAN.

175 i. Settlement on eve of insolvency.]—Post-nuptial settlement set aside as fraudulent under 13 Eliz. c. 5, although for valuable but inadequate consideration where the settlor was proved to have been largely indebted at the time of execution but not in insolvent circumstances.—*SHAW v. SALTER* (1865), 2 W. W. & A.B. 159.—AUS.

175 ii. —.]—M. made a voluntary conveyance of his real estate in trust

child; & also a proviso, enabling the trustees to pay the income to the husband surviving his wife, & for that purpose to postpone the interest of the children. Another child was born a few months afterwards:—*Held*: the settlement was, under the circumstances, clearly intended to defeat creditors, & void against the husband's assignees.—*ACRAMAN v. CORBETT* (1861), 1 John. & H. 410; 30 L. J. Ch. 642; 4 L. T. 203; 7 Jur. N. S. 624; 9 W. R. 409; 70 E. R. 807.

Annotation:—*Generally, Mentd. Re Poyton* (1861), 7 H. & N. 265.

176. Settlor insolvent.—A voluntary settlement in favour of his wife & child by an insolvent settlor of his equitable reversionary interest in personal estate comprising stocks & shares not subject to an imperative trust for sale:—*Held*: void, under 13 Eliz. c. 5, as against the creditors of the settlor, on the ground that it "delayed, hindered, or defrauded" plffs., who were judgment creditors suing on behalf of themselves, & all other creditors, from obtaining either a charging order upon the stocks & shares under Judgments Act, 1838 (c. 110), s. 14, or the advantage of the appointment of a receiver, by way of equitable execution, of debtor's reversionary interest, which would have operated as an injunction to restrain debtor from himself receiving the property. *Semble*: having appointed a receiver at the instance of the judgment creditor, the ct. would not stop short of granting whatever injunction was necessary to prevent debtor's property from being received by his assignee to the prejudice of the judgment creditor.—*IDEAL BEDDING CO., LTD. v. HOLLAND*, [1907] 2 Ch. 157; 76 L. J. Ch. 441; 96 L. T. 774; 23 T. L. R. 467; 14 Mans. 113.

177. Exceptions to general rule—Settlement supported by other consideration—Payment of portion.—*RUSSEL v. HAMMOND*, No. 275, *post*.

178. ——— Or agreement to pay.—A settlement after marriage good, if it be upon payment of money as a portion or a new additional sum, or even an agreement to pay money, if afterwards paid. In the case of voluntary settlements & wills, if there is no declaration of the trust of a term, it results to the donor; otherwise where it is a settlement for a valuable consideration & in the nature of a contract for the benefit of a wife & of the issue.—*BROWN v. JONES* (1744), 1 Atk. 188; 26 E. R. 122, L. C.

Annotation:—*Reid. Sidney v. Miller* (1815), Coop. G. 206.

179. ———.—Settlement after marriage, if a portion paid, is on good consideration, & equal to one made before marriage.—*RAMSDEN v. HYLTON*, *HYLTON v. BISCOE* (1751), 2 Ves. Sen. 304; 28 E. R. 196, L. C.

Annotations:—*Mentd. Worsley v. Granville* (1751), 2 Ves. Sen. 331; *Clifton v. Cockburn* (1834), 3 My. & K. 76.

for his wife, the effect of the conveyance being to strip himself of all his property which would be available to meet his liabilities. There being evidence of a settled purpose to defeat & delay creditors:—*Held*: the conveyance must be set aside.—*HART v. MCLEAN* (1890), 23 N. S. R. (11 R. & G.) 1.—*CAN.*

176 i. Settlor insolvent.—A married woman had left her husband, on account of his alleged adultery, & had not contributed to the support of her or her children, whom he allowed to remain with their mother. To compromise threatened proceedings, the husband made a settlement in favour

of the wife & children, being in fact then insolvent, but neither the wife nor the trustees had any knowledge thereof:—*Held*: the settlement could not be impeached under 13 Eliz. c. 5.—*MASON v. SCOTT* (1873), 20 Gr. 84.—*CAN.*

1. Settlement on eve of judgment.—On Aug. 5, 1903, J. commenced an action against E. to recover a debt of £89; on Aug. 10 E. in consideration of natural love & affection & of £1 & with the intention & effect of delaying J., assigned to his wife, plff., all his share & interest in his father's estate consisting of real & personal estate. On Aug. 12, judgment was signed by

180. ———.—Daughter entitled to a portion secured on land, marries clandestinely in the lifetime of her father. Afterwards the father secures the portion to the husband, on his making a settlement:—*Held*: the settlement was not fraudulent against the creditors of the husband.—*WHEELER v. CARYL* (1751), Amb. 121; 27 E. R. 79, L. C.

Surrender of interest by wife.—Settlement after marriage by husband on wife & children, on her agreeing with her friends' privity, to part with her contingent interest, good against his creditors.—*WARD v. SHALLET* (1750), 2 Ves. Sen. 16; 28 E. R. 11, L. C.

182. Mutual surrenders by husband & wife.—A *feme covert* entitled to an equitable estate tail in copyholds at B. executed, in Feb. 1870, a deed declaring that such copyholds should be held in trust for such persons as she & her husband should jointly appoint, & in default for herself in fee. The deed was duly acknowledged but was not entered upon the ct. rolls of the manor within six months after execution. By a deed of settlement dated in Mar. 1870, she & her husband, purporting to exercise this joint power, appointed the copyholds at B., & also covenanted to surrender those & other copyholds to which she was entitled in fee, to trustees upon trust to sell, invest the proceeds, & hold the fund (in the events which happened) for her for her separate use for life, then for her husband for life, & then for her children other than her eldest son. No sale or surrender of any of the copyholds was ever made. The *feme covert* had several children, & after the deaths of her & her husband the trustee of the settlement petitioned that all the copyholds might vest in him for all the estate therein of the eldest son & customary heir, who was an infant. A vesting order was made according to the prayer of the petition:—*Held*: the petition for a vesting order must be treated as an action by the persons interested under the settlement to enforce the covenant therein contained for the surrender & settlement of the copyholds, & although the interchange of estates between the husband & wife imported a valuable consideration as between them, the settlement being post-nuptial was voluntary as regarded the children of the marriage, who were strangers to the contract, & consequently the ct. would not interfere in their favour, & the order appealed from must be discharged.

Where there is anything passing between the parties, as there might be said to be here between husband & wife, or as there may be said to be in an assignment of leaseholds, the deed is not under the statute in favour of purchasers fraudulent; but still it is voluntary so as to be bad as against creditors (*COTTON, L.J.*).—*GREEN v. PATERSON*

J. for £12, & on Sept. 4, the sheriff sold to deft. all the right, title & interest of E. in his father's estate for £50, out of which J.'s claim was satisfied. In a suit to administer the estate of E.'s father:—*Held*: as the assignment of Aug. 10 was with the *bona fide* intention of passing the property to plff., the assignment was not void under 13 Eliz. c. 5, & plff. was entitled to the share of E., in his father's estate subject to the payment by her of the sum of £50 to deft.—*JOHNSON v. JOHNSON* (1904), 4 S. R. N. S. W. 585.—*AUS.*

m. ———.—A transfer of his homestead by a man to his wife, if made to defeat creditors, will be

Sect. 3.—Protection of bona fide purchasers for value: Sub-sect. 3, C. (b) i. & ii., D. & E¹

(1886), 32 Ch. D. 95; 56 L. J. Ch. 181; 54 L. T. 738; 34 W. R. 724, C. A.

Annotations:—Mentd. Harris v. Tubb (1889), 42 Ch. D. 79; Stephens v. Green, Green v. Knight (1895), 43 W. R. 466; Carter v. Carter, [1896] 1 Ch. 62.

183. ——— Waiver of equity to settlement by wife.]—Re HOME, Ex p. HOME, No. 121, ante.

184. ——— No intention to defeat or delay creditors.]—Re TETLEY, Ex p. JEFFREY, No. 295, post.

185. ——— Settlor solvent.]—STEPHENS v. OLIVE, No. 278, post.

186. ———.]—On an interpleader issue, a post-nuptial settlement, executed when the assignor was perfectly solvent:—Held: not invalid as against subsequent creditors.—GUGEN v. SAMPSON (1866), 4 F. & F. 974.

Annotations:—Mentd. Mason v. Wood (1875), 1 C. P. D. 63; Emmott v. Marchant (1876), 3 Q. B. D. 555.

Settlement not conforming to ante-nuptial agreement.]—See Nos. 162–164, ante.

ii. Settlements of Wife's Property.

187. General rule.]—The trust created by the husband of the wife's estate would not at law have been deemed fraudulent against creditors, nor even against a subsequent purchaser; & if so, this ct. will not carry it further.—WHITE v. SANSOM (1746), 3 Atk. 410; 26 E. R. 1037, L. C.

Annotations:—Mentd. Doe d. Otley v. Manning (1807), 9 East, 59; Clarke v. Wright (1861), 6 H. & N. 849.

188. No provision for wife on marriage.]—A husband who had made no provision for his wife, agrees that her fortune, which was in trustees' hands, should be laid out in a purchase of lands. This agreement, though after marriage, not to be considered as voluntary, so as to be set aside in favour of a creditor of the husband.—MOOR v. RYCAULT (1691), Prec. Ch. 22; 2 Eq. Cas. Abr. 51, 478; 24 E. R. 12.

189. ——— Settlement to separate use.]—The husband in poor circumstances, & his wife wholly unprovided for, settles her orphanage part in trust, for her sole & separate use, his creditors prior to this assignment, shall not set it aside, or have the interest of the money during his life, for this is a reasonable settlement, & such as the ct. would have obliged the husband to make, if he had sued for her orphanage part here.—HINTON v. SCOT (1730), Mos. 336; 25 E. R. 426.

190. ——— Wife an infant—Husband not indebted at date of settlement.]—MIDDLECOME v. MARLOW, No. 276, post.

191. Fine covenanted to be levied—To use of husband in fee—Not levied for many years—Alteration of uses.]—(1) A. having purchased a freehold estate & paid part of the purchase-money, died intestate, leaving two daughters, his co-heiresses & next of kin. After his decease, on payment of the remainder of the purchase-money by the two daughters & their husbands, the estate

was conveyed to the two daughters as tenants in common. By an arrangement between the two daughters & their husbands, the freehold estate, & certain personal property, were agreed to be taken by B., the husband of one of the daughters, by whom the remainder of the purchase-money for the estate was recited to have been paid, as his share of the property, & a fine was covenanted to be levied to the use of B. in fee. The fine was neglected to be levied, but B. remained in possession till his death, acting as absolute owner of the estate; shortly before his death, & seventeen years after the covenant to levy the fine, a deed was executed & fine levied, by which the estate was settled to the use of B. & his wife for their lives successively, with remainder to their children. A bill by the creditors of B. to set aside this settlement as voluntary & fraudulent within 13 Eliz. c. 5, was dismissed.

(2) Where a fine is covenanted to be levied to certain uses, it is competent to the parties, whilst it is directory, to vary the uses, but the uses must be varied by all the parties, & by an instrument of as high a degree as the former, & the fine ought to be levied to the same conusee; & therefore, where a fine covenanted to be levied to certain uses was omitted to be levied, & several years afterwards a fine was levied by the same conusors pursuant to a deed declaring other uses, & to a different conusee:—Held: the fine operated to the uses of the latter deed, & not of the former.—HOUGHTON v. TATE (1829), 3 Y. & J. 486; 148 E. R. 1271.

192. Settlement in consideration of wife paying husband's debts.]—Where husband & wife agreed that, in consideration of the wife's paying her husband's debts, the husband should settle all the moneys coming to his wife under the will of a relative upon her & her children, & the settlement was accordingly made:—Held: such a settlement was not void as against the trustee in bankruptcy, either under 13 Eliz. c. 5, or under Bkpcy. Act, 1869 (c. 71), s. 91.—Re MOGER, Ex p. RIVINGTON (1879), 41 L. T. 416.

193. After acquired property of wife—Settled on husband for life—Determinable on bankruptcy or alienation.]—A settlement may be made of a legacy to which a married woman becomes entitled during coverture, so as to give her husband a life interest determinable on bkpcy. or alienation.—MONTEFIORE v. BEHRENS (1865), L. R. 1 Eq. 171; 35 Beav. 95; 55 E. R. 830.

Annotations:—Consd. Mackintosh v. Pogose, [1895] 1 Ch. 505; Re Holland, Gregg v. Holland, [1902] 2 Ch. 360.

194. ——— Settled on wife for life—For her separate use—Debt incurred by wife during coverture.]—(1) By a post-nuptial settlement, made before Married Women's Property Act, 1882 (c. 75), property devised by will to a married woman for her separate use without restraint against anticipation was limited to her for life for her separate use without power of anticipation, remainder to the husband for life, remainder to the children. The wife after the Act & during coverture made a promissory note in favour of pltf's., & after the death of the husband pltf's. obtained judgment upon the note against the

declared void by the ct. so far as to enable an execution subsequently obtained by one of the creditors to form thereon the lien or charge given by virtue of an execution.—ADVANCE THRESHER CO. v. BOLLEY,

—CAN.

PART I. SECT. 3, SUB-SECT. 3.—C. (b) ii.

187 i. General rule.]—A settlement

D. L. R. 696.

after marriage of the wife's fortune, if it be an equitable chose in action, is not voluntary or fraudulent, within the 10 Car. 1, s. 2, c. 3 (1r.).—M'CLINTOCK v. ASHE (1833), 2 Ir. L. Rec. N. S. 45.—IR.

widow & an order for the appointment of a receiver of the rents & profits of the property in settlement:—*Held*: upon the true construction of Married Women's Property Act, 1882 (c. 75), ss. 1, 5, 19, the property in settlement was not liable to satisfy the judgment, & the order appointing the receiver must be discharged.

(2) The mere fact that a settlement is voluntary is not enough of itself to make the settlement void under the statute of Elizabeth (WILLS, J.).—*BECKETT v. TASKER* (1887), 19 Q. B. D. 7; 56 L. T. 636; 36 W. R. 158, D. C.

Annotations:—*As to* (1) *Consd.* *Softlaw v. Welch*, [1899] 2 Q. B. 419. *Reid.* *Braunstein v. Lewis* (1891), 7 T. L. R. 246; *Pelton v. Harrison*, [1891] 2 Q. B. 422; *Re Lumley, Hood Barrs v. Cathcart* (1894), 7 R. 400; *Re Hewett, Ex p. Levone*, [1895] 1 Q. B. 328.

D. Settlements by Strangers.

195. Settlement on child—In consideration of redemise to father.]—*TYRER v. LITTLETON* (1612), 2 Brownl. 187; 123 E. R. 889.

196. — Subsequent marriage on faith of settlement.]—*EAST INDIA CO. v. OLAVELL* (1714), Gilb. Ch. 37; Prec. Ch. 377; 25 E. R. 27.

Annotations:—*Expld.* *George v. Milbank* (1803), 9 Ves. 190; *Payne v. Mortimer* (1859), 28 L. J. Ch. 716.

197. — By father & mother—Limitations in mother's favour.]—On the treaty of marriage between A. & B. the father & mother of B., in consideration of the settlement to be made by A. join in conveying a small estate, out of which the mother was dowable, to A. in fee, but no fine was levied; & they also joined in settling another estate of which the father was seized in fee on the father for life, remainder to the mother for life, remainder to the uses of the marriage. At the time of the settlement the father was indebted by specialty. This being a fair & reasonable family settlement, & not made with any view to defeat creditors, the limitation to the mother for life is not fraudulent as against creditors, within 13 Eliz. c. 5, more especially as she had joined in conveying the small estate in fee to the husband.—*JONES v. BOULTER* (1786), 1 Cox, Eq. Cas. 288; 29 E. R. 1170.

Annotation:—*Reid.* *Crofts v. Middleton* (1856), 8 De G. M. & G. 192.

198. — Consideration settlement by parent of other party.]—*Ex p. HALL*, No. 138, *ante*.

199. Settlement on adopted daughter.]—A married woman, having a power of appointment over certain funds, executed same by will in favour of her husband. The funds were handed over to the husband in the lifetime of his wife, & by him transferred to the trustees of a settlement made in anticipation of the marriage of his adopted daughter. The husband survived his wife, but

did not prove her will, & died possessed of property of only nominal value. Subsequently his representative propounded the will of the married woman, & was opposed by her next of kin. A copy of it was pronounced for, & the costs of the next of kin ordered to be paid out of deceased's estate:—*Held*: there was no property out of which such costs could be paid.—*ADAMSON v. HAMMOND* (1873), L. R. 3 P. & D. 141; 43 L. J. P. & M. 17; *sub nom.* *ADAMSON v. ADAMSON & HAMMOND*, 29 L. T. 700; 38 J. P. 89.

E. Who are within the Consideration.

200. General rule.]—In marriage settlements etc., on good or valuable consideration, as between the immediate "parties," such consideration will run through all the limitations for the benefit of the remotest persons: even of those in respect of whom the deeds would otherwise have been voluntary.

Husband on second marriage contracts to pay money in trust for the wife for life, & afterwards for the issue of that & a son by a former wife; his creditors cannot come upon this against the son as being a voluntary disposition as to him.—*ITHELL v. BEANE* (1749), 1 Ves. Sen. 215; 1 Dick. 132; 27 E. R. 990, L. C.

Annotations:—*Consd.* *Price v. Jenkins* (1876), 4 Ch. D. 483. *Appld.* *Gale v. Gale* (1877), 6 Ch. D. 144. *Mentd.* *Andrew v. Wrigley* (1792), 4 Bro. C. C. 125.

201. —.]—The consideration of marriage runs through the whole settlement; & especially supports every provision with regard to the husband & wife. She is interested in the provision for her husband, enabling him to provide for her & the children; & it is not affected by subsequent events, as the death of the wife without children.—*NAIRN v. PROWSE* (1802), 6 Ves. 752; 31 E. R. 1291.

Annotations:—*Mentd.* *Mackroth v. Symmons* (1808), 15 Ves. 329; *Re Lightoller, Ex p. Peake* (1816), 1 Madd. 346; *Winter v. Anson* (1827), 6 L. J. O. S. Ch. 7.

202. Issue—Entail barred & property resettled—Postponement of jointure by wife.]—The wife joins with the husband in letting in an incumbrance on her jointure lands, & barring the estate tail, & then limits the uses to the husband for life, remainder to the wife for life, remainder to their daughters: the daughters are not purchasers, so as to shut out a judgment creditor of the husband's antecedent to the barring of the estate tail, but the limitations to them voluntary, unless the consideration of the wife's parting with her jointure, had extended also to the limitation to the daughters.—*BALL v. BURNFORD* (1700), Prec. Ch. 113; 24 E. R. 55.

203. — Post-nuptial settlement.]—*GREEN v. PATERSON*, No. 182, *ante*.

PART I. SECT. 3, SUB-SECT. 3.—D.

n. Settlement on child—Subsequent marriage on faith of settlement—Settlor indebted at time.]—A father, who was heavily involved, executed an agreement to settle all his property on his daughter on her marriage. Neither the daughter nor her intended husband knew of the father's position, & both married on the faith of the ante-nuptial agreement being carried into effect:—*Held*: in order to impeach such deed, it was not enough to show a scheme by the settlor to defeat his creditors, but it should be shown that there was such a scheme between the settlor, the daughter, & her husband; & bill to set aside a subsequent settle-

ment executed by the father, in pursuance of the ante-nuptial agreement, dismissed.—*SINNOT v. HOCKIN* (1882), 8 V. L. R. 205.—*AUS.*

o. Settlement by relative—Subsequent marriage on faith of settlement—Not a voluntary debt.]—Testator in order to induce A., his half brother, to marry, promised to enter into a bond for £50,000, to be paid within five years of testator's death, & interest to be paid to A., in the meantime. Relying on this promise, A. married & testator executed a deed of settlement, vesting the sum of £16,666 in trustees, for the benefit of the parties to the marriage, A. acknowledging such settlement as in satisfaction, *pro tanto*,

of the £50,000:—*Held*: neither the £50,000 nor the £16,666 was a voluntary debt.—*HAY v. COMR. OF STAMPS* (1911), 11 S. R. N. S. W. 304.—*AUS.*

PART I. SECT. 3, SUB-SECT. 3.—E.

200 i. General rule.]—On a petition after a decree absolute of divorce to vary the terms of an ante-nuptial settlement, the ct. will not make a variation, though consented to by the other party to the marriage, where the variation affects an infant interested under the settlement, if the ct. is not clearly satisfied that the variation is advantageous to the infant.—*BURNS v. BURNS*, [1924] 1 D. L. R. 402; 1 W. W. R. 498.—*CAN.*

Sect. 3.—Protection of bond fide purchasers for value: Sub-sect. 3, E. Sect. 4: Sub-sect. 1.]

204. Issue of former marriage—Settlement by widow on remarriage.]—NEWSTEAD v. SEARLE, No. 656, post.

See, also, No. 206, post.

205. ——— Settlements of widower on remarriage.]—ITHELL v. BEANE, No. 200, ante.

206. ———.]—A settlement by a widower on remarriage is voluntary as regards a daughter by a previous marriage.

As to the daughter by the previous marriage we must remember this is a case of a widower's disposing of his property, not of a widow providing for children of a former marriage. This seems to be covered by authority; in *Re Cameron & Wells*, No. 659, post, KAY, J., held that a conveyance made under similar conditions was void under 27 Eliz. c. 4. The effect will be the same under 13 Eliz. c. 5 (WARRINGTON, J.).—CARRUTHERS v. PEAKE (1911), 55 Sol. Jo. 291.

207. Stranger—Voluntary.]—Covenant in marriage articles in favour of a stranger:—Held: merely voluntary, & not to be supported by the marriage consideration.—SUTTON v. CHETWYND (1817), 3 Mer. 249; 36 E. R. 96.

Annotations:—Consd. *Clarke v. Wright* (1861), 6 H. & N. 849. Apprvd. *De Mestré v. West*, [1891] A. C. 264. Refd. *Davenport v. Bishopp* (1846), 1 Ph. 698; *Voyle v. Hughes* (1854), 2 Sm. & G. 18; *Cramer v. Moore* (1855), 25 L. T. O. S. 31; *A.-G. v. Jacobs Smith*, [1895] 2 Q. B. 341.

204 i. Issue of former marriage—Settlement by widow on remarriage.]—A settlement providing for the children of a widow who is about to marry again is made on valuable consideration, if the settlement is a marriage contract, the valuable consideration being the contract of marriage; & is within 13 Eliz. c. 5, if the settlor is indebted at the time, but only in relation to liabilities existing at the time of marriage.—BRUNSKILL v. ANDERSON (1912), 31 N. Z. L. R. 1018.—N.Z.

PART I. SECT. 4. SUB-SECT. 1.

209 i. Question of fact.]—The question of fact which the judge has to leave for the jury alone to ascertain, is whether an assignment is of a feigned, covinous & fraudulent character, made with that purpose & intent, & with a colourable & feigned consideration; or, on the contrary, was it made bond fide & on a good consideration.—TARRATT v. SAWYER (1835), 1 N. S. R. (Thom.) 46.—CAN.

209 ii. ———.]—Although a valuable consideration be specified in the deed, it is a question for the jury whether the same is real or fictitious.—DOE d. BARLOW v. HATFIELD (1843), 4 N. B. R. (2 Kerr) 122.—CAN.

209 iii. ———.]—Although the bona fides of a trust deed is a question for the jury, & has been so left to them by the judge, yet the ct. will set aside the verdict where the evidence does not appear sufficient to warrant the inference of fraud which the jury have drawn.—BURNHAM v. WHITE (1844), 4 N. B. R. (2 Kerr) 571.—CAN.

209 iv. ———.]—Where a deed under which pltf. claimed was in several parts illegible, & contained no sufficient description of the part of the lot intended to be conveyed, & there was strong evidence that the deed was made to defeat creditors, the ct. set aside a verdict for pltf., rendered in opposi-

tion to the judge's charge.—DOE d. McDONALD v. McDONALD (1846), 2 U. C. R. 267.—CAN.

209 v. ———.]—The fact of the lessor of pltf. having failed to record his deed for seventeen years, together with acts & acknowledgments by him inconsistent with his title, subsequent to the making of the deed to him, are evidence for the jury against its validity as a bond fide conveyance.—MCKINNON'S LESSEE v. McDONALD (1853), 2 N. S. R. (James) 7.—CAN.

209 vi. ———.]—Where debtor mtgd. all his personal property including the most trifling articles, to secure a debt very small in proportion to their value:—Held: although no evidence of value was given, & the bona fides of the debt was not disputed, it should have been left to the jury to say whether these circumstances were not sufficient to show that the deed was made, not for the security of the assignee, but for the purposes of debtor, & to shield his property from other creditors.—FLEMING v. McNAUGHTEN (1858), 16 U. C. R. 194.—CAN.

209 vii. ———.]—HOWELL v. McFARLANE (1858), 16 U. C. R. 469.—CAN.

209 viii. ———.]—GIDNEY v. TITUS (1877), 11 N. S. R. (2 R. & C.) 561.—CAN.

209 ix. ———.]—Where the question as to whether a bill of sale was fraudulent or not was fairly left to the jury, the ct. refused to disturb their verdict.—FERGUSON v. JOHNSTON (1879), 19 N. B. R. 279.—CAN.

209 x. ———.]—No certain rule can be laid down as to what is an honest transaction or the opposite. Every case must stand on its own footing, & the ct. or jury must consider whether, having regard to all the circumstances, the transaction was a fair one & was intended to pass the property for a good & valuable consideration.—

208. Collateral relations—Niece adopted as daughter—Voluntary.]—A lady being indebted to pltf. at the time of marriage, settled all her real & personal property, with the exception of jewels & furniture exceeding in value the amount of her debt, upon failure of issue of the marriage, in favour of certain collateral relatives, including a niece whom she had adopted as her daughter. The lady survived her husband, & died without issue, leaving no assets:—Held: the settlement, so far as it was made in favour of collaterals, was voluntary, & must be set aside to the extent of pltf.'s debt.—SMITH v. CHERRILL (1867), L. R. 4 Eq. 390; 36 L. J. Ch. 738; 16 L. T. 517; 15 W. R. 919.

Annotation:—Refd. *Denison v. Tattersall*, *Denison v. Cropper* (1868), 18 L. T. 303.

Compare Part II., Sect. 3, sub-sect. 2, B. (c) iii., post.

SECT. 4.—FRAUDULENT INTENT AND EVIDENCE THEREOF.

SUB-SECT. 1.—IN GENERAL.

209. Question of fact.]—INGLISS v. GRANT, No. 46, ante.

210. ———.]—The question left to the jury was, whether R. had conveyed the property in question to the lessors of pltf. with a fraudulent view, or to prevent his bond fide creditors from obtaining their

DOE d. JONES v. NEVERS (1879), 18 N. B. R. (2 P. & B.) 627.—CAN.

209 xi. ———.]—HOLMES v. BONNETT (1889), 21 N. S. R. (9 R. & G.) 497

209 xii. ———.]—BOURQUE v. LOGAN (1893), 26 N. S. R. (14 R. & G.) 1.—CAN.

209 xiii. ———.]—Where the facts which must govern the ct. in coming to a conclusion are different in each case, while an isolated fact may not be sufficient to induce the ct. to set aside a transaction as fraudulent, a combination of facts may irresistibly lead to that conclusion.—DELONG v. GILLIS (1898), 31 N. S. R. (19 R. & G.) 61.—CAN.

209 xiv. ———.]—BENTLEY v. MORRISON (1910), 9 E. L. R. 135.—CAN.

209 xv. ———.]—The question is always whether there was an actual intent to defeat, hinder, or delay creditors; & the circumstances that the conveyance is made because of a belief that there is a legal obligation to convey is sufficient to negative any intent to defraud.—BANK OF MONTREAL v. STAIR (1919), 44 O. L. R. 79; 15 O. W. N. 146.—CAN.

209 xvi. ———.]—The question of intent is one of fact to be determined upon the circumstances of each case. The ct. is not bound to find that there was an intent to defeat creditors from the mere fact that the necessary consequence of what debtor did was to defeat creditors.—DAVIS v. CAVERS, [1923] 1 D. L. R. 883; 1 W. W. R. 274.—CAN.

209 xvii. ———.]—SEBILLEAU v. STOKES, [1923] 1 W. W. R. 537.—CAN.

209 xviii. ———.]—O'CONNOR v. BERNARD (1838), 2 Jo. Ex. Ir. 654.—IR.

p. ——— Misdirection.]—CLARK v. MORRELL (1862), 21 U. C. R. 596.—CAN.

—.]—Where pltf.'s counsel

just debts, & the jury had negatived all fraud. The question, therefore, was properly left to them, & set at rest by their verdict (BEST, C.J.).—DOE d. DIXON v. WILLIS (1829), 5 Bing. 441; 3 Moo. & P. 24; 7 L. J. O. S. C. P. 170; 130 E. R. 1131.

Annotations.—Mentd. Doe d. Harris v. Saunder (1836), 5 Ad. & El. 664; Williams v. Phillips (1881), 8 Q. B. D. 437.

211. —.]—(1) H., by settlement after marriage, in July, 1853, assigned or purported to assign, all the real & personal estate to which he was entitled in right of his wife, upon trust for her separate use for life, & afterwards for her children; with a power to the trustee, at her request, to raise a certain sum for the payment of his, the husband's, debts. Previously to making such settlement H. was indebted to pltf. who, in Mar. 1854, entered up judgment against him for the amount. The personal estate, which was the subject of settlement, was by a decree of Jan. 1854, in another cause ordered, to be transferred to the trustee of the settlement, & the residue was so transferred. Pltf. having obtained a charging order, filed a bill on behalf of himself & all other creditors, praying that the settlement might be set aside as fraudulent & void against the creditors; or, at all events, so far as it affected the real estate. At the hearing the case against the personal estate was abandoned, & relief sought against the real estate only. It was not proved that there was any real estate:—*Held*: pltf. was bound to show not only that he was a creditor, but that the settlement did actually put property out of the reach of creditors.

(2) Pltf. not having proved that H. was indebted to the extent of insolvency, or that the object of the settlement was to defeat or delay creditors, the bill was dismissed with costs.

(3) *Semble*: on a bill to set aside a conveyance of real & personal estate, the ct. will not exert its authority to set aside the deed partially, for example, as to the real estate only.—TURNLEY v. HOOPER (1856), 3 Sm. & G. 349; 28 L. T. O. S. 62; 2 Jur. N. S. 1081; 5 W. R. 1; 65 E. R. 689.

212. —.]—A trader, in consideration of advances in cash & goods, assigned all his stock to debts., to secure such advances & also a debt previously due to them. The goods so assigned

comprised all his property, except some household furniture & book debts. In an action by the assignees of the trader to recover the value of the goods seized under this bill of sale, the judge left it to the jury, with very strong observations, to say whether they would infer an intent to defeat & delay creditors.—PENNELL v. DAWSON (1856), 18 C. B. 355; 139 E. R. 1407.

Annotation.—Reid. Pennell v. Reynolds (1861), 11 C. B. N. S. 709.

213. —.]—SUTTON v. BATH, No. 388, *post*.

214. —.]—HALE v. SALOON OMNIBUS CO., No. 383, *post*.

215. —.]—THOMPSON v. WEBSTER, No. 308, *post*.

216. —.]—HENDERSON v. LLOYD, No. 386, *post*.

217. —.]—The insertion in a bill of sale knowingly of a wrong sum does not necessarily invalidate the security as against creditors, if it be done without fraud, & with the intention of making the security available only to the extent of the sum actually due.

The governing statute on this point is 13 Eliz. c. 5, but that statute speaks of a fraudulent deed, & this is expressly found not to be fraudulent (BLACKBURN, J.).—BIDDULPH v. GOOLD (1863), 2 New Rep. 420; 11 W. R. 882.

218. —.]—*Re* WISE, *Ex p.* MERCER, No. 398, *post*.

219. —.]—Where a debtor conveyed all his real estate upon trust to sell & pay off his debts, & as to any ultimate surplus to pay the same to trustees to be held by them in trust for the separate use of his wife for life, & after her decease in trust for their children in equal shares as tenants in common, in a suit by a subsequent purchaser for value, at a sale in execution, of the grantor's interest in some lands comprised in the conveyance:—*Held*: (1) the deed of conveyance was not revocable, there being an ultimate trust for the benefit of wife & children; (2) it was not void as intended to delay or defeat creditors; (3) not being fraudulent in fact, it was not fraudulent in law & void against creditors under 13 Eliz. c. 5, no intention to delay or defeat creditors being

asked the judge to instruct the jury as to what constituted fraud under Stat. Eliz., & the judge refused to define fraud to the jury as requested:—*Held*: the refusal of the judge to charge the jury as requested amounted to misdirection.—GRIFFITHS v. BOSCHOWITZ (1891), 18 S. C. R. 718.—CAN.

r. *Unregistered bill of sale*.—It is an arrangement not to register & not the fact of non-registration which raises a presumption of intent to defeat.—*Re* ISRAEL, *Ex p.* OFFICIAL ASSIGNEE (1895), 16 N. S. W. B. 93.—AUS.

s. — *Badges of fraud*.—CULTON v. HARRIS (1897), 30 N. S. R. (18 R. & G.) 112.—CAN.

t. *Proof of*.—Fraudulent intention is a material element in an action to set aside a conveyance as being voluntary & fraudulent against creditors, & where it does not exist, the action cannot succeed. The fact that the result of a conveyance is to defeat creditors is not necessarily proof that the intention of grantor in making it was fraudulent.—CARR v. CORFIELD (1890), 20 O. R. 218.—CAN.

a. —.]—R. v. SHAW (1895), 31 N. S. R. (19 R. & G.) 534.—CAN.

b. —.]—Where a conveyance by a married woman of alleged separate property is attacked as a device to defraud creditors, it must be clearly shown that the grantee had knowledge of the device at the time the security was given.—HARTLEN v. ADAMS (1896), 40 N. S. R. 96.—CAN.

c. —.]—Where the consideration for a deed is, at most, meritorious, & in the absence of valuable consideration, the rule requiring the party attacking the deed to prove fraud does not apply.—MCNEIL v. MCPHEE (1898), 31 N. S. R. (19 R. & G.) 140.—CAN.

d. —.]—MILLER v. MCCUAIG (1899), 13 Man. L. R. 220.—CAN.

e. —.]—NEWTON v. BERGMAN (1901), 21 C. L. T. 485; 13 Man. L. R. 563.—CAN.

f. —.]—MERCHANTS BANK OF CANADA v. HOOVER (1907), 5 W. L. R. 516.—CAN.

g. —.]—MORTON v. THOMAS (1915), 49 N. S. R. 252.—CAN.

h. —.]—SHEPARD v. SHEPARD, [1924] 3 D. L. R. 566.—CAN.

k. —.]—In order to defeat a voluntary grant of land, it is not necessary, under 13 Eliz. c. 5, for a creditor impeaching the transaction to show that the intent of grantor was fraudulent. It is sufficient if the effect of the grant is to hinder & defeat the claims of grantor's creditors.—HARROP v. CHOKER (1872), Mac. 800.—N.Z.

l. *Creditors delayed or hindered*.—*Proof of*.—Where transaction not voluntary.—In 1876, a marriage being contemplated between debt. & M., debt.'s father proposed that M. should erect a house, which he had intended building, on a lot belonging to the father, who agreed to convey the same to his daughter as a marriage portion. This M. assented to, & the marriage took place. The year following M. built the house & his father-in-law conveyed the lot to debt. In 1880 M. became insolvent, & proceedings were taken by his assignee to have the transaction declared fraudulent as against creditors, under 13 Eliz. c. 5:—*Held*: no fraudulent intention was shown on the part

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Sub-sects. 1 & 2, A., B. & C.]

shown; (4) it was not void under 27 Eliz. c. 4, as against a purchaser for value under New South Wales District Courts Act, 1858, ss. 78, 79. The subsequent sale for value not being by the voluntary grantor, no presumption arose that the prior grant was fraudulent.—*GODFREY v. POOLE* (1888), 13 App. Cas. 497; 57 L. J. P. C. 78; 58 L. T. 685; 37 W. R. 357; 4 T. L. R. 414, P. C.

Annotation:—Generally, Mentd. Jones v. Barnett, [1899] 1 Ch. 611.

220. ———.]—*Re HOLLAND, GREGG v. HOLLAND, No. 167, ante.*

221. ———.]—*GLEGG v. BROMLEY, No. 133, ante.*

222. ——— Unregistered bill of sale.]—*MORRIS v. MORRIS, No. 363, post.*

—— **Creditors' trust deeds.]—*See Sect. 2, sub-sect. 3, A., ante.***

—— **Grantor continuing in possession.]—*See Sect. 4, sub-sect. 6, A., post.***

223. Creditors delayed or hindered—Creditors prevented from obtaining charging order—Or equitable execution.]—*IDEAL BEDDING CO., LTD. v. HOLLAND, No. 176, ante.*

SUB-SECT. 2. —ABSENCE OF CONSIDERATION.

A. In General.

224. Absence of consideration—Whether conclusive of fraud.]—Every voluntary conveyance is not therefore fraudulent, but a voluntary conveyance, if there was a reasonable cause for the making of it may be good & valid even against a creditor (*per OUR.*).—*SAGITARY v. HYDE* (1688), 2 Vern. 44; 23 E. R. 639, L. C.

225. ———.]—*BECKETT v. TASKER, No. 104, ante.*

226. ———.]—*GLEGG v. BROMLEY, No. 133, ante.*

227. ——— Grantor indebted.]—A general power of appointment given over an estate in lieu of a present interest in it having been executed

of M., & any knowledge by debt. or her father was distinctly negatived by the evidence, & the transaction could not be impeached.—*DAVIDSON v. MAGUIRE* (1882), 7 A. R. 98.—CAN.

m. ———.]—A transaction is not fraudulent where it is not voluntary, but brought about by pressure, & is for valuable consideration, & the mere fact if it is shown of creditors being delayed, will not dispense with proof of intent to delay.—*ALLAN v. McTAVISH* (1883), 8 A. R. 410.—CAN.

n. Family transactions.]—Although family transactions, by which creditors are defeated, are ordinarily looked upon by the ct. with a good deal of suspicion, yet when the evidence is clear & satisfactory they will not be set aside.—*McDONALD v. McQUEEN* (1893), 9 Man. L. R. 315.—CAN.

o. ———.]—Strong suspicion that a father's appointment to his son was for the father's benefit, & was a fraud upon the power, does not suffice to avoid the transaction.—*HAMILTON v. KIRWAN* (1845), 8 L. Eq. R. 278; 2 Jo. & Lat. 393.—IR.

PART I. SECT. 4, SUB-SECT. 2.—A.

224 i. Absence of consideration—Whether conclusive of fraud.]—When a voluntary conveyance has the effect of defeating creditors it will be set aside, & it is not necessary to adduce evidence of fraud.—*CUNNINGHAM v. CURTIS* (1897), 5 B. C. R. 472.—CAN.

PART I. SECT. 4, SUB-SECT. 2.—B.

229 i. General rule.]—A person against whom several executions for small amounts were in the sheriff's hands, & whose chattel property when sold by the sheriff was not sufficient to pay these executions, made a settlement of the only real estate he had in trust for his wife & children:—*Held: fraudulent & void.*—*GOODWIN v. WILLIAMS* (1856), 5 Gr. 539.—CAN.

229 ii. ———.]—There need not in the case of a voluntary settlement be proof of an actual & express intent to defeat creditors; a settlement by a debtor of the whole of his property available for payment of a debt is fraudulent & void against that debt.—*HOLMES v. HOLMES* (1913), 24 W. L. R. 720; 4 W. W. R.

voluntarily though for a daughter:—*Held: to be assets in favour of creditors.*

I know of no case on 13 Eliz. c. 5, where a man indebted at the time makes a mere voluntary conveyance to a child without consideration & dies indebted but that it shall be considered as part of his estate for the benefit of his creditors. . . . A man actually indebted & conveying voluntarily always means to be in fraud of creditors I take it (*LORD HARDWICKE, C.*).—*TOWNSHEND (LORD) v. WINDHAM* (1750), 2 Ves. Sen. 1; 28 E. R. 1, L. C.

Annotations:—Consd. Holloway v. Millard (1816), 1 Madd. 414; *Scarf v. Soulby* (1849), 1 H. & Tw. 426; *Re Guodalla, Lee v. Guedalla's Trustee*, [1905] 2 Ch. 331. *Reid. Ward v. Shallet* (1750), 2 Ves. Sen. 16; *Holmes v. Coghill* (1806), 12 Ves. 206; *Doc d. Otley v. Manning* (1807), 9 East, 59; *Ewart v. Ewart* (1853), 11 Hare, 276; *Re Roper, Roper v. Doncaster* (1883), 39 Ch. D. 482; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659. *Mentd. Hurst v. Winchelsea* (1759), 2 Keny. 444; *Thorpe v. Goodall* (1811), 17 Ves. 460; *Platt v. Routh* (1840), 6 M. & W. 756; *Patch v. Shore* (1862), 2 Drew. & Sm. 589; *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *O'Grady v. Wilmot*, [1916] 2 A. C. 231.

See, also, No. 235, post.

228. Inadequacy of consideration.]—R., a married man, by a deed dated in Dec. 1845, in consideration of £500 expressed to be paid to him by L., his wife's father, settled certain reversionary real estate upon trusts for the benefit of his wife & children, & under a power in that deed the property was sold for £4,300. This sum was afterwards invested in stock, & by a deed of May, 1846, the trusts thereof were declared, being trusts corresponding with those of the deed of Dec. 1845. A bill was filed by a judgment creditor of R. impeaching the latter deed only:—*Held: (1) the consideration was illusory, & the whole transaction fraudulent & void against creditors; & (2) it was competent to the pltf. to impeach the latter deed only, not claiming his lien as a judgment creditor.*—*GOLDSMITH v. RUSSELL* (1855), 5 De G. M. & G. 517; 25 L. J. Ch. 232; 24 L. T. O. S. 285; 1 Jur. N. S. 985; 3 W. R. 218; 43 E. R. 982, L. C.

Annotations:—As to (1) Reid. Roese River Silver Mining Co. v. Atwell (1869), L. R. 7 Eq. 347. *Generally, Mentd. Ponsford v. Widnell*, [1869] W. N. 81; *Re New Zealand Mid. Ry., Smith v. Lubbock*, [1901] 2 Ch. 357.

B. Settlements.

229. General rule.]—*NAYLOR v. BALDWIN* (1639), 1 Rep. Ch. 130; 21 E. R. 528.

1065; 10 D. L. R. 73; 6 Sask. L. R. 79.—CAN.

229 iii. ———.]—Where the effect of a conveyance of land was merely to transfer the ownership from husband to wife & the conveyance was made for the purpose of defeating an expected & impending execution, the grantee, wife of grantor, knowing that it was pending & knowing all the facts & knowing that her husband had no other property to satisfy the judgment:—*Held: the conveyance was fraudulent.*—*HOPKINSON v. WESTERMAN* (1919), 16 O. W. N. 5; 45 O. L. R. 208; 48 D. L. R. 597.—CAN.

229 iv. ———.]—Where a husband caused property, for which he alone had paid, to be conveyed to his wife in order to defeat & delay creditors, & the wife had notice of the fraudulent intent:—*Held: the legal estate as against the husband's creditors passed to the wife, & she held the property subject to the payment of creditors, & her claim to the property would stand as between her husband & herself.*—*DOTY v. MARKS* (1923), 55 O. L. R. 147; 3 D. L. R. 687.—CAN.

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230. —.]—*HOLMES v. PENNEY*, No. 158, *ante*.

231. —.]—*BARRACK v. M'CULLOCH*, No. 80, *ante*.

232. —.]—*FREEMAN v. POPE*, No. 301, *post*.

233. Settlement on child—Settlor indebted.]—*SNEED v. CULPEPPER* (LORD & LADY), No. 21, *ante*.

234. — Settlor not indebted.]—One not in debt, nor then a trader, makes a voluntary settlement on a child, & afterwards becomes a trader & a bkpt.; this settlement not liable to the bkpcy.—*LILLY v. OSBORN* (1734), 3 P. Wms. 298; 24 E. R. 1073.

*Annotations:—*Refd. *Glaister v. Hower* (1802), 8 Ves. 195. *Mentd.* *Banks v. Farquharson* (1752), cited in 2 Rev. Supp. p. 178.

235. Settlement in favour of strangers—Settlor not indebted—No intention to defraud.]—A voluntary settlement in favour of strangers, by one not indebted at the time, nor meaning a fraud, good against subsequent creditors.—*HOLLOWAY v. MILLARD* (1816), 1 Madd. 414; 56 E. R. 152.

*Annotations:—*Refd. *Mackay v. Douglas* (1872), L. R. 14 Eq. 106. *Mentd.* *Angell v. Dawson* (1839), 3 Y. & C. Ex. 308.

236. Consideration partly meritorious—Falsely recited as valuable.]—(1) In a settlement executed by a person in embarrassed circumstances, being in part merely meritorious, but untruly recited as valuable, where the operation of the deed was to withdraw property from the creditors of the settlor, the ct. declared the deed invalid as against creditors, & set it aside.

(2) *Semble*: advances made by a parent to a child, which formed a debt, but had ceased by lapse of time to be a legal obligation, are yet a sufficient consideration to support a deed by way

of family arrangement, but not against creditors.—*PENHALL v. ELWIN* (1853), 1 Sm. & G. 258; 1 W. R. 273; 65 E. R. 112.

C. Gifts.

237. Grantor continuing in possession.]—A man made a gift of his goods of intent to defraud his creditors, & yet continued the possession of them, & took sanctuary & died there; now his exors. having the goods were charged towards the creditors.—*ANON.* (1176), Cary, 18; 21 E. R. 10.

238. To children—Gift of money.]—*DUFFIN v. FURNESS* (1729), Cas. temp. King, 77; 25 E. R. 232.

239. — Without knowledge of bad circumstances—What court will consider.]—Bill against children for discovery of sums advanced to them *pendente lite*, by their father, an insolvent executor; it appeared on the answers that two of them received £500 each on their marriages, that two others received £500 each for their maintenance:—*Held*: the two last should refund although they denied knowledge of their father's insolvency.

As to the two other children, it struck me at first as a hardship to make the children refund . . . but on consideration I think no man has such a power over his own property, to dispose of it so as to defeat his creditors, unless for consideration the statute [13 Eliz. c. 5] extends to all cases except where this is good consideration & *bona fide*; blood has been held not to be a good consideration. I have no doubt but that this voluntary gift proceeded from affection getting the better of justice. The transaction smells of craft & experiment. . . . It was done secretly & *de lite* (LORD NORTHINGTON, LORD KEE

233 i. Settlement on child—Settlor indebted.]—Land was conveyed to an infant by direction of his father for the purpose of defrauding the father's creditors; the father having afterwards been arrested by the creditors, he & his son joined in a mtge. of the land to secure the debt:—*Held*: the mtge. was good, the infant, being only a trustee for his father, was bound to convey the land as he directed, & neither of them could set up the infancy to defeat the mtge. *DUFFIN v. SIMPSON* (1846), 5 N. B. R. (3 Kerr) 194.—CAN.

234 i. — Settlor not indebted.] In 1878 J. arranged with his two sons, H. & T., to convey to H. two parcels of land which H. was to hold until T. came of age. H. held the land until 1882, when he conveyed it to his father, who immediately reconveyed one parcel to H. & the other to T. It was found that the conveyances of 1882 were merely to carry out the trust upon which the conveyance of 1878 was made; that when it was made J. was in a position to pay all his debts in full, even after deducting the property in question; & that no debt, in existence when the conveyance of 1878 was made, was now unpaid:—*Held*: the conveyances to H. & T. were valid, as in the circumstances they could not be deemed to be made with intent to hinder, delay, or defraud creditors.—*BANK OF MONTREAL v. DAVIS* (1885), 9 O. R. 556.—CAN.

234 ii. — —.]—Deft.'s father, believing himself solvent, in Jan. 1903, conveyed land voluntary to deft. At that time he owned shares in plff. co.,

& had borrowed from the co. upon them, but these shares up to the time of the failure of the co. in June, 1903, were saleable above par, & considered then & at the time of the loan ample security for the amount of it:—*Held*: on the evidence, no fraudulent intent on the part of the grantor could be inferred.—*ELGIN LOAN & SAVINGS CO. v. ORCHARD* (1904), 24 C. L. T. Occ. N. 292; 7 O. L. R. O. W. R. 781.—CAN.

PART I. SECT. 4, SUB-SECT. 2. C.

p. General rule.]—A voluntary transfer of property by way of gift, if made *bona fide* & not with the intention of defrauding creditors, is valid as against creditors.—*GNANABHAI v. SRINIVASA PILLAI* (1868), 4 Mad. 84.—IND.

To children—Grantor in —.]—*WARD v. —* (1865), 1 L. C. L. J. —CAN.

r. To wife—Land purchased with money payable by Crown.]—S. purchased lands with money payable to him by the Crown for work done under a contract, which lands he procured to be conveyed to his wife:—*Held*: the money having passed out of the Crown by reason of the husband's appointment in favour of his wife, the effect was to defraud creditors, & the gift was void.—*NICHOLSON v. SHANNON. McPHERSON v. SHANNON* (1881), 28 Gr. 378.—CAN.

s. — Donor indebted.]—L. caused a deed of real estate to be made to a trustee for the benefit of his wife.

The title was in his son W., by whom the deed was made, but it was proved that although the property was purchased, & the consideration money paid by W., who was then a minor, yet his father had erected part of a double house on the property with the consent of his son, & that the deed from the latter to the trustee was made with the father's concurrence. At the time of the conveyance in trust, L. was indebted to plffs. There was no consideration for the trust-deed:—*Held*: the trust deed had the effect of delaying & hindering creditors & was void.—*DODD v. LINTON* (1885), 14 N. B. R. (6 R. & G.) 35; 6 C. L. T. 13.—CAN.

t. — —.]—C. in 1896 gave his wife \$600, which she kept in the house, & he shortly after to receive it back in small portions, & continued to do so until he had received it all. In March, 1898, she demanded some settlement, & he agreed to give her a bill of sale of the household furniture, but the transaction was not carried out until June, after he had been sued for the price of the furniture:—*Held*: there was no legal obligation binding upon the husband to repay the \$600, & that the bill of sale must be treated in the same way as if the gift had been made to the wife at the time of the execution of the bill of sale, & was therefore void.—*CORBINOLEY v. MACARTHUR* (1899), 6 B. C. R. 527.—CAN.

u. — Money paid to wife's —.]—In an action by a husband his wife for recovery of pos- of land, he claimed that the land was purchased by the wife with

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sect. 2, C. & D.; sub-sects. 3 & 4.]

The fraudulent intent is to be collected from the magnitude & value of the gift (LORD NORTHINGTON, LORD KEEPER).—*PARTRIDGE v. GOPP* (1758), Amb. 596; 1 Eden, 163; 27 E. R. 388.

240. Gifts by administrator to renouncing executor.]—A. made B. his exor., & died. B. to the intent to defraud the creditors refused to take upon him the exorship., but caused a stranger to take upon him letters of administration, which stranger fraudulently gave the goods of testator to B.

If the gift be fraudulent, then by 13 Eliz. c. 5, the gift is void (DYER, J.).—*STOKE'S CASE* (1573), 3 Leon. 57; 74 E. R. 538.

241. Gifts by executor to stranger—Executor retaining possession of assets.]—*WATSON'S CASE* (1595), Moore, K. B. 396; 72 E. R. 651.

D. Other Dispositions.

242. Release of interests under will—Under misapprehension.]—Release from one brother to another of certain premises that had been devised to him by his father, executed in consequence of a threat to file a bill, & of assurances that a favourable opinion had been given by counsel, set aside in favour of creditors.

There was indeed no fraud but it being a voluntary conveyance is void against the creditors (HENLEY, LORD KEEPER).—*PEAT v. POWELL* (1760), 1 Eden, 479; Amb. 387; 28 E. R. 771.

*Annotations:—*Mentd. Smith v. Smith (1861), 11 C. B. N. S. 121; Cropton v. Davies (1869), L. R. 4 C. P. 159; *Re Hedley's Trusts* (1877), 25 W. R. 529.

243. Bill of sale given by tenant to landlord—Before rent due.]—(1) The first count was framed upon 8 Anne, c. 11, s. 1, for seizing the goods of a tenant in execution, without leaving enough to pay the landlord a year's rent then due, & of which arrear debt. had notice, & stated that debt. took the goods of T., the tenant of pltf., under a *fi. fa.* issued against T. at the suit of B. This was

not traversed by the pleas, & no other execution appeared:—*Held*: the connection of the party, who was shown to have seized the goods, with debt., sufficiently appeared without producing any warrant from debt. to that party.

(2) The second count was in trover for seizing the same goods. Pltf. put in a bill of sale of them, which had been delivered to him by his tenant before any rent was due. The tenant had remained in possession as before. The jury found the bill of sale fraudulent:—*Held*: although the bill of sale might still be valid against pltf. as a party to it, though void as to other creditors, pltf. was not prevented from recovering on the first count, that being distinct from the second.—*REED v. THOYTS* (1840), 6 M. & W. 410; 9 L. J. Ex. 316; 151 E. R. 472; *sub nom.* *READ v. THOYTS*, 9 C. & P. 515.

244. Nomination to receive insurance moneys.]—The rules of a life assurance society provided that the assured might nominate a person to receive the sum assured, & that in case of no nomination the sum should be paid to his assigns under any disposition or charge specifically affecting same, either by express reference thereto or by reference generally to sums due on assurances, by deed, will, or other instrument. If no nomination, disposition, or charge, the sum was to be paid to his widow; if no widow, to his children living at his death; if no children, to his exors. The assured made no nomination. By his will, after exercising certain powers of appointment, he gave all his residuary estate in trust for his three daughters, & the widow & children of a deceased son, but made no express or general reference to the sum assured. He left no widow:—*Held*: although testator might have made the sum assured assets by expressly referring thereto, he had not done so, & there was nothing illegal as against creditors in the contract made when the assurance was effected, & under this contract his three children were entitled to the fund.—*Re DAVIES, DAVIES v. DAVIES*, [1892] 3 Ch. 63; 61 L. J. Ch. 595; 67 L. T. 548; 41 W. R. 13; 8 T. L. R. 673; 36 Sol. Jo. 627.

his money. The purchase-money, or the greater part of it, was money withdrawn from the savings-bank standing to the credit of the wife & her children. The husband claimed that a portion of these moneys was paid in by him with the intention of placing the moneys beyond the reach of his creditors but was not intended to be the absolute property of the wife:—*Held*: moneys paid by the husband to the wife's account were a valid gift to her & her own moneys, & property purchased therewith belonged to her absolutely.—*KAIROOZ v. KAIROOZ* (1912), 32 N. Z. L. R. 312.—N. Z.

b. Gift on eve of insolvency.]—Where an order had been made calling on a certain person to show cause why she should not hand over to the official assignee money alleged that insolvent had paid her shortly before insolvency in circumstances which might make the transaction void against the creditors:—*Held*: the transaction was a gift, & in the circumstances, void as against the creditors.—*Re UMBICA NUNDUN BISWAS* (1878), L. L. R. 3 Calc. 434; 1 C. L. R. 561.—IND.

c. —.]—A gift made by donor out of natural love & affection for donee & in order to secure a provision for him & his descendants, & therefore for good consideration, & having operated, & donor having reserved a sufficient property to satisfy a

decree, the mere fact that donor reserved to himself no property within the jurisdiction of the ct. which made the decree, was not a ground for holding that such gift was fraudulent & not made in good faith.—*NASIR HUSAIN v. MATA PRASAD* (1880), L. L. R. 2 All. 891.—IND.

PART I. SECT. 4, SUB-SECT. 2.—D.

242 i. Release of interests under will—Under misapprehension.]—A widow, by her conduct, parted with her right to equitable dower in favour of her son:—*Held*: a subsequent creditor of hers was not entitled to have her dower set out & applied to pay his demand, though she was not aware of her right to dower at the time she was said to have parted with it.—*COTTLE v. MCHARDY* (1870), 17 Gr. 342.—CAN.

242 ii. —.]—A share in the annual income of an estate in Ireland payable under will, through the hands of the exors. was assigned by the beneficiary to a trustee to maintain the assignor & his family, & then to pay his creditors a limited sum. In a suit to set aside the assignment as fraudulent & void against a judgment creditor of the assignor:—*Held*: as the money coming into the hands of the exor. was liable to attachment, or to equitable execution, pltf. was prejudiced by the assignment.—*BLACK v. MOORE* (1900), 2 N. B. Eq. Rep. 98;

20 C. L. T. Occ. N. 463.—CAN.

d. Conveyance—Void for collusion.]—A. having a claim against insolvent, gave it to his sister, the wife of insolvent, in order that she might obtain from her husband a deed of his property in consideration of such debt, which she did through the intervention of a third party, who conveyed the land to her:—*Held*: the conveyance, at the instance of a creditor of the husband, was void under 13 Eliz.—*PEGG v. EASTMAN* (1867), 13 Gr. 137.—CAN.

e. —.]—V. engaged in 1896, B., as a servant in an hotel kept by him on the understanding that the rate of wages would be fixed when he found out what she was worth, & later he fixed the rate at \$50 per month. A few months after, V. built a house, & he & B. lived there as man & wife. In Nov. 1898, V. made an assignment for the benefit of his creditors, having seven days previously conveyed to B. the house property for an alleged consideration of \$1,200 as representing her wages for two years. She had never asked for wages before Oct. 1898, & V. was then hopelessly in debt. In an action to set aside the conveyance on the ground of its being fraudulent:—*Held*: there was collusion between V. & B. to defeat V.'s creditors, & the conveyance was void on the ground that it was based on an immoral consideration.—*HOLTEN v. VANDALL* (1900), 7 B. C. R. 331.—CAN.

PART I.—CONVEYANCES IMPEACHABLE BY CREDITORS UNDER STATUTE.

SUB-SECT. 3.—INADEQUACY OF CONSIDERATION.

245. General rule.]—An assignment of personal property for a consideration clearly inadequate is fraudulent as against creditors under 13 Eliz. c. 5. But copyholds not being naturally subject to the debts, a conveyance of them cannot be fraudulent against creditors.—**MATHEWS v. FEAVER** (1786), 1 Cox, Eq. Cas. 278; 29 E. R. 1165.

*Annotations:—***Consd.** Doe d. Tunstill v. Bottrill (1833), 5 B. & Ad. 131. **Refd.** Copis v. Middleton (1817), 2 Madd. 410; Sims v. Thomas, Strachan v. Thomas (1840), 12 Ad. & El. 536.

246. —.]—A., being liable to plffs. for a breach of trust, conveyed his property to his son, in consideration of a life annuity of £60. The consideration for the conveyance was greatly inadequate. The father was in a dangerous state of health, & died seven days later, leaving no property. The conveyance was set aside as fraudulent, for the benefit not only of plffs. but of all the other creditors of A.—**STRONG v. STRONG** (1854), 18 Beav. 408; 52 E. R. 161.

*Annotation:—***Mentd.** Re Fryer's Estate, Martindale v. Picquot (1857), 26 L. J. Ch. 398.

247. Degree of inadequacy.]—A purchase for a valuable consideration, the adequacy of which was disputed by a nephew from his uncle, who, un-

known to the nephew, was insolvent, & died soon after the purchase:—**Held**: not to be impeachable by creditors of the uncle, & a mtgee. of the purchaser ought to have been a party to the suit.

Mere inadequacy of price to invalidate a contract must, *per se*, be so excessive as to be demonstrative of fraud (**PLUMER, V.-O.**).—**COPIS v. MIDDLETON** (1818), 2 Madd. 410; 56 E. R. 386.

*Annotation:—***Refd.** Re Johnson, Golden v. Gillam (1881), 20 Ch. D. 389.

248. Advances small in relation to value of security—Advantage to grantor & his creditors.]—**BITTLESTONE v. COOKE**, No. 260, *post*.

—**]**—**Compare** BANKRUPTCY, Vol. IV., pp. 60–67, Nos. 513–534, 541–557, 562–568, & *see* generally, CONTRACT, Vol. XII., pp. 204 *et seq*.

SUB-SECT. 4.—GENERALITY OF GRANT.

249. General rule.]—**TWYNE'S CASE**, No. 108, *ante*.

250. —.]—A trader, who was liable under a judgment for the costs of an action, purported to sell his business to a co. which he had formed for the purpose in consideration of fully paid-up

PART I. SECT. 4, SUB-SECT. 3.

1. Degree of inadequacy—Advances small in relation to value of security.]

—**M.**, an unmarried woman, resided for some years with her sister & brother-in-law. He, having become involved, conveyed his real estate to M., for the alleged consideration of wages due her as a hired servant. Notes were also made & given to M. by her brother-in-law, & on these notes becoming due judgment was obtained under which M. sold the farm stock & other personal property of her brother-in-law, becoming herself the purchaser:—**Held**: the evidence as to *bona fides* & good consideration for the transfer of the land & giving of the notes was unsatisfactory, & the conveyance set aside as fraudulent at the instance of the creditors of the grantor.—**BALL v. BALLANTYNE** (1865), 11 Gr. 199.—**CAN.**

g. —.]—A trader in insolvent circumstances, for the purpose avowedly of inducing his wife to release her power in a property shown to have been worth about \$1,300, conveyed to her a farm, the net value of which was about \$1,700:—**Held**: this was a fraud upon creditors, & the transaction set aside.—**BLACK v. FOUNTAIN** (1876), 23 Gr. 174.—**CAN.**

h. —.]—In Apr. 1917, S. being then insolvent, conveyed his house & land to his married daughter in consideration of parental love & affection & the sum of \$1. The deed, which was registered, contained a covenant by the grantee to allow the grantor & his wife a home on the land for their lives & the life of the survivor. The grantee's husband had, in 1914, advanced \$600 to S., which had not been repaid. In July, 1920, after S.'s death, the property was sold for \$3,000 & conveyed to the purchaser. In an action brought by a creditor of S., the son-in-law admitted that he wanted to get the property for his wife because he was afraid that he & his wife might lose it, & he said he also wished to secure the \$600:—**Held**: defts. had failed to establish that there was any consideration for the conveyance of 1917; & it was voluntary, & given with intent to defeat, hinder & delay creditors of S.; & the \$3,000 was

available for their benefit.—**ANDERSON v. BRADLEY** (1921), 51 O. L. R. 94; 64 D. L. R. 707.—**CAN.**

k. — Family arrangements.]—A son purchased land from his father on the eve of the father's insolvency for an inadequate consideration, & mortgaged it the next day for the same price as he gave. The father's official assignee claimed the equity of redemption:—**Held**: conveyance not fraudulent, & official assignee not entitled to equity of redemption.—**LYONS OFFICIAL ASSIGNEE v. HENDERSON** (1879), 2 N. S. W. S. C. R. N. S. 23.—**AUS.**

l. —.]—Adequacy of consideration is not necessary to maintain a transaction, though the inadequacy may afford some evidence of guilty knowledge. But a conveyance by a father to his son, in consideration of an annuity of less value than the property conveyed, does not suggest the son's guilty knowledge of a fraud by his father, in the same way that a conveyance for an inadequate price to a stranger sometimes does.—**CARRADICE v. CURRIE** (1872), 19 Gr. 108.—**CAN.**

m. —.]—In an action to set aside a conveyance where no fraud is shown & there is valuable consideration, the ct. will not inquire into the amount of such consideration, except so far as it is evidence that the transaction was a sham. Family arrangements are exempt from the ordinary rule which affects other deeds, even as against creditors, the consideration being composed partly of natural love & affection, & partly of value.—**KEARNEY v. JACK** (1912), 41 N. B. R. 293; 11 E. L. R. 401.—**CAN.**

n. — Advances greater than security—Creditor's right to rely on mortgage debt.]—The owner of B. & W. created a mtgee. on B. in favour of a loan society to secure an advance of \$2,000, the estimated value of the mtged. premises being \$3,000 at least. The mtgor. subsequently, not being indebted otherwise, voluntarily settled W. in good faith on his wife. On a bill filed by a subsequent creditor:—**Held**: the settlement was fraudulent against creditors, since B. was

sufficient to pay the loan society at the time of the settlement, although the loan society was not a party impeaching the settlement.—**MASURET v. MITCHELL** (1879), 26 Gr. 435.—**CAN.**

o. Proof of inadequacy.]—In a suit by a creditor impeaching a sale by N. to his sister, made in consideration of her assuming two mtges. on the land, certain executions against him which she paid, & of a debt due to herself, it appeared she was aware of plff.'s claim; that her brother had no other property to meet it; that a sheriff's sale was pending; that N. had previously refused a larger sum for the land than his sister gave; that she shortly afterwards sold the estate for more than twice what she gave for it; & that she bought other lands with part of the proceeds:—**Held**: sufficient was shown to warrant a decree declaring the conveyance by N. to his sister fraudulent as against creditors.—**MERRITT v. NILES** (1881), 28 Gr. 346.—**CAN.**

p. —.]—**BANK OF TORONTO v. IRWIN** (1881), 28 Gr. 397.—**CAN.**

q. —.]—Where in a suit to establish plff.'s right to property purchased by him it was found that his vendor, who had many debts to pay, had sold to plff. all his property, reserving nothing to himself; that plff. bought the property without seeing it or valuing it; that the consideration for the sale consisted of time-barred debts or debts which were not payable at the time; that the property sold remained in the possession of the vendor, who paid its assessment; & that the consideration was grossly inadequate:—**Held**: there was no *bona fide* or valid sale, but a mere colourable transaction without consideration not intended to transfer the property to plff.—**NANA MANSARAM SHET v. RAUTMAL TARACHAND SHET** (1896), 1 L. R. 22 Bom. 255.—**IND.**

r. Effect of inadequacy.]—Where the consideration for a deed was at most meritorious & in the absence of valuable consideration, the rule requiring the party attacking the deed to prove fraud does not apply.—**McNEIL v. McPHEE** (1898), 31 N. S. R. (19 R. & G.) 140.—**CAN.**

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sects. 4 & 5, A.]

shares & of the co. undertaking to pay his debts. He was the chairman, managing director, & secretary of the co.; he or his nominee held substantially the whole of the shares in it, & he had the complete control of it, including the power to draw cheques, which he exercised in his own favour. Within three months of this transaction a bkpcy. petition was presented against him, grounded on his non-compliance with a bkpcy. notice in respect of the costs in question, & a receiving order was made upon it. His liabilities exceeded £2,000, with assets nil. Between the presentation of the petition & the making of the order, a resolution was passed for the voluntary winding up of the co., & a liquidator was appointed. Upon a motion by the trustee in bkpcy. against the liquidator impeaching the validity of the transfer of the business:—*Held*: the transfer was fraudulent.

That the transaction of sale between H. & the co. which was carried out by the agreement of Mar. 7, 1898, was a juggle & a fraud admits of no doubt; but upon the evidence before us there is a difficulty in saying whether it can be reached under the statute of Elizabeth which relates to what we called frauds on creditors . . . to reach it under the statute of Elizabeth it must be shown that the sale was of the whole, or substantially the whole, of H.'s property; & it must be shown that the co. had notice that he was cheating his creditors (LINDLEY, M.R.).—*Re HIRTH, Ex p. TRUSTEE*, [1899] 1 Q. B. 612; 68 L. J. Q. B. 287; 80 L. T. 63; 47 W. R. 243; 15 T. L. R. 153; 43 Sol. Jo. 209; 6 Mans. 10, A. C.

Annotations:—*Reid. Re Ely, Ex p. Ely* (1900), 82 L. T. 501. *Mentd. Bullock v. Arden* (1901), 17 T. L. R. 285; *Re Slobodsky, Ex p. Moore* (1903), 72 L. J. K. B. 883; *Gonville's Trustee v. Patent Caramel Co., Same v. Gonville, Jarvis*, [1912] 1 K. B. 599; *Re Gunsbourg*, [1920] 2 K. B. 426.

251. Substantially whole property — Life estate only excepted.]—The effect of the settlement was to withdraw from creditors all the settlor's property, except his life estate; all his absolute property he assigned, reserving only his life estate. Those circumstances certainly do lead *prima facie* to the inference that he must have intended to defeat, hinder or delay creditors; & if there were nothing more, I certainly should feel bound to come to the conclusion that this settlement is a conveyance of property made with intent to defraud creditors (KINDERSLEY, V.-C.).

—*THOMPSON v. WEBSTER* (1859), 4 Drew. 628; 28 L. J. Ch. 702, n.; 33 L. T. O. S. 298; 5 Jur. N. S. 608; 7 W. R. 596; 62 E. R. 241; *on appeal*, 4 De G. & J. 600, L. J.J.; (1861), 4 L. T. 750, H. L.

Annotations:—*Reid. Smith v. Cherrill* (1867), L. R. 4 Eq. 390; *Re Johnson, Golden v. Gillam* (1881), 20 Ch. D. 389; *Godfrey v. Poole* (1888), 13 App. Cas. 497; *Edmunds*

v. Edmunds (1904), 73 L. J. P. 97. *v. Collins* (1871), 40 L. J. Ch. 289; *Re Manuover, Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523; *Hance v. Harding* (1887), 4 T. L. R. 185; *Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111.

252. —.]—A trader debtor being in expectation that a writ of sequestration would issue against him for non-payment of a sum of money ordered to be paid by him into the Ct. of Ch., executed a deed of mtge., which was registered as a bill of sale, vesting substantially all his property in trustees for the benefit of five of his creditors. The deed contained a proviso that the debtor should remain in possession of his property for six months, but not so as to let in any execution or sequestration, & in case any such should be enforced his possession was to cease. A writ of sequestration was subsequently issued:—*Held*: the deed was not void under 13 Eliz. c. 5, notwithstanding the fact that it conveyed the whole of the debtor's property for the benefit of some of his creditors, & that it contained a proviso that the debtor should remain in possession for six months.

If the deed is *bond fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth (GIFFORD, L.J.).—*ALTON v. HARRISON, POYSER v. HARRISON* (1869), 4 Ch. App. 622; 38 L. J. Ch. 669; 21 L. T. 282; 17 W. R. 1034, L. J.

Annotations:—*Expld. & Apld. Re Bamford, Ex p. Games* (1879), 12 Ch. D. 314. *Expld. Re Yates, Ex p. Brown* (1879), 27 W. R. 651. *Consd. Maskelyne & Cooke v. Smith*, [1903] 1 K. B. 671. *Reid. Allen v. Bonnett* (1870), 5 Ch. App. 577. *Mentd. Boldero v. London & Westminster Loan & Discount Co.* (1879), 5 Ex. D. 47; *Mason v. Briton Medical & General Life Assn.* (1888), 4 T. L. R. 755; *Glegg v. Bromley*, [1912] 3 K. B. 474; *Re Fasey, Ex p. Trustees*, [1923] 2 Ch. 1.

253. —.]—*Re RIDLER, RIDLER v. RIDLER*, No. 119, *ante*.

254. Grantor prevented from carrying on trade.]—W., a trader, being in insolvent circumstances, in Mar. 1857, executed to plffs. a bill of sale of "all the goods, chattels, & all other things whatsoever" in or about B., the place where he carried on his trade. In the following month W. was adjudged a bkpt. In the bkpcy. proceedings he was described as of B. & also of another place:—*Held*: the assignment by W., being an assignment of all the articles by means of which he was enabled to carry on his trade, was fraudulent & void as against his creditors.—*ORIENTAL BANKING CO. v. COLEMAN* (1861), 3 Giff. 11; 30 L. J. Ch. 635; 4 L. T. 9; 9 W. R. 432; 66 E. R. 302.

Annotation:—*Apld. Re Nurse, Ex p. Foxley* (1868), 17 L. T. 623.

255. All existing & after acquired property.]—*Re BAMFORD, Ex p. GAMES*, No. 129, *ante*.

256. Trust for pretended creditors—With power to charge other debts.]—*READ v. WARD* (1739),

PART I. SECT. 4, SUB-SECT. 4.

252 i. Substantially whole property.]—The trustees of a church had been sued by debt., & pending the action they passed a resolution authorising the raising by loan of \$400 to pay off urgent claims, which recited that it was necessary to give security to the party making the advance. Plff., one of the trustees, thereupon advanced the money, obtaining from the trustees a chattel mtge. on all the movables contained in the church:—*Held*: the mtge. was not invalid as having been made with intent to defeat or defraud creditors under Stat. Eliz., as explained

by R. S. O. 1877, c. 95, s. 13; & the fact that all the movable property of the mtgors. was included in the security, was not of itself sufficient to satisfy the ct. of any fraudulent intent in making it.—*BROWN v. SWEET* (1882), 7 A. R. 725.—*CAN.*

252 ii. —.]—Although the ct. view with favour the carrying out of family agreements when made *bond fide*, & for good consideration, & although in the present case the family intention was to make provision for the sons, yet such intention cannot validate the conveyance where no definite agreement had been reached prior to the

time the conveyances were executed; & because at the time they were executed all the parties must have known that the father would have no property left wherewith to satisfy his creditors. In these circumstances the conclusion must be that the conveyances were evidently intended to benefit the sons at the expense of the father's creditors.—*KIEHL v. FUSSEL*, [1923] 2 D. L. R. 1135; 2 W. W. R. 251; 68 D. L. R. 780.—*CAN.*

s. Consideration contemporaneous advance — To enable creditor to plead validity of assignment.]—Where creditor

2 Eq. Cas. Abr. 119; 7 Vin. Abr. 119, pl. 2; 22 E. R. 101, L. C.

Annotation:—Reid. Robinson v. Carrington (1833), 1 Mont. & A. 1.

257. Control of stock-in-trade reserved to grantor.]—WARE v. GARDNER, No. 290, post.

258. Assignment by personal representative—With notice of liability of testator's estate.]—Mrs. T., the widow & residuary legatee of T., testator, in Nov. 1889, took out letters of administration with the will annexed, & possessed herself of the personal property of testator, but did not have 500 shares in the pltf. co. transferred into her name. On Apr. 10, 1893, pltf. gave Mrs. T. notice of a call of £1 per share. On Apr. 17, three deeds were executed, whereby Mrs. T. assigned the whole of the personal estate except the shares to L., upon consideration of covenants entered into by L. to indemnify Mrs. T. against all liabilities, & to provide her with board, lodging, & wearing apparel, & amenities suitable to her position, & on Mrs. T.'s death to provide her with a decent funeral:—*Held*: as legal personal representative, Mrs. T. was bound to administer her husband's estate according to law, & as residuary legatee, she took only what was left after due administration, i.e. after payment of the debts, including the calls that might be made on the shares; the deeds of assignment must be declared void as against pltf., & there must be the ordinary accounts in a creditor's action; pltf. were entitled to be paid the call & interest, & the costs of the action, & the surplus of the estate would go according to the provisions of the deeds of assignment.—*Re TROUGHTON, RENT & GENERAL COLLECTING & ESTATE CO. v. TROUGHTON (1894), 71 L. T. 427; 10 T. L. R. 611; 13 R. 140.*

259. Assignment to company.]—Re HIRTH, Ex p. TRUSTEE, No. 250, ante.

260. Consideration future advances — Adequacy of consideration.]—B., a trader, by bill of sale, conveyed all his stock, & all the stock that should during the continuance of the security become his, with a power of sale, to C., as a security for money to be advanced by C. The bill of sale was drawn up as a security for an existing debt, as well as for fresh advances—but this was a mistake, the whole consideration being fresh advances not to exceed a certain sum. C. made the advances; the property in fact was of about three times the value of the advances. B. was at this time in reality insolvent: but the ct., which had power to draw inferences of fact, drew the inference that the advances were both *bond fide* asked for & made with a view to keep the business going, & in the belief that they would enable B. to get over his difficulties. Afterwards C. took possession of the goods. B. being declared a bkpt., his assignees brought trover against C., contending that the transaction in question was itself an act of bkpcy. On a case stating these facts, in which the ct. had power to draw inferences of fact:—*Held*: the transaction must be viewed as if the bill of sale had been drawn as it was intended to be, entirely as a security for fresh advances.

receives an assignment of certain assets from debtor as security for both a present advance & a pre-existing debt, & it appears from the evidence that the present advance was made to enable creditor to afterwards plead the validity of the assignment:—*Held*: the assignment is invalid both as to the present

advance & the pre-existing debt.—*HAZELL v. CULLEN (1914), 20 B. C. R. 603.—CAN.*

PART I. SECT. 4, SUB-SECT. 5.—A.

264 i. General rule.—Debtor insolvent.]—A chattel mtge. upon certain stock-

The effect of pledging the whole of the trader's property for such advances was not necessarily to delay his creditors, as the advances, even if bearing a small proportion to the value of the property pledged, might be of more advantage to the trader & his creditors than the property itself; & consequently, the bill of sale in this case, being in fact *bond fide*, was not, in point of law, fraudulent, nor an act of bkpcy.—

STONE v. COOKE (1856), 6 E. & B. 296; 25 L. J. Q. B. 281; 2 Jur. N. S. 758; 4 W. R. 493; 119 E. R. 875.

Annotations:—Consd. Bow v. Bill (1868), 16 W. R. 760; Woodhouse v. Murray (1868), L. R. 4 Q. B. 27; Martin v. Williams (1869), 20 L. T. 350. Reid. Re Disputed Adjudication, Ex p. Cottrell (1860), 1 L. T. 465; Lacon v. Liffen (1862), 4 Giff. 75; Whitmore v. Claridge, Weaver & Moore (1862), 31 L. J. Q. B. 141; Re Colemore (1865), 1 Ch. App. 128; Re Ash, Ex p. Fisher (1872), 7 Ch. App. 636; Harrison v. Cohen (1875), 32 L. T. 717. Mentd. Pennell v. Reynolds (1861), 11 C. B. N. S. 709; Lacon v. Liffen (1863), 32 L. J. Ch. 315; Re Nurse, Ex p. Foxley (1868), 3 Ch. App. 515.

261. Consideration contemporaneous advance—Agreement to give bill of sale if required—Bill executed shortly before liquidation.]—When a bill of sale comprising the whole of the grantor's property is given on the eve of his bkpcy., to secure a pre-existing debt, & it is attempted to support it by an agreement alleged to have been made at the time when the money was advanced, it is for the ct. to judge from all the surrounding circumstances whether the agreement was a *bond fide* one, or whether the giving of the bill of sale was purposely postponed in order to protect the grantor's credit. The fact that the agreement was to give the bill of sale "if or when required" by the creditor does not of itself necessarily invalidate it.—*Re BARKER, Ex p. KILNER (1879), 13 Ch. D. 245; 41 L. T. 520; 44 J. P. 264; 28 W. R. 269, C. A.*

Annotations:—Consd. Re Hemingway, Ex p. Hauxwell (1883), 23 Ch. D. 626. Reid. Re Jackson & Bamford, [1906] 2 Ch. 467; Re Davies, Ex p. Miles, [1921] 3 K. B. 628.

262. Consideration existing debt & future advances.]—Re BAMFORD, Ex p. GAMES, No. 129, ante.

263. —.]—Re LEWIS, Ex p. OFFICIAL RECEIVER (TRUSTEE) v. POWELL (1912), 1 L. J. C. C. 86, U. A.

Compare BANKRUPTCY, Vol. IV., pp. 57 et seq., Nos. 490-512, 536-539, 558-561; Vol. V., p. 565, No. 5209.

SUB-SECT. 5.—INDEBTEDNESS OF GRANTOR.

A. In General.

264. General rule — Debtor insolvent.]—(1) Where a person in insolvent circumstances executes a voluntary conveyance without consideration, it is void, under 13 Eliz. c. 5, against creditors; & the property thereby intended to be conveyed will, after the death of the party conveying, be assets in the hands of his exor., for their benefit. It does not require, that the

in-trade of an insolvent was set aside at the instance of the assignee for the benefit of creditors, on the evidence establishing that at the date it was given it was known to the mtgee. that the mtgor. was insolvent & that the same was being given in fraud of the other creditors of the mtgor.—*COLL v.*

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sect. 5, A. & B.]

party making the conveyance should be insolvent, in the strict acceptation of the word; but, if from the statement of his accounts & admissions, it appear that he is in extremely embarrassed circumstances, & upon an application made to him for the payment of the debt, that the payment of it at that time would have left him almost destitute, he must be considered insolvent, so as to make void, as against creditors, a deed executed by him under such circumstances.

(2) The assignment was void as soon as the creditors claimed to treat it as such, though not until then (LITTLEDALE, J.).—SHEARS v. ROGERS (1832), 3 B. & Ad. 362; 1 L. J. K. B. 89; 110 E. R. 137.

Annotations:—As to (1) *Reid*. De Tastet v. Le Tavernier (1836), 1 Keen, 161; Hue v. French (1857), 26 L. J. Ch. 317; Richards v. James, Sharpe v. James (1867), L. R. 2 Q. B. 285; *Re Nurse*, *Ex p.* Foxley ((1868), 17 L. T. 623; *Re O'Sullivan*, *Ex p.* Ferd. Baller (1892), 61 L. J. Q. B. 228; *Re Mount*, Kingston Cotton Mills Co. v. Mount, [1899] 1 Ch. 831; Harrods v. Stanton, [1923] 1 K. B. 516.

265. ———. —.] —TARLETON v. LIDDELL, No. 169, *ante*.

266. ———. —.] —FRENCH v. FRENCH, No. 39, *ante*.

267. ———. —.] —Voluntary gift of leaseholds by a father to his sons, in 1835 & 1841, set aside, it being ascertained, on a reference, that at those periods the settlor's debts exceeded his assets.—CHRISTY v. COURTENAY (1858), 26 Beav. 140; 53 E. R. 856.

268. ———. ———.] —According to the general law prevailing as well in the Isle of Man as in England, a deed is void against creditors when the debtor is in a state of insolvency, or when the effect of the deed is to leave the debtor without the means of paying his present debts. A deed of settlement, & a conveyance in favour of the son of the grantor, upon certain beneficial considerations for his wife & younger children, made by the grantor when in insolvent circumstances, set aside as being fraudulent & void against the creditors of the grantor.—CORLETT v. RADCLIFFE (1860), 14 Moo. P. C. C. 121; 4 L. T. 1; 15 E. R. 251, P. C.

269. ———. —.] —TAYLOR v. COENEN, No. 471,

270. Whether debts of ancestor included.] —GOOCH'S CASE, No. 553, *post*.

271. ———. —.] —In an action against an heir, the averment of "assets by descent" shall not be defeated by a conveyance made by the ancestor "to the use of himself for life, remainder to his first & every other son in tail, remainder to himself in fee; with power to make leases, & revoke uses," provided the jury find it to be fraudulent. It being moved that this was no fraudulent conveyance within 13 Eliz. c. 5:—*Held*: it was within

the statute, for the heir is a debtor.—APHARRY v. BODINGHAM (1594), Cro. Eliz. 350; 78 E. R. 598.

Annotation:—*Reid*. Richardson v. Horton (1843), 7 Beav. 112.

272. ———.] —Settlement by the heir, upon his marriage, of the ancestor's estates, supported against the claims of the specialty creditors of such ancestor. Sir W. died indebted in specialty. After his death, on the marriage of his heiress, a settlement was executed, whereby, after reciting the insufficiency of the personal estate to pay the debts, & that a considerable sum was due on that account, a part of the estates were conveyed to provide a fund to pay the debts, & the remainder was settled on the heiress, her intended husband, & their issue. Many years after, the produce of the estates appropriated to the payment of the debts was found insufficient:—*Held*: the circumstances did not afford any proof of fraud, or any want of *bona fides*, in the execution of the settlement; the settled estates were not liable to the specialty debts; & even if a want of *bona fides* had appeared, relief could only be obtained in a suit putting the *mala fides* properly in issue.

It has been argued, that the settlement is fraudulent & void under the statute of 13 Eliz. c. 5. . . . Admitting on the authority of *Gooch's Case*, No. 553, *post*, & the case of *Apharry v. Bodingham*, No. 271, *ante*, that cases of this kind may fall within the statute, the enactment makes void any conveyance executed with the intent or purpose to delay, hinder, or defraud creditors of their just & lawful actions, suits, or reliefs; but it is not to extend to any interest, upon good consideration, & *bona fide* conveyed to any person not having notice of the fraud (LORD LANGDALE, M.R.).—RICHARDSON v. HORTON (1843), 7 Beav. 112; 13 L. J. Ch. 186; 7 Jur. 1144; 49 E. R. 1006.

Annotations:—*Reid*. Pimm v. Insall (1849), 1 H. & Tw. 487; Kinderley v. Jervis (1856), 22 Beav. 1; Dilkes v. Broadmead (1860), 2 Giff. 113.

273. Only debt a partnership debt.] —C. having competent private means, & being engaged as a member of a partnership, which was indebted to the extent of £375, made a voluntary settlement of property amounting to £5,000 odd in favour of his wife & married daughter, reserving to benefit to himself. One year & a half afterwards, he having become of unsound mind, the other partners were made bkpts. on their own declaration, & no dividend had been paid:—*Held*: the settlement was void under 13 Eliz. c. 5.—DENISON v. TATTERSALL, DENISON v. CROPPER (1868), 18 L. T. 303.

274. Proof of solvency—Burden of proof.] —(1) A settlor, at the time of making a voluntary settlement, made a statement of his assets & liabilities, showing a balance in his favour. He was incurring heavy liabilities as managing director of a co., & from transactions on the Stock Exchange. Nine months after the date of the settlement he called a meeting of his creditors, & laid before them a statement showing himself to be insolvent, & subsequently he became bkpt.:—*Held*: the burden was upon him to show solvency at the date of the settlement.

(1913), 24 O. W. R. 622; 4 O. W. N. 1327; 11 D. L. R. 322.—CAN.

264 II. ———. —.] —A voluntary conveyance made by a person owing debts & having no means other than the property which he voluntarily conveys with which to pay such debts is bad, not only as against creditors, but also

against future creditors.—EWACHOWSKI v. MARCHISCHUK, [1917] 3 W. W. R. 747.—CAN.

1. Assignor not aware of his insolvency.] —Pursuer averred that at the date of the assignment bkpt. was insolvent; that debts, the two, were aware of this, but con-

coaled the fact from him; that the assignment was obtained by debts. In order to secure the debt to the bank; & that its effect was, with another contemporaneous assignment to the bank, to strip bkpt. of his whole assets:—*Held*: as it was not averred that bkpt. was at the date of the assignment aware of his insolvency,

Seemle: damages recovered in an action commenced after the settlement for inducing pltf. to become a member of a co. by false & fraudulent misrepresentations made previously to the settlement must be taken into consideration in estimating the settlor's solvency at the date of the settlement.

(2) A settlement was set aside as against creditors generally in a suit instituted by a person who had recovered judgment against the settlor in an action commenced after the date of the settlement for a tort committed before it. Guardian of infant defts. ordered to pay the pltf.'s costs.

Mrs. E. & the trustees must pay their own costs. The guardian of the infant defts. must pay the costs of the pltf. The costs of the assignee in bkpcy. must be paid by pltf., who will have them over again from the guardians of the infant defts. (MALINS, V.-C.).—CROSSLEY v. ELWORTHY (1871), L. R. 12 Eq. 158; 40 L. J. Ch. 480; 24 L. T. 607; 19 W. R. 842.

Annotations:—As to (1) *Expld.* MacKay v. Douglas (1872), L. R. 14 Eq. 106; *Re Wise, Ex p. Mercer* (1886), 17 Q. B. D. 290. *Reid.* Taylor v. Coenen (1876), 1 Ch. D. 636; *Re Butterworth, Ex p. Russell* (1882), 19 Ch. D. 588. As to (2) *Consd.* MacKay v. Douglas (1872), L. R. 14 Eq. 106.

B. Indebtedness at Time of Conveyance.

275. *Whether necessary.*—A settlement being voluntary, is not for that reason fraudulent, but an evidence of fraud only, though hardly a case, where the person conveying was indebted at the time, that it has not been deemed fraudulent. A voluntary settlement is not fraudulent, where the person making is not indebted at the time, nor will subsequent debts shake such settlement.

G. being tenant for life of a freehold, & a leasehold estate called F., with remainder to his son in tail, & being absolutely entitled to another leasehold estate, joins with his son after his marriage in making three settlements of the three different estates, all the settlements being of the same date; By the first settlement, in consideration of £200 part of the wife's portion paid by her father, they join in settling upon the son & his wife, & the issue of the marriage, the freehold estate; by a second settlement, in consideration of £100 being the residue of the portion paid soon after the execution of the settlement, they make the same settlement of the F. estate; & by a third settlement, the other leasehold estate in which G. had an absolute interest, was assigned upon trust, to secure G. & his wife an annuity of £25 during their joint lives, & after the death of one of them, to pay £13 to the survivor, & subject thereto to the son & his wife for their lives, with remainder to such uses as the survivor might appoint. The father & son being both indebted at the time of the execution of these settlements:—*Held*: the first & second settlements were not, within 13 Eliz. c. 5, fraudulent as against their creditors, but the third settlement was fraudulent against their creditors, there being no pecuniary consideration

to support it, & the father's reservation of an annuity to the value of the leasehold estate being a strong badge of fraud.—RUSSEL v. HAMMOND (1738), 1 Atk. 13; West temp. Hard. 530; 26 E. R. 9, L. C.

Annotations:—*Consd.* Holloway v. Millard (1816), 1 Madd. 414; Townsend v. Westacott (1840), 9 L. J. Ch. 241. *Reid.* Scarf v. Soulby (1849), 1 H. & Tw. 426.

276. —.]—A settlement made after marriage is good, where the husband was not indebted at the time, & the wife, when married, an infant.

The question is whether this deed is upon such a consideration as to prevail against creditors. I am of opinion it is; for if a man marries an infant & makes no manner of provision before marriage, a settlement made afterwards is good, where there is no proof of his being indebted at the time (LORD HARDWICKE, C.).—MIDDLECOME v. MARLOW (1743), 2 Atk. 519; 26 E. R. 712, L. C. *Annotation*:—*Consd.* Re Holland, Gregg v. Holland, [1902] 2 Ch. 360.

277. —.]—Necessary to prove on 13 Eliz. c. 5, that at the making of the settlement the person conveying was indebted at the time of the execution of the deed.—WALKER v. BURROWS (1745), 1 Atk. 93; 26 E. R. 61, L. C.

Annotations:—*Consd.* Holloway v. Millard (1816), 1 Madd. 414; Scarf v. Soulby (1849), 1 H. & Tw. 426. *Reid.* Glalster v. Hewer (1802), 8 Ves. 195; Smith v. Keating (1848), 6 C. B. 136; *Re Totley, Ex p. Jeffroy v. Totley* (1896), 3 Mans. 321.

278. —.]—A settlement after marriage, by a person not indebted, is not within 13 Eliz. c. 5.—STEPHENS v. OLIVE (1786), 2 Bro. C. C. 90; 29 E. R. 52.

Annotations:—*Consd.* Scarf v. Soulby (1849), 1 H. & Tw. 426. *Reid.* Guth v. Guth (1792), 3 Bro. C. C. 614; Lush v. Wilkinson (1800), 5 Ves. 384; Copis v. Middleton (1817), 2 Madd. 410; Westmeath v. Westmeath (1821), Jac. 126; Westmeath v. Salisbury (1831), 5 Bl. N. S. 339. *Mentd.* St. John v. St. John (1805), 11 Ves. 526; Worrall v. Jacob (1817), 3 Mer. 256; Bralley v. Bralley, [1922] P. 15.

279. —.]—LUSH v. WILKINSON, No. 466, *post*.

280. —.]—A voluntary settlement without fraud, by a husband, not indebted, in favour of his wife & children, is valid against subsequent creditors.—BATTERSBEE v. FARRINGTON (1818), 1 Swan. 106; 1 Wils. Ch. 88; 36 E. R. 317.

Annotation:—*Consd.* Re Holland, Gregg v. Holland, [1902] 2 Ch. 360.

281. —.]—BARLING v. BISHOPP, No. 399, *post*.

282. —.]—STILEMAN v. ASHDOWN, No. 291, *post*.

283. —.]—(1) A voluntary settlement whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there are no creditors whose debts arose before the date of

pursuer's averments were irrelevant; action dismissed.—MACDOUGALL'S TRUSTEE v. IRONSIDE, [1914] S. C. 186.—SCOT.

PART I. SECT. 4, SUB-SECT. 5.—B.

275 i. *Whether necessary.*—Voluntary conveyances are void against existing debts which are thereby defeated or delayed, whether the conveyances were fraudulent or not. v. FREEMAN (1867), 13 Gr.

465.—CAN.

275 ii. —.]—It is not necessary that debts should have become payable before a fraudulent disposal of property was made.—BRIMSTONE v. SMITH (1884), 1 Man. L. R. 302.—CAN.

275 iii. —.]—Where a conveyance is attacked as fraudulent, it must be shown that a debt of the grantor was in existence at the time of the conveyance, or that a scheme had been entered into to defraud possible

subsequent creditors.—CLINTON v. SELLAARS (1908), 7 W. L. R. 615; 1 Alta. L. R. 135.—CAN.

275 iv. —.]—Where a person in embarrassed circumstances makes a settlement of his property & thereby defeats his creditors, the deed is fraudulent & void, even though the settlor had no intention to defraud.—CREDITORS' TRUSTEE OF TROY v. FITZGERALD (1885), 4 N. Z. L. R. 253 (S. C.).—N.Z.

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sect. 5, B. & C.]

the settlement, & though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect.

(2) In order to set aside a voluntary settlement as being void as against creditors, it is not necessary to show that the settlor contemplated becoming actually indebted. It is sufficient if he contemplated a state of things which might result in bkpcy. or insolvency.

(3) A debtor is not entitled to set up, as a defence to a suit to set aside a voluntary settlement, a release contained in an inspectorship deed by which he vested all his property in the inspectors, the settlement or the existence of the property comprised in it not having been disclosed at the time the inspectorship deed was executed.—*MACKAY v. DOUGLAS* (1872), 1 L. R. 14 Eq. 106; 41 L. J. Ch. 539; 26 L. T. 721; 20 W. R. 652.

Annotations:—As to (1) *Apprvd. Re Butterworth, Ex p. Russell* (1882), 19 Ch. D. 588. *Reid. Taylor v. Coenen* (1876), 34 L. T. 18; *Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111.

284. —.—*Re HOLLAND, GREGG v. HOLLAND*, No. 167, *ante*.

285. Whether conclusive — Assignment voluntary.]—*TOWNSHEND (LORD) v. WINDHAM*, No. —, *ante*.

286. — Debts since paid.] —*JENKYN v. VAUGHAN*, No. 411, *post*.

287. — —.]—A voluntary settlement, honestly entered into at the time it is made, all then existing debts being paid, & the settlor retaining an income sufficient for reasonable & probable requirements, ought not to be treated as fraudulent & void under 13 Eliz. c. 5, merely because some years afterwards it has the effect of defeating or delaying the subsequent creditors of the settlor. In 1891 A., a few days after attaining twenty-one, executed a voluntary settlement whereby she vested the whole of her property in trustees with an absolute discretionary trust to apply either capital or income in payment of any of her then existing or future debts; & a further discretionary trust to apply the income during her life for the benefit of herself or any husband

or children. The deed contained a power for A. to revoke the settlement with the consent of her trustees. The few debts she had at the date of the settlement were paid out of cash in hand. On two subsequent occasions A. executed partial revocations of the settlement, & portions of the settled funds were applied by the trustees in payment of her debts; but the trustees refused a third time to pay her debts, & thereupon, in Feb. 1900, she was adjudicated bkpt. having no assets except the settled property:—*Held*: the settlement was not fraudulent & void under 13 Eliz. c. 5, as against her trustee in bkpcy.—*Re LANE-FOX, Ex p. GIMBLETT*, [1900] 2 Q. B. 508; 69 L. J. Q. B. 722; 83 L. T. 176; 48 W. R. 650; 7 Mans. 295.

Annotation:—*Reid. Glegg v. Bromley* (1911), 81 L. J. K. B. 334.

288. — Family arrangement.]—By a deed of gift J. granted farming property in trust for her daughters, in consideration of which they covenanted to pay the debts "incurred by J. up to the date of the deed in connection with the working arrangement of the farm," & to maintain J. J. had no other property than that comprised in the deed, & pltf.'s debt not having been incurred by J. in connection with the farm, was defeated by the deed. The ct. found that the deed was an honestly intended family arrangement, & was not executed with the object of defeating creditors:—*Held*: the deed was valid under 13 Eliz. c. 5.—*Re JOHNSON, GOLDEN v. GILLAM* (1881), 20 Ch. D. 389; 51 L. J. Ch. 154; 46 L. T. 222; *affd. sub nom. GOLDEN v. GILLAM* (1882), 51 L. J. Ch. 503 C. A.

Annotations:—*Consd. Hance v. Harding* (1887), 4 T. L. R. 185; *Re Fasey, Ex p. Trustees*, [1923] 2 Ch. 1. *Reid. Re Maddever, Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523.

289. — —.]—By a post-nuptial settlement made in pursuance of an arrangement between the settlor & his father, the settlor assigned a policy of insurance upon his life to trustees on trusts for the benefit of his children, the settlor's father at the same time conveying certain leasehold property to the trustees on similar trusts. The transaction was entered into in good faith for the purpose of securing a provision for the children, & not with any intention to defraud or defeat the settlor's creditors.

The judge at the trial came to the conclusion

286 i. Whether conclusive—Debts since paid.]—In ejectment pltf. claimed through a deed from M. to J., made in 1857. Deft. claimed through a purchase at sheriff's sale under execution against M., at the suit of C., & he contended that the deed from M. to J. was void under Stat. Eliz. Both M. & J. swore that this deed was made in good faith for a valuable consideration; provision was made for paying off C.'s judgment out of the purchase money; & it did not appear that M. had any other creditors:—*Held*: the deed was good.—*MORRISON v. STRKER* (1871), 32 U. C. R. 182.—**CAN.**

—.]—A member of a trading firm, in Mar. 1875, effected a voluntary settlement on his wife of land on which he had erected a dwelling-house at an expense of \$3,000, & in July following the firm were compelled to effect a compromise of their liabilities, & finally, in Feb. 1877, became insolvent. Pltf. was appointed their assignee, & filed a bill impeaching the settlement as having been made while insolvent with a view of defraud-

ing creditors. There was no evidence that any debt due at the time of making the settlement was unpaid at the date of the insolvency:—*Held*: in these circumstances the bill was dismissed, without prejudice to the right to institute proceedings to obtain relief out of any separate estate of the wife.—*DARLING v. PRICK* (1880), 27 Gr. 331.—**CAN.**

286 iii. — —.]—An insolvent debtor, for the purpose of defeating pltf.'s claim against him, by voluntary deed conveyed the equity of redemption in certain lands to another creditor who, as previously arranged with grantor, sold the property to an innocent purchaser & applied the proceeds in payment of all incumbrances on the property & all his own debts & those of certain other creditors of grantor, & of a commission to himself in respect of the sale, & paid over the final balance to grantor:—*Held*: plts. had no right of action against the fraudulent grantee to recover any part of the purchase money.—*TENNANT & Co. v. GALLOW* (1894), 25 O. R. 56.—**CAN.**

286 iv. — —.]—*SMITH v. TATTON* (1879), 6 L. R. Ir. 32.—**IR.**

286 v. —.]—Proof of an isolated debt, especially a balance of account between trader & merchant, subsequently discharged by payments, is insufficient to support the inference of an intent to defeat or delay creditors. It must be shown that the settlor's assets, apart from the settled property, were insufficient to discharge his debts.—*TAYLOR v. ALLEN* (1900), 19 N. Z. L. R. 85.—**N.Z.**

a. — Where no judgments or executions before date of transfer.]—In 1906, I., the owner of a hotel property, was financially embarrassed, owing \$6,000 to deft., & \$8,000 to other creditors, among whom were plts. Defts. entered into an agreement on Sept. 17, 1906, with I. to buy the property from him for \$18,000: \$12,000 to be paid by the debt of \$6,000 & the new advance of \$6,000, & the payment of the remaining \$6,000 to be deferred, & leased the hotel to I. for two years, the rent to be applied on the indebtedness.

that these parties were not guilty of any fraud upon creditors, & that being so, I think there ought really to be an almost overwhelming case to induce us to interfere & to say that he was wrong. So far from that being so, I do not think there is any evidence upon which we ought to find that he was wrong, or that there was any fraudulent intention in executing this settlement; & it therefore follows that the settlement is not void under the statute of Elizabeth (LORD ESHER, M.R.).—*HANCE v. HARDING* (1888), 20 Q. B. D. 732; 57 L. J. Q. B. 403; 59 L. T. 659; 36 W. R. 629; 4 T. L. R. 463, C. A.

Annotations:—*Refd.* *Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111; *Sturmeys Trustee v. Sturmeys* (1912), 107 L. T. 718. *Mentd.* *Re Dale to Elsdon* (1892), 36 Sol. Jo. 347; *Re Vansittart, Ex p. Brown*, [1893] 2 Q. B. 377; *Mackintosh v. Pogose*, [1895] 1 Ch. 505; *Re Parry, Ex p. Salaman*, [1904] 1 K. B. 129; *Re Pope, Ex p. Dicksee*, [1908] 2 K. B. 169; *I. R. Comrs. v. Gribble*, [1913] 3 K. B. 212; *Re Collins* (1914), 112 L. T. 87; *Re Charters, Ex p. Trustee*, [1923] B. & C. R. 94.

290. Existing debts all secured — & since paid — Assignment of all property—Control of stock-in-trade retained.]—A trader, by a post-nuptial settlement, settled all his property of every description, both present & future, upon trust for his wife for her separate use for life, remainder for himself for life, remainder for his children, reserving the control of his stock-in-trade to himself. Five years later he became bkpt.:—*Held*: the settle-

Subsequently a transfer of the property was made to debts. who, with I. afterwards sold the property to H. & F., & there were subsequent involved transactions with the property by way of mtge., & debts. paid \$5,000 more to I. Pltfs. alleged that the agreement of Sept. 17, 1906, & the transfer were made at a time when I. was insolvent:—*Held*: there were no judgments or executions against I. before the date of the transfer by debts. to H. & F.; so that, even if the property had remained in I.'s name, he could have made a valid transfer to H. & F.—*RICHARD BELIVEAU Co. v. MILLER* (1911), 16 W. L. R. 460; 3 Alta. L. R. 207.—CAN.

b. —.]—The mere proof of the existence of particular debts prior to a voluntary settlement does not, without more, establish fraudulent intent & thus invalidate the settlement, but to have that effect it is necessary to show such a state of the settlor's affairs at the time of the settlement as would lead the ct. to infer that the effect of the settlement was to defeat or delay creditors.—*DANCEY v. BROWN* (1914), 31 O. L. R. 152; 19 D. L. R. 862; 6 O. W. N. 137.—CAN.

c. —.]—Upon a bill, filed to impeach a voluntary settlement as void against creditors, pltf. proved the existence of but one debt, of small amount, existing at the date of the settlement; & there were not in the case any circumstances to induce the ct. to suspect that the settlor was at that time largely indebted:—*Held*: an inquiry touching the amount of his debts at that period was refused.—*MANDERS v. MANDERS* (1842), 4 L. Eq. R. 434.—IR.

d. *Assignment of anticipated profits—Assets out of reach of creditors at time of making.]*—Action to set aside an assignment by way of security to debt. of an interest in profits expected to be earned under a contract for the performance of work on the ground that it was made to defeat & delay creditors of the assignor who was insolvent, & to give the assignee an unjust preference. In the trial of

the decision in favour of debt. was based on the ground that the assignment had been made under pressure & was therefore valid:—*Held*: on appeal affirmed this judgment, as the subject of the assignment did not consist of assets which could be reached by creditors at the time when it was made, the assignment did not come within Assignments & Preferences Act.—*BLAKELEY v. GOULD* (1897), 27 S. C. R. 682.—CAN.

e. *Where debt barred by lapse of time.]*—A voluntary conveyance of land cannot be successfully attacked under 13 Eliz. c. 5, on the basis of a debt due at the time of the conveyance but barred by lapse of time before the commencement of the action to attack.—*KEDDY v. MORDEN* (1905), 15 Man. L. R. 629; 2 W. L. R. 373.—CAN.

PART I. SECT. 4, SUB-SECT. 5.—C.

291 i. General rule.]—A conveyance may be fraudulent & void as against creditors, although no debt may be in existence at the time, if made in contemplation of becoming indebted.—*BANK OF BRITISH NORTH AMERICA v. RATTENBURY* (1859), 7 Gr. 383.—CAN.

291 ii. —.]—A voluntary conveyance made with intent to affect future creditors alone will be set aside.—*OTTAWA WINE VAULTS Co. v. MCGUIRE* (1912), 27 O. L. R. 319; 4 O. W. N. 318; 8 D. L. R. 229; *affd.* 43 S. C. R. 144; 13 D. L. R. 8.—CAN.

291 iii. —.]—By deed A., in consideration of love and affection, assigned premises in trust to pay an annuity of £150 for the benefit of B. & his wife & children. At the date of the deed, May, 1853, A. owed £2,584, & had property to the value of £3,000. There was not any evidence of an intention to defraud subsequent creditors. He became bankrupt in 1860:—*Held*: the deed, though voluntary, was not void against his creditors.—*GRAHAM v. O'KEEFE* (1864), 16 L. Ch. R. 1.—IR.

292 i. — Settlor about to embark on hazardous trade.]—The owner of real estate being about to enter into a partnership, settled his pro-

ment was void under 13 Eliz. c. 5, although it did not appear that A. was indebted at the time of its execution, except on mtges. of part of the settled property, which had since been satisfied.—*WARE v. GARDNER* (1869), L. R. 7 Eq. 317; 38 L. J. Ch. 348; 20 L. T. 71; 17 W. R. 439.

C. Settlement with a view to Future Indebtedness.

291. General rule.]—(1) A creditor, on the circumstances of this case, decreed to be let in upon the estates jointly purchased by a father & his sons, & a moiety of each directed to be sold, & the money arising therefrom to be applied to the satisfaction of his judgment.

(2) Not necessary a man should be actually indebted at the time he enters into a voluntary settlement to make it fraudulent; for if he does it with a view to his being indebted at a future time, it is equally so, & ought to be set aside.—*STILEMAN v. ASHDOWN* (1742), 2 Atk. 477; 26 E. R. 688, L. C.; *affd.* (1743), 2 Atk. 608, L. C.

Annotations:—*As to* (2) *Consd.* *Bott v. Smith* (1856), 21 Boav. 511. *Apld.* *Mackay v. Douglas* (1872), L. R. 14 Eq. 106. *Refd.* *Taylor v. Jones* (1743), 2 Atk. 600. *Generally, Mentd.* *Burroughs v. Elton* (1805), 11 Ves. 29; *Dummer v. Pitcher* (1833), 2 My. & K. 262; *Crabb v. Crabb* (1834), 1 My. & K. 511; *Doswell v. Reece* (1866), 13 L. T. 156.

292. — Settlor about to embark on hazardous trade.]—*MACKAY v. DOUGLAS*, No. 283, *ante*.

erty on his wife & children. The evidence showed that it was made at the instance of the settlor's wife, & with a view to save the property from any debts which might arise in consequence of the partnership:—*Held*: the settlement was void as against subsequent creditors; although at the time of the settlement the settlor was perfectly solvent, & no intention of fraudulently withdrawing his assets could be imputed to him, & the property in question was partly paid for by money given to the wife by her father.—*BUCKLAND v. ROSE* (1859), 7 Gr. 440.—CAN.

292 ii. — — —.]—A. having received a large sum bought with it part of a farm, of which he took the deed in his own name; & afterwards gave instructions for a settlement of the property for the use of himself for life, with remainder to his wife & children; but the settlement was not prepared or executed for a year. Shortly before it was executed he had entered into a hazardous business, which proved disastrous, all his means not sufficing to pay its losses. The farm was the only real estate he had in the province:—*Held*: at the suit of a creditor whose debt accrued before the settlement, that the settlement was void as against creditors.—*KING v. KEATING* (1865), 12 Gr. 29.—CAN.

292 iii. — — —.]—Where a settlement has been made with the object of putting property beyond the chances & uncertainties of the business in which the settlor was engaged & which he continued to carry on until insolvent, it must be regarded as having been made with intent to defraud the creditors of that business, & it is unnecessary to prove any old debt still unpaid.—*FERGUSON v. KENNY* (1889), 16 A. R. 276.—CAN.

292 iv. — — —.]—When a settlor, not indebted at the time, transfers the bulk of his property shortly before engaging in a trade of a hazardous character, such settlement may be declared void as against subsequent creditors, & the burden of proof of *bona fides* of the settlement rests on

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sect. 5, C. & D.]

293. —.]—A trader, who had for many years carried on the business of a baker, & had saved some money, being about to purchase a grocery business, which he intended to carry on in addition to the other, made a voluntary settlement of the bulk of his property for the benefit of his wife & children. He afterwards bought the grocery business, & carried it on for about six months, but lost money by it. He then sold it for as much money as he had given for it, & afterwards carried on the baker's business alone, until, about three years after the execution of the settlement, he filed a liquidation petition, his liabilities largely exceeding his assets. The debts which he owed at the date of the settlement had been all paid:—*Held*: independently of the question whether he was solvent at the date of the settlement, the settlement was void as against the trustee in the liquidation under 13 Eliz. c. 5, on the ground that it was evidently executed with the view of putting the settlor's property out of the reach of his creditors in case he should fail in the speculation on which he was about to enter in carrying on a new business of which he knew nothing.—*Re BUTTERWORTH, Ex p. RUSSELL* (1882), 19 Ch. D. 588; 51 L. J. Ch. 521; 40 L. T. 113; 30 W. R. 584, C. A.

Annotations:—*Reid. Re Ridler, Ridler v. Ridler* (1882), 52 L. J. Ch. 343; *Re Briggs & Spicer*, [1891] 2 Ch. 127. *Mentd. Re Holden, Ex p. Official Receiver* (1887), 20 Q. B. D. 43.

294. —. —.]—*Re HOLLAND, GREGG v. HOLLAND*, No. 167, *ante*.

295. Bonâ fide transaction for protection of grantor—Grantor of extravagant habits—Settlement for value.]—A settlor on attaining twenty-one years executed a post-nuptial settlement whereby he assigned all the property to which he

then became entitled, with the exception of a sum of £3,000 to trustees upon trust to pay the income thereof to himself for life or until he should charge or incumber his life interest, with a gift over in favour of his wife & children. The consideration for the settlement was covenants by the mother & brother of the settlor respectively to pay him annuities of £50 & £25. The object of the mother & brother in entering into these covenants was to endeavour to protect the property of the settlor, who was a young man of extravagant habits, from his future creditors. At the date of the settlement the settlor was under certain liabilities in respect of debts incurred during his minority, & £3,000 had been excepted from the settlement for the purpose of discharging these liabilities:—*Held*: there was no intention to defeat & delay creditors, & that the settlement was not therefore void under the statute of Elizabeth.

This is a case in which, there being value given for the settlement, there must be evidence of an actual or express intent to defeat & delay creditors before one can find the settlement void. I say that in distinction to the case of a voluntary settlement where it is not necessary that there should be any such evidence. It is only necessary that the facts should be such that the settlement has a necessary tendency to defeat & delay creditors. In the case of a voluntary settlement, however honestly the settlor may execute it, however little he may be thinking of his creditors at the time he executes it, however free he may be from any desire to defeat or delay his creditors, the settlement, if voluntary, is void as against creditors if its necessary tendency is to defeat & delay them. As I have said in the case of a settlement for valuable consideration that is not so. You must prove the actual express intention to defeat & delay creditors (*VAUGHAN WILLIAMS, L.J.*).—*Re TETLEY, Ex p. JEFFREY* (1896),

the settlor.—*LAI HOP v. JACKSON* (1895), 4 B. C. R. 108.—CAN.

292 v. —. —.]—A voluntary conveyance of part of his estate by a retired & successful hotel-keeper to his wife, made at a time when he was in solvent circumstances but was after some months of idleness about to take up hotel-keeping business again, was upheld as against subsequent creditors, where the grantor's subsequent insolvency was caused by loss by fire.—*FLKING v. EDWARDS* (1896), 23 A. R. 718.—CAN.

292 vi. —. —.]—Pltfs. alleged that debt. was indebted to them, & that certain lots in E. were purchased by debt. in his wife's name & buildings erected thereon for the purpose of defeating, delaying & hindering the persons who might become his creditors in the course of his business:—*Held*: pltfs. were entitled to a declaration that the lots were purchased by debt. & the buildings erected by him, & that the lots were acquired by him in the name of his wife for the purpose of hindering, delaying & preventing pltfs. & others in the recovery of their just claims & the lots & buildings were exigible for claims.—*REVELLON BROTHERS, LTD. v. DEROME* (1907), 7 W. L. R. 53.—CAN.

292 vii. —. —.]—If a person engaged in trade of a hazardous nature voluntarily settles the bulk of his property on his wife, resulting in his creditors, even though they became such after the settlement, being defeated of their claims, the transaction should be set aside, as being within

13 Eliz. c. 5.—*JEFFREY v. AAGAARD*, [1922] 2 W. W. R. 1201; 68 D. L. R. 291; 32 Man. L. R. 173.—CAN.

292 viii. —. —.]—Where a person on the eve of entering or having just entered into a new venture involving risk of financial loss made a voluntary conveyance to his wife of a farm, being his principal asset:—*Held*: a fraud upon persons who subsequently became his creditors, & set aside.—*NEWLANDS SAWMILLS Co. v. BATEMAN*, [1922] 3 W. W. R. 649; 70 D. L. R. CAN.

292 ix. —. —.]—A trader, who had previously taken the benefit of Insolvent Act, three days after entering into partnership with another, conveyed by a voluntary deed all his property to trustees in trust for himself for life, or until bkpcy. or insolvency; & afterwards in trust for his wife & children. When this deed was executed he was in debt, but not to the extent of insolvency. Six years afterwards he became bkpt. In a suit by the assignees in bkpcy.:—*Held*: the deed was void.—*MURPHY v. ABRAHAM* (1863), 15 I. Ch. R. 371.—IR.

292 x. —. —.]—If a contractor, after the conclusion of each successful contract, places the bulk of his moneys in the hands of his wife, with the intention of putting them beyond the reach of his creditors, each of such payments is fraudulent & void against creditors.—*Re MCGRATH, Ex p. OFFICIAL ASSIGNEE* (1897), 17 N. Z. L. R. 646.—N.Z.

1. Transaction in view of in-

solvency—Mortgage to secure prior advance.—H. & S. in June, 1871, entered into co-partnership, the former to give his skill & ability to the business, & the latter, a minor, to supply capital & purchase stock to the extent of \$4,000. A lot of land was purchased which was secured by a mtge. The deed was taken in the name of H. & Mrs. A., the mother of S., who advanced \$4,000 to start the business. Although pltf. contended that this advance was made by Mrs. A. to her son, there was some evidence to show that it was to be repaid by the partnership. S. became of age in Feb. 1873, & in Aug. the partnership was dissolved, & a mtge. made by H. to Mrs. A. to secure the amount of her advances. Pltf., assignee, sought to have the mtge. declared void, as made in contemplation of insolvency. At the time of making the mtge. the business was embarrassed, but the jury found that the mtge. was not made in contemplation of insolvency, & they negatived fraud in the transaction, though they found that the conveyance had the effect of impeding, obstructing & delaying creditors; & the ct. upheld the conveyance.—*FRASER v. ADAMS* (circa 1878), R. E. D. 235.—CAN.

g. — Trust in favour of wife.]—Deft. applied to set aside a writ of attachment, levy & sheriff's return on the ground that the property attached was not that of debt., having been conveyed to a trustee in trust for his wife some time previously. Affidavits were read in reply to show that the trust deed was made fraudulently in

L. J. Q. B. 111; 75 L. T. 166; 40 Sol. Jo. 686; 3 Mans. 226; *affd.* 3 Mans. 321, C. A.

Annotation :—*Reid*. Denny (Trustee) v. Denny & Warr, [1919] 1 K. B. 583.

Right of subsequent creditors to avoid.]—
See, generally, Sect. 5, sub-sect. 2, D. (b), *post*.

D. Degree of Indebtedness.

296. Assets not assigned insufficient to pay debts.]—*OAKOVER v. PERTUS* (1676), *Gas. temp.* Finch, 270; 23 E. R. 148, L. C.

297. —.]—Where testator assigned his property, & *pltf.*, in an action against the *exor.* set up fraud in the assignment, & suggested, to prove the fraud, that testator was insolvent at the time of the assignment, it is sufficient for the purposes of *pltf.* in the action, if, by the very act of assignment, *pltf.* make himself insolvent, *i.e.* if the property left after the conveyance be not enough to pay his debts. But where the sum realised after the death of testator, very nearly equalled the amount of his debts, the *ct.* still left it to the jury to say whether there had been fraud in the assignment.—*JACKSON v. BOWLEY* (EXECUTOR OF LYON) (1841), *Car. & M.* 97.

298. —.]—*R.*, being indebted by bond & simple contract, & entitled under a will as tenant for life, with remainder to his children, executes a trust deed in favour of his own & his son's creditors, by which, reciting that he was justly indebted, the creditors, in consideration of £1,000, & an assignment of his children's interest, covenant not to sue him as long as the deed remains in force. The bond debt, & one of the same party by simple contract, are entered in the schedules. *R.* survived all his children, & conveyed his interest under the will, which was absolute, he being heir of testator, & executed a voluntary conveyance to trustees to sell & hold the proceeds, after certain payments thereout, in moieties upon the trusts of his son & daughter's settlements. *R.* then died, & by will confirmed the voluntary deed, & left the residue to his grandson. The £1,000 was paid to the creditors under the trust deed, which ceased to operate by the deaths of *R.*'s children in his lifetime; & the questions arose, whether the simple contract debts became specialty debts by the operation of that deed, whether Stat. Limitations was suspended & revived the right to sue when it ceased to operate, & whether the voluntary conveyance by *R.* was void as against creditors :—*Held* : the voluntary deed was void.

Suppose a man had £100,000, & owed £10,000, he might make a voluntary settlement without fraud; & on the other hand, if he had property & owed to the same amount, & settled the whole or nine-tenths upon a son or daughter, the *Ct.* would consider that voluntary settlement a

sufficient fraud to set it aside (*KINDERSLEY, V.-C.*).—*IVENS v. ELWES* (1854), 2 W. R. 335.

Annotation :—*Mentd.* *Brewe v. Cox* (1855), 3 W. R. 276.

299. —.]—*CORLETT v. RADCLIFFE*, No. 268, *ante*.

300. — Impeachment by subsequent creditors.]—*SPIRETT v. WILLOWS*, No. 482, *post*.

301. —.]—A clergyman of seventy-three years of age, who had a living worth £800 a year, an annuity of £180 & furniture worth about £500 was indebted to his bankers in £489 & had to borrow £350 to pay other creditors, for which he gave a bill of sale over the furniture. His only other property was a policy for £1,000 on his own life, in respect of which a premium of £63 was payable yearly. Being thus circumstanced, he, in Mar. 1863, settled the policy on his god-daughter, wife of *deft.*, & he subsequently became indebted to *pltf.* for goods supplied. At his death in 1868, a part of the debt due to the bankers remained unpaid, & this bill was filed to set aside the settlement :—*Held* : by the execution of the settlement the settlor was rendered absolutely insolvent.

The intention to defeat or delay creditors by such an instrument is to be inferred in many ways; & among these where, after deducting from the settlor's property the particulars settled, he is not left with enough to pay his debts.—*FREEMAN v. POPE* (1870), 5 Ch. App. 538; 39 L. J. Ch. 689; 23 L. T. 208; 34 J. P. 659; 18 W. R. 906, L. C. & L. J.

Annotations :—*Appld.* *Kent v. Riley* (1872), 41 L. J. Ch. 569. *Consd.* *Maokay v. Douglas* (1872), L. R. 14 Eq. 106; *Taylor v. Coenen* (1876), 1 Ch. D. 636; *Re Johnson*, *Golden v. Gillam* (1881), 20 Ch. D. 389; *Re Wise, Ex p. Mercer* (1886), 17 Q. B. D. 290. *Distd.* *Re Totley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111. *Consd.* *Re Lane-Fox, Ex p. Gimblett*, [1900] 2 Q. B. 508; *Re Holland, Frogg v. Holland*, [1902] 2 Ch. 360; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334. *Folld.* *Carruthers v. Peake* (1911), 55 Sol. Jo. 291. *Reid.* *Re Ridler, Ridler v. Ridler* (1882), 22 Ch. D. 74; *Re Maddever, Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523; *Edmunds v. Edmunds*, [1904] P. 362; *Re Halsted, Ex p. Richardson* (1917), 116 L. T. 386.

302. Whether actual insolvency necessary.]—*LUSH v. WILKINSON*, No. 466, *post*.

303. — Other evidence of intention to delay creditors.]—(1) A suit to set aside a settlement as fraudulent against creditors, entertained where *pltf.* subsequently became a creditor by the breach of a covenant previously entered into by the settlor.

(2) Where a deed is set aside as fraudulent against creditors, the property becomes assets & subsequent creditors are let in.

(3) In order to make void a deed as fraudulent against creditors, it is not necessary to prove that the party was insolvent at the time if it appear that the intention was to delay creditors.—

contemplation of insolvency :—*Held* : rule discharged with costs.—*THOMSON v. ELLIS* (1883), 16 N. S. R. (4 R. & G.) 307.—*CAN.*

h. —.]—Where a trust was created to raise £1,000 for the wife in the event of her husband's insolvency :—*Held* : only valid to the extent of £500, the amount of her fortune paid to him.—*DOHERTY v. POWER*, [1916] 1 I. R. 337.—*IR.*

PART I. SECT. 4, SUB-SECT. 5.—D.

296 i. Assets not assigned insufficient

*to pay debts.]—*A. purchased property & took conveyance in the name of his wife, swearing that at the time he did not owe a dollar, & that the money expended in the purchase of the property belonged to his wife, having been obtained on the sale of lands belonging to her. This statement was shown to be incorrect; & judgment having been recovered against A., upon which nothing could be realised under execution :—*Held* : the transaction was fraudulent as against creditors, & a sale of the lands ordered, & payment of proceeds to creditors.—

CAMPBELL v. CHAPMAN (1879), 26 Gr. 240.—*CAN.*

k. Whether actual insolvency necessary—One creditor only.]—H. became insolvent & his official assignee sought to have several indentures declared void as against his creditors on the grounds that the consideration was inadequate & that at the date of execution of the indentures, H. was insolvent, or, if not, became insolvent by their execution. It appeared that at the date of the conveyance H. was only indebted to one creditor :—*Held* :

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sect. 5, D.; sub-sect. 6, A.]

RICHARDSON v. SMALLWOOD (1822), Jac. 552; 37 E. R. 958.

Annotations:—As to (3) Consd. Skarf v. Soulbey (1849), 1 Mac. & G. 364. *Folld. Spirett v. Willows* (1864), 5 Giff. 49. *Refd. Holmes v. Penney* (1856), 3 K. & J. 90; *Jenkyn v. Vaughan* (1856), 2 Jur. N. S. 109.

304. —.] — **SHEARS v. ROGERS**, No. 264, *ante*.

305. A party largely indebted made a voluntary settlement, & became insolvent within three years:—*Held*: (1) sufficient to avoid the settlement under 13 Eliz. c. 5; (2) in order to set it aside, it was not necessary to prove that the settlor was in a state amounting to insolvency.—**TOWNSEND v. WESTACOTT** (1840), 2 Beav. 340; 9 L. J. Ch. 241; 4 Jur. 187; 48 E. R. 1212; *subsequent proceedings* (1841), 4 Beav. 58.

Annotations:—As to (1) Refd. Ivens v. Elwes (1854), 2 W. R. 335. *As to (2) Apprvd. Scarf v. Soulbey* (1849), 1 H. & Tw. 426. *Apld. Crossley v. Elworthy* (1871), L. R. 12 Eq. 158. *Consd. Mackay v. Douglas* (1872), L. R. 14 Eq. 106; *Taylor v. Coenen* (1876), 1 Ch. D. 636. *Generally, Refd. Christy v. Courtenay* (1850), 13 Beav. 96; *Jenkyn v. Vaughan* (1856), 2 Jur. N. S. 109.

306. —.] (1) The bill alleged that, at the time of executing a voluntary settlement, the settlor was insolvent, or in embarrassed circumstances, or indebted to divers persons:—*Held*: in the absence of any proof of actual insolvency, the mere fact of the settlor then owing some debts was not sufficient to invalidate the settlement.

(2) In this case there was no allegation of any debt owing to plff. at the date of the settlement, but the fact was proved by evidence in the cause:—*Held*: this circumstance, though, forming no ground for deciding at once against the validity of the settlement, laid the foundation for inquiry, & the ct. accordingly would direct a reference to inquire what debts were owing by the settlor at the time of executing the settlement, & at his death, & what, at the time of the settlement, was the amount of the settlor's property not included in it.—**SKARF v. SOULBY** (1849), 1 Mac. & G. 364; 19 L. J. Ch. 30; 13 Jur. 1109; 41 E. R. 1306; *sub nom. SCARF v. SOULBY*, 1 H. & Tw. 426; 16 Sim. 481, L. C.

Annotations:—As to (1) Consd. Crossley v. Elworthy (1871), L. R. 12 Eq. 158. *Refd. Spirett v. Willows* (1864), 5 Giff. 49; *Coulthas v. Swan* (1870), 22 L. T. 539. *As to (2) Folld. Ivens v. Elwes* (1854), 2 W. R. 335; *Jenkyn v. Vaughan* (1856), 25 L. J. Ch. 338.

307. —.] — **TURNLEY v. HOOPER**, No. 211, *ante*.

308. —.] — J. was in embarrassed circumstances & applied to his mother for a loan, who lent it on his settling a small estate on his children. There being no clear evidence that J. either intended or knew the necessary consequences of the

conveyance would be to hinder or delay his creditors, & there being no notice to the mother of any confirmed insolvency of J. at the time:—*Held*: the deed was not void under 13 Eliz. c. 5. It is not necessary to prove the insolvency of the settlor at the time a conveyance of defeating creditors is executed, in order to set it aside under 13 Eliz. c. 5.

The rule in each particular case is whether the intention of the settlor was "to delay, hinder, or defraud his creditors."—**THOMPSON v. WEBSTER** (1861), 4 L. T. 750; 7 Jur. N. S. 531; 9 W. R. 641, H. L.

Annotations:—Consd. Smith v. Cherrill (1867), L. R. 4 Eq. 390. *Folld. Bayspoole v. Collins* (1871), 40 L. J. Ch. 289. *Consd. Re Johnson, Golden v. Gillam* (1881), 20 Ch. D. 389. *Refd. Re Maddever, Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523; *Hance v. Harding* (1887), 4 T. L. R. 185; *Godfrey v. Poole* (1888), 13 App. Cas. 497; *Re Totley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111; *Edmunds v. Edmunds* (1904), 73 L. J. P. 97.

309. — *Impeachment by creditor at date of settlement.*—**SPIRETT v. WILLOWS**, No. 482, *post*.

310. —.] — In the absence of actual intent to defeat, delay, or hinder creditors, a voluntary settlement, made by a settlor in embarrassed circumstances, but having property not included in the settlement ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid.—**KENT v. RILEY** (1872), L. R. 14 Eq. 190; 41 L. J. Ch. 569; 27 L. T. 263; 20 W. R. 852.

SUB-SECT. 6.—GRANTOR CONTINUING IN POSSESSION.

A. In General.

311. Fraudulent intent a question of fact.—Want of possession on a bill of sale, a notorious badge of fraud, which ought to be left to a jury.—**MARTYN v. PODGER** (1770), 5 Burr. 2631; 2 Wm. Bl. 701; 98 E. R. 384.

Annotations:—Refd. Doo d. Batten v. Murless (1817), 6 M. & S. 110; *Martindale v. Booth* (1832), 3 B. & Ad. 498; *White v. Morris* (1852), 11 C. B. 1015. *Mentd. Haylock v. Sparke* (1853), 1 E. & B. 471.

312. —.] — The next consideration then is, in what condition the creditors stood, in relation to conditional sales or mtges. by their debtors to their prejudice, where the mtgor. continued in possession of the goods mortgaged; & the statute governing this matter is 13 Eliz. c. 5, which relates only to creditors; 27 Eliz. c. 4, relates to purchasers, in which there is no distinction between conditional & absolute sales, provided they are fraudulent. This statute being made to protect

bill dismissed.—**MACKENZIE v. GOUGH** (1874), 12 N. S. W. S. C. R. (Eq.) 111. —**AUS.**

PART I. SECT. 4, SUB-SECT. 6. —A.

311 i. Fraudulent intent a question of fact.—P. was indebted to plffs. in respect of a mtge. upon certain lands in E. After default he conveyed certain other lands to his son, who immediately conveyed them to P.'s wife. The conveyances were voluntary & intended as a provision for the wife so that she could have a house. Previous to the date of the conveyances, land had become unsaleable in E., & plff.'s security was inadequate.

There was no direct evidence that P. had no other property sufficient to pay the debt, but there was sufficient to lead the ct. to suspect it. The deeds were not registered. P. continued to collect the rents & to put them into the common purse for household purposes:—*Held*: the conveyance was fraudulent as against creditors.—**DUNDEE MORTGAGE CO. v. PETERSON** (1889), 6 Man. L. R. 66.—**CAN.**

311 ii. —.] — The mere continuance in possession, by debtor, of property which he has assigned by bill of sale to his creditors, is not *per se* such a badge of fraud as renders the bill of sale fraudulent. *Id.*, it is only *prima*

facie evidence of fraud. Continuance in possession, to render such a transaction void, must be accompanied by other circumstances from which the jury may arrive at the conclusion that its object was fraudulent.—**MACDONA v. SWINEY** (1858), 8 I. C. L. R. 73; 10 Ir. Jur. 411.—**IR.**

311 iii. —.] — Where a person engaged in trade, & at the time largely indebted, purchased property & had it conveyed in trust for his infant daughter, & himself continued to use it in his trade:—*Held*: a fraudulent conveyance & void as against the creditor.—**DIXON v. BENNETT** (1848), 3 Nfld. L. R. 41.—**NFLD.**

creditors against all conveyances to defraud them, it was incumbent on a ct. of equity, or a jury at common law, upon considering the whole circumstances to pronounce whether the conveyance was made with such intent or not. Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud, where left in his hands. But if from concurrent circumstances it appeared, the title deeds were not left to defraud creditors, but upon reasonable & honest purposes, or left with the vendor, not so as to deceive touching his substance, that being accompanied with other circumstances, could not be pronounced a badge of fraud (BURNET, J.).—*RYALL v. ROWLES* (1750), 1 Ves. Sen. 348; 1 Atk. 165; 9 Bli. N. S. 377; 27 E. R. 1074, L. C.

Annotations:—*Consd.* *Dearle v. Hall*, *Loveridge v. Cooper* (1828), 3 Russ. 1. *Refd.* *West v. Skip* (1749), 1 Ves. Sen. 239; *Ex p. Dumas* (1754), 2 Ves. Sen. 582; *Worseley v. Demattos & Slader* (1758), 1 Burr. 467; *Falkener v. Case* (1781), 1 Bro. C. C. 125; *Horn v. Baker* (1808), 9 East, 215; *Hartley v. Smith* (1819), Buck, 368; *Belcher v. Bellamy* (1848), 2 Exch. 303; *Re Buller, Ex p. Wornald* (1860), 2 L. T. 544; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426; *Sharman v. Mason*, [1899] 2 Q. B. 679. *Mentd.* *Row v. Dawson* (1749), 1 Ves. Sen. 331; *Doddington v. Hallet* (1750), 1 Ves. Sen. 497; *Ward v. Turner* (1752), 2 Ves. Sen. 431; *Ex p. Shank* (1754), 1 Atk. 234; *Wilson v. Day* (1759), 2 Burr. 827; *Mason v. Vere* (1779), 2 Wm. Bl. 1309; *Atkinson v. Maling* (1788), 2 Term Rep. 462; *Plumb v. Fluit* (1791), 2 Anst. 432; *Gordon v. East India Co.* (1797), 7 Term Rep. 228; *Lingham v. Biggs* (1797), 1 Bos. & P. 82; *Evans v. Bicknell* (1801), 6 Ves. 174; *Jones v. Gibbons* (1804), 9 Ves. 407; *Taylor v. Plumer* (1815), 3 M. & S. 562; *Re Frazer, Ex p. Monro* (1819), Buck, 300; *Storer v. Hunter* (1824), 3 B. & C. 368; *Hubbard v. Bagshaw* (1831), 4 Sm. 326; *Re Severn, Ex p. Colville* (1831), 9 L. J. O. S. Ch. 56; *Re Severn, Ex p. Tennyson* (1832), Mont. & B. 67; *Buck v. Lee* (1834), 1 Ad. & El. 804; *Re Ogden, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Gardner v. Lachlan* (1838), 4 My. & Cr. 129; *Reeves v. Capper* (1838), 1 Arn. 427; *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443; *Belcher v. Capper* (1842), 4 Man. & G. 502; *Etty v. Bridges* (1843), 2 Y. & C. Ch. Cas. 486; *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Bartlett v. Bartlett* (1857), 1 De G. & J. 127; *Re Brooke, Ex p. Scott* (1857), 29 L. T. O. S. 314; *Re Selby, Ex p. Probyn* (1857), 28 L. T. O. S. 258; *Re Body, Ex p. Staner* (1859), 33 L. T. O. S. 244; *North v. Gurney* (1861), 1 John. & H. 509; *Grainge v. Warner, Re Grainge* (1865), 6 New Rep. 219; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Cooke v. Hemming* (1868), L. R. 3 C. P. 334; *Re Bainbridge, Ex p. Fletcher* (1878), 8 Ch. D. 218; *Re West of England & South Wales District Bank, Ex p. Dale* (1879), 11 Ch. D. 772; *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; *Re Patrick, Bills v. Tatham* (1890), 63 L. T. 752; *Re Richards, Humber v. Richards* (1890), 45 Ch. D. 589; *Thomas v. Searles*, [1891] 2 Q. B. 408; *English & Scottish Mercantile Investment Trust v. Brunton*, [1892] 2 Q. B. 1; *Re Wyatt, White v. Ellis*, [1892] 1 Ch. 188; *Ward v. Duncombe*, [1893] A. C. 369; *Rose v. Buckett*, [1901] 2 K. B. 449; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334.

313. —— One who had a life interest in a settled estate of his wife, both of whom were aged, of at least £3,000 a year, whereof the ultimate reversion on failure of issue male, of which there was none, was in her, & having furniture & pictures, etc., in his mansion of not less than £8,000 value, being pressed by his creditors, in pursuance of an agreement with his wife, conveyed all that his property to trustees, who had married his two daughters, for the benefit of his wife & daughters, & subject to his wife's future appointment; in consideration whereof the wife discharged him of above £3,000 before raised on the estate, principally for his use, & enabled the trustees to raise out of her estate £12,000 more for the benefit of her husband's creditors, but subject to the appointment of him, his exors., etc.; & also covenanted to levy a fine, which was levied a year afterwards; & the husband covenanted to deliver an inventory of the goods to the trustees within six months, which was not done; & after the conveyance the husband continued to use the

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furniture, etc., in the house as before; & was soon afterwards sued by several of the creditors, whose executions against such goods were satisfied by him, without setting up the trust deed, or resorting to the trust fund; but money was raised on it afterwards for other creditors; & above two years after the deed, the husband being sued by pltf., a creditor before that time, the trust deed was set up in bar of the levy upon the goods in the house; & the sheriff returned *nulla bona*; & upon an action brought for a false return:—*Held*: in the consideration of the question, whether this was a *bond fide* transaction or a contrivance to defeat creditors, & therefore void at common law, or by 13 Eliz., c. 5, it was material to submit to the jury the relative value of the property withdrawn from the reach of the creditors in proportion to the amount of their demands at the time, & the value & tangibility of that substituted in its place, in aid of the conclusion that the deed was covinous against them, & therefore, a verdict for pltf., founded principally on these concomitant circumstances: the previous embarrassment of the husband; the want of notoriety of the conveyance at the time; the want of an inventory; the continuance of the husband's possession though consistent with the deed, yet without notice of the change of property; & the appropriation by the husband of a part of the money raised by the trustees to his own use, without objection; was set aside, & a new trial granted to bring the question more fully before the ct. & jury as to the good faith of the transaction, & the value of the consideration, & its availability to the creditors.—*DEWEY v. BAYNTON* (1805), 6 East, 257; 102 E. R. 1285.

Annotation:—*Consd.* *Arundell v. Phipps & Taunton* (1804), 10 Ves. 139.

314. —— (1) A conveyance of chattels unaccompanied with possession is void, although in the same instrument be contained a valid mtge. of leasehold buildings in which the chattels are situated.

(2) Where a person pretending to be a purchaser of goods under an execution leased the goods at a rent to the former owner who still continued in possession, no money having been proved to be given for the purchase nor rent paid under the lease, it was a question for the jury whether the lease was not fraudulent, but under circumstances the possession of the lessee might have been the possession of the lessor.—*REED v. BLADES* (1813), 5 Taunt. 212; 128 E. R. 669.

Annotation:—*As to* (1) *Refd.* *Reeves v. Capper* (1838), 5 N. C. 136.

315. —— A. being indebted to B. in the sum of £10 for goods applied for a further supply upon credit, & for a loan. B. refused to grant either without security; & it was then agreed that A. should give a bill of sale of his household furniture & fixtures, & that B. should give him credit for £200 on that security. Before the bill of sale was executed, B., upon the faith of such agreement, advanced to A. £90 in money & goods, & afterwards, on May 8, 1828, A. executed a bill of sale, whereby, in consideration of the debt of £100 he bargained & sold to B. all his, A.'s household goods & furniture, etc., with a proviso, that if A. should pay the £100 by instalments, the first of which was to be due on June 7, the deed should be void; but in default of payment of any of the instalments at the times appointed, it should be lawful, although no advantage should have been taken of any previous default, for B. to enter upon

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sect. 6, A. & B.]

the premises & take possession, & sell off the goods. There was a further proviso, that until such default, it should be lawful for A. to keep possession of them. In 1823, A. had given a warrant of attorney to C. & D., as security for a debt of £1,100, & they, in Nov. 1828, entered up judgment & sued out a *fi. fa.*, under which the sheriff seized the goods:—*Held*: in these circumstances the bill of sale was not fraudulent by reason of A.'s having continued in possession. *Semble*: after a conveyance of goods & chattels, want of possession does not constitute fraud, as against creditors, but is only evidence of it.

The consideration for the sale was not only an antecedent debt, but a sum of money to be advanced by pltf. to enable A. to carry on his trade (LORD TENTERDEN, C.J.).—MARTINDALE v. BOOTH (1832), 3 B. & Ad. 498; 1 L. J. K. B. 166; 110 E. R. 180.

Annotations:—*Folld. Carr v. Burdiss* (1835), 5 Tyr. 309. *Reid. Lindon v. Sharp* (1843), 6 Man. & G. 895; *Ward v. Audland* (1847), 16 M. & W. 862; *Darvill v. Terry* (1861), 6 H. & N. 807; *Ashtou v. Blackshaw* (1870), 30 L. J. Ch. 205; *Crawcour v. Salter* (1881), 18 Ch. D. 30.

316. —.]—To a declaration in trover by the assignees of a bkpt. to recover damages for goods, chattels, & fixtures, alleged to be in the possession of bkpt. at the time of his bkpcy., & to have been since converted by defts., they pleaded that before the bkpcy. bkpt. assigned the goods to them by deed, who before the bkpcy. took possession of them, & kept & retained such possession afterwards. Pltfs. replied, that defts. did not take possession of the goods before the bkpcy. Issue was joined thereon, & a verdict found for pltfs. upon it:—*Held*: the issue was immaterial, because the assignment by deed conveyed the property in the goods to defts., & the continued possession of the assignor only amounted to evidence of fraud.

I am of opinion that a transfer of personalty is sufficiently perfected by a deed of assignment, without possession, & that a continued possession by the assignor is only evidence of fraud (PARKE, B.).—CARR v. BURDISS (1835), 1 Cr. M. & R. 782; 5 Tyr. 309; 4 L. J. Ex. 60; 149 E. R. 1293.

Annotations:—*Consd. Stanger v. Wilkins* (1855), 19 Beav. 626. *Mentd. Doe d. Frankis v. Frankis* (1840), 4 Jur. 273; *Re Hunt, Ex p. Simpson* (1844), 14 L. J. Bey. 1; *Young v. Wand* (1852), 8 Exch. 221; *Smith v. Cannan* (1853), 17 Jur. 911; *Johnson v. Fesomeyer* (1858), 3 De G. & J. 13.

317. —.]—The modern doctrine is that it must be left to the jury to say whether the continuance of possession is fraudulent or not. It is a strong fact, but not conclusive (TINDAL, C.J.).—LINDON v. SHARP (1843), 6 Man. & G. 895; 7 Scott, N. R. 730; 13 L. J. C. P. 67; 131 E. R. 1154.

Annotations:—*Reid. Graham v. Chapman* (1852), 12 C. B. 85; *Re Barrell, Ex p. Bailey* (1853), 3 De G. M. & G. 534; *Re Murgatroyd, Ex p. Bland* (1855), 6 De G. M. & G. 757; *Mercor, Assignee v. Peterson* (1868), 18 L. T. 30; *Re Nurse, Ex p. Foxley* (1868), 18 L. T. 862; *Re Winstanley, Ex p. Sheon* (1876), 1 Ch. D. 560; *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313.

3181. *Possession consistent with terms of deed—Effect where deed in fact fraudulent.*—A lease made by debtor of his farm property under terms by which debtor was to remain in possession, & out of the crop pay himself \$1,500, declared void as against creditors, although there was no evidence of financial embarrassment or inability to pay debts in full.—WAY

v. MASSEY MANUFACTURING CO. (1886), 4 Man. L. R. 38.—CAN.

1. Grantor in possession—Not necessarily a badge of fraud.—The assignor continuing in possession of the goods assigned is not a conclusive badge of fraud.—TARRATT v. SAWYER (1835), 1 N. S. R. (Thom.) 46.—CAN.

318. *Possession consistent with terms of deed—Effect where deed in fact fraudulent.*—RICHES v. EVANS, No. 60, ante.

B. Absolute Transfer.

319. *Profits retained.*—Formedon. The tenant pleads "*non tenure*"; & upon this they were at issue; & it was found, that before the writ purchased, the tenant enfeoffed divers persons to the intent to defraud them which had cause of action for the same lands & notwithstanding he took the profits, & the verdict was adjudged for the demandant for the feoffment was void against him by 13 Eliz. c. 5.—LEONARD v. BACON (1591), Cro. Eliz. 234; 78 E. R. 489.

320. *Possession inconsistent with grant.*—TWYNE'S CASE, No. 108, ante.

321. —.]—OAKOVER v. PETTUS (1676), Cas. temp. Finch, 270; 23 E. R. 148, L. C.

322. — Goods taken in execution & redeemed for donor.]—A deed of gift made of personal chattels is not good against creditors, if the donor continue in possession; but if, while they are so in his possession, they are taken in execution, & redeemed for, & on account of the donor, they thereby become his absolute property again, & notwithstanding the deed of gift, will pass to a legatee under a bequest of "all his personal estate," etc.—WINCHELSEA (COUNTESS) v. MAIDSTONE (LADY) (1691), 4 Mod. Rep. 51; 87 E. R. 257.

323. —.]—The father makes a settlement on trustees in trust to pay his debts therein mentioned, reserving £50 a year to himself for life, remainder to his son, etc. Father continues in possession, & twelve years after contracts debts by bond. *Qu.*: whether the settlement is void as to the bond-creditors.—HUNGERFORD v. EARLE (1692), 2 Vern. 261; Freem. C. 120; 23 E. R. 768.

Annotation:—*Reid. Beckett v. Cordley* (1784), 1 Bro. C. C. 353.

324. —.]—MEGGOT v. MILLS, No. 350, post.

325. — Partial consideration.]—Bill lies for creditor by *elegit* to set aside a fraudulent conveyance, whether he could recover at law or not. Conveyance fraudulent if without delivery of possession, though part a real consideration.—BENNET v. MUSGROVE (1750), 2 Ves. Sen. 51; 28 E. R. 34, L. C.

326. —.]—(1) If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, & in the meantime the debtor die, whereupon the creditor takes & sells the goods, he will be liable to be sued as exor. *de son tort* for the debts of deceased; for debtor's continuing in possession is inconsistent with the deed, & fraudulent against creditors. It is a general rule in the transfer of chattels, that the possession must accompany & follow the deed. Therefore, where the conveyance is absolute, the possession must be delivered

to be taken as conclusive evidence that a deed is fraudulent against creditors where debtor has remained in possession receiving the rents & profits for a long time after the execution of the deed.—DOE d. ROY v. HAMILTON (1843), 8 O. S. 410.—CAN.

FAIRCHILD & MILLIGAN (1856), L. C. R. 113.—CAN.

immediately; where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed.

(2) If the deed or conveyance be conditional, the vendor's continuing in possession does not avoid it, because, by the terms of the conveyance, the vendee is not to have possession till he has performed the condition. [*Stone v. Grubham*, No. 345, *post*] makes the distinction between deeds or bills of sale which are to take place immediately, & those which are to take place at some future time; for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; & such possession comes within the rule, as accompanying & following the deed 'BULLER, J.).—EDWARDS v. HARBEN (1788), 2 Term Rep. 587; 100 E. R. 315.

Innotations:—As to (1) *Distd.* *Steel v. Brown* (1808), 1 Taunt. 381. *Consd.* *Joseph v. Ingram* (1817), 1 Moore, C. P. 189. *Apld.* *Armstrong v. Baldock* (1818), Gow, 33. *Consd.* *Steward v. Lombe* (1820), 1 Brod. & Bing. 506. *v. Crampborne* (1825), 3 L. J. O. S. Ch. 223; *Martindale v. Booth* (1832), 3 B. & Ad. 498. *Refd.* *Manton v. Moore* (1796), 7 Term Rep. 67; *Lewis v. Rogers* (1834), 1 Cr. M. & R. 48; *Lindon v. Sharp* (1843), 6 Man. & G. 895; *Ward v. Audland* (1847), 16 M. & W. 862. As to (2) *Apld.* *Reed v. Wilmot* (1831), 7 Bing. 577. *Refd.* *Armstrong v. Baldock* (1818), Gow, 33.

327. Person put in possession jointly with grantor.]—An assignment of personal property is void as against creditors, unless there be a complete change of possession; & it is not enough that a person is put in to keep possession jointly with the assignor.—WORDALL v. SMITH (1808), 1 Camp. 32, N. P.

Innotations:—N.F. *Eastwood v. Brown* (1825), Ry. & M. 312. *Distd.* *Latimer v. Batson* (1825), 4 B. & C. 652. *Refd.* *Cromack v. Heathcote* (1820), 4 Moore, C. P. 357. *Mentd.* *Cookson v. Fryer* (1858), 1 F. & F. 328.

328. — Effect of assent by creditor.]—A bill of sale of goods made for a valuable consideration, unaccompanied with the possession, is valid as against the vendor; & as against a creditor, with whose knowledge & assent it was given.

If one executes even a colourable bill of sale for a valuable consideration, though the vendor remains some time in possession, it is a good bill as between the parties. All that has been said about the genuineness of the transaction, relates only to third persons: but in the present case, if debtors had proved themselves to be creditors, which they failed to do, it is very doubtful whether they could have been in a better situation than they now are, on account of the communication which appears to have been made at the time of the transfer of the lease (MANSFIELD, C.J.).—STEEL v. BROWN & PARRY (1808), 1 Taunt. 381; 1 Camp. 512, n.; 127 E. R. 881.

329. — Mortgage of premises in which chattels situated.]—REED v. BLADES, No. 314, *ante*.

330. — Pretended purchase & lease to grantor.]—REED v. BLADES, No. 314, *ante*.

331. — Assignment not concealed.]—If an assignment be made of household furniture & the assignor continues in the possession of it, it is not protected against an execution, at the suit of a creditor of the assignor, unless the assignment were notorious. In such cases, the notoriety of the change of possession is the question to be ascertained.—ARMSTRONG v. BALDOCK (1818), Gow, 33, N. P.

332. — —.]—Where the *bond fide* assignee of a bill of sale executed by the sheriff under a

fi. fa. against the goods of B., allowed the latter to remain in the possession & enjoyment of the goods until another execution was put in, & the same effects were again seized:—*Held*: the first execution, being notorious, the assignee of the bill of sale might maintain trespass against sheriff, & an absolute change of possession was not necessary to give effect to the bill of sale as against creditors.—LATIMER v. BATSON (1825), 4 B. & C. 652; 7 Dow. & Ry. K. B. 106; 4 L. J. O. S. K. B. 25; 107 E. R. 1203.

333. — Not conclusive evidence of fraud.]—A sale to a creditor of personal property, by a person in embarrassed circumstances, without any change of possession, is valid, unless made with a fraudulent intention to defeat other creditors. The continuance of possession is not conclusive evidence of fraud.—EASTWOOD v. BROWN (1825), Ry. & M. 312, N. P.

334. — Agreement that grant to be void on repayment of price.]—A. executed to B. a bill of sale, dated May 11, by which, in consideration of £350, he granted all his goods, chattels, & effects to B.; & in it there was a clause stating that symbolical possession had been delivered, & a proviso, that the instrument should be void, if A. paid the £350 to B. on or before Sept. 29 following. A. remained in the visible possession of the property till his death, on Sept. 30:—*Held*: the bill of sale was void as against the creditors of A.—CRAMPHORNE v. — (1827), 6 L. J. O. S. Ch. 91, L. C.; *affg.* S. C. *sub nom.* — v. CRAMPHORNE (1825), 3 L. J. O. S. Ch. 223.

335. — —.]—BARTON v. VANHEYTHUYSEN, STONE v. VANHEYTHUYSEN, No. 14, *ante*.

336. — Grantor remaining in possession with view to re-purchase.]—A., a trader, being in difficulties, & having five executions against him, all his goods were conveyed to debt. by bill of sale from the sheriff, with an understanding that they should remain on A.'s premises to enable him to re-purchase them. The jury having found that the object of the transaction was, not merely to relieve A. from a forced sale of his goods, but also to protect them from the demands of other creditors:—*Held*: the transaction was void under 13 Eliz. c. 5, s. 1, & an act of bkpey.

Semble: it was void also as to persons who became creditors subsequent to the transaction, if they were thereby delayed or defrauded.—GRAHAM v. FURBER (1854), 14 C. B. 410; 2 C. L. R. 452; 23 L. J. C. P. 51; 22 L. T. O. S. 242; 18 Jur. 226; 2 W. R. 163; 130 E. R. 169.

337. — Grantor's foreman & family remaining in possession—Colourable transaction.]—An assignment by a judgment debtor, a trader, of his furniture, etc., to a friendly creditor pending proceedings in the Insolvent Ct., his foreman & family remaining in possession:—*Held*: fraudulent as against a judgment creditor.

It is not sufficient to invalidate an assignment, that it was designed to defeat an execution; the question is, whether it is real or only colourable, & for the sole purpose of being used to defeat the execution & then treated as null (WILLES, J.).—YOUNG v. BARNET (1858), 1 F. & F. 320.

338. — Subsequent sale—Grantee taking price.]—A debtor executed an assignment of the goodwill & fixtures of his business to his brother, in satisfaction of moneys advanced. Two years afterwards debtor, who had retained possession of the

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goodwill & fixtures, sold them, & his brother obtained payment of the purchase-money. Debtor was then insolvent, & soon afterwards presented a petition for liquidation by arrangement:—*Held*: the payment of the purchase-money to debtor's brother was not a fraud upon the other creditors, & could not be set aside.—*Re WILSON, Ex p. WILSON* (1874), 29 L. T. 860; 22 W. R. 241, L. JJ.

339. Purchase from sheriff under *fi. fa.*—Debtor allowed to retain possession—Subsequent execution.]—*LATIMER v. BATSON*, No. 332, *ante*.

340. — By judgment creditor—Goods let to debtor.]—*WATKINS v. BIRCH*, No. 34, *ante*.

341. Purchaser after execution levied—Security given by purchaser to sheriff.]—A., for a good consideration, assigned his interest in a farm, & his cattle & implements of husbandry then in the possession of the sheriff under a writ of *fi. fa.* at the suit of C., & the property was liberated by the sheriff on his taking security from B. B., after the assignment, managed the property, but A. continued in possession; on the property being afterwards taken in execution at the suit of D.:—*Held*: it was protected by the assignment to B.

The donor's continuance in possession is not in all cases a mark of fraud, as where a donee lends his donor money to buy goods, & at the same time, takes a bill of sale of them for securing the money (*PARKE, J.*).—*JEZEPIH v. INGRAM* (1817), 8 Taunt. 838; 1 Moore, C. P. 189; 129 E. R. 609.

Annotations:—*Apld.* *Latimer v. Batson* (1825), 4 B. & C. 652. *Consd.* *Martindale v. Booth* (1832), 3 B. & Ad. 498.

342. Purchase from trustee for benefit of creditors—Debtor's wife remaining in possession.]—Where the husband of pltf.'s mother assigned his effects to trustees for the benefit of his creditors, & absconded, leaving his wife in possession of his house, & goods, & notice of such assignment was advertised in the newspaper, & the goods were afterwards sold by the trustees at public auction, & pltf. purchased them in order to accommodate his mother, & paid for them at a fair valuation, & removed some, but left the greater part in her possession:—*Held*: such purchase by pltf. would protect the goods against a judgment afterwards obtained & execution levied by a creditor of the husband, who had notice of the assignment at the time, although pltf. permitted his mother to continue in possession, & therefore, he was entitled to recover them from the sheriff.—*LEONARD v. BAKER* (1813), 1 M. & S. 251; 105 E. R. 91.

Annotation:—*Apld.* *Latimer v. Batson* (1825), 4 B. & C. 652.

343. Purchase by trustee of debtor's estate from landlord under distress.]—Goods seized & sold by the landlord under a distress for rent without any collusion, & purchased by a trustee of the tenant's estate under an assignment by such tenant, for the benefit of the creditors, out of the trust funds, are not liable to be taken in execution by an annuity & judgment creditor, although they are permitted by the trustees to remain in the possession of the tenant.—*GUTHRIE v. WOOD* (1816), 1 Stark. 367, N.P.

344. Possession not apparent—Goods & grant in possession of third party.]—Goods were taken under a *fi. fa.* as the goods of S., & on an issue directed to try whether the goods were the property of J., it was proved that the goods, prior to 1836, belonged to W. when they were distrained for rent, & the sum for which they were distrained paid in the name of S., with the money of pltf. In 1837 W. became bkpt., & pltf. paid £128 to the official assignee for W.'s interest in the goods. Early in 1839, W. took the benefit of the Insolvent Debtors' Act, but his assignee never claimed the goods. In Nov. 1839, S. executed an assignment of the goods to pltf., & in Mar. 1840, the goods were seized under a *fi. fa.* against S. The goods always had remained in the possession of W. as the ostensible owner of them, & S. never was in possession of them:—*Held*: (1) on these facts J. had made out his property in the goods, & as S. had never been in the possession of the goods, & never could have gained false credit by them, there was nothing from which the jury ought to infer that the assignment was fraudulent; (2) that the assignment was kept at W.'s house was immaterial, & it was also immaterial that no possession of the goods had been delivered by S. to pltf., as the right to them would pass by the execution of the deed.—*BURLING v. PATERSON* (1840), 9 C. & P. 570, N. P.

345. Consideration future—Possession not fraudulent.]—*STONE v. GRUBBAM* (1615), 1 Roll. Rep. 3; 2 Bulst. 225; 81 E. R. 285.

Annotations:—*Refd.* *Ryall v. Rolle* (1749), 1 Atk. 165; *Edwards v. Harben* (1788), 2 Term Rep. 587; *Reed Wilmott* (1831), 5 Moo. & P. 553.

346. Settlement of furniture with house.]
CADOGAN v. KENNETT, No. 139, *ante*.

C. Conditional Transfer.

347. Whether distinguishable from absolute transfer.]—*RYALL v. ROWLES*, No. 312, *ante*.

348. Possession retained until condition performed.]—*EDWARDS v. HARBEN*, No. 326, *ante*.

349. — Payment on a named day.]—A mtge. of chattels without delivery of possession to the mtgee. is valid, if the mtgor.'s continuing in possession is consistent with the terms of the deed.

[The dictum of *BULLER, J.*, in *Edwards v. Harben*, No. 326, *ante*] appears to me to be precisely applicable to the present case, as the parties stipulated by the deed that the mtgor. should remain in possession of the barges for six months after the execution of the instrument, when, in default of the payment of the principal sum, pltf., as mtgees., were to take possession (*PARKE, J.*).—*REED v. WILMOT* (1831), 7 Bing. 577; 5 Moo. & P. 553; 131 E. R. 223; *sub nom.* *READ v. WILMOTT*, 9 L. J. O. S. C. P. 176.

Annotation:—*Mentd.* *Doe d. Downe v. Govier* (1845), 5 L. T. O. S. 37.

— **Future consideration.]—***See* No. 345, *ante*.

D. Transfer by way of Charge.

350. General rule.]—Permitting the vendor to continue in possession will in general make a sale fraudulent against creditors. But if one man

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350 i. General rule.]—A. by a deed of trust charged real estate to secure

among other things a debt alleged to be due by him to his grandfather's estate on account of sums received by

him from a debtor to that estate. A. was in a state of indebtedness which occasioned his afterwards becoming

lends another money to buy furniture & takes a bill of sale of the furniture, leaving it in the vendor's possession will not make the sale fraudulent.—**MEGGOT v. MILLS** (1697), as reported in 1 *Ld. Raym.* 286; 91 *E. R.* 1088.

Annotations:—**Consd.** *Ryall v. Rowles* (1750), 1 *Ves. Sen.* 348; *Worsley v. Demattos & Slader* (1758), 1 *Burr.* 467. **Mentd.** *Saunders v. Rowles* (1767), 4 *Burr.* 2064; *Peters v. Anderson* (1814), 5 *Taunt.* 596; *Devaynes v. Noble*, *Clayton's Case* (1816), 1 *Mer.* 572; *Surtees v. Ellison* (1829), 9 *B. & C.* 750; *Mills v. Fowkes* (1839), 2 *Arn.* 62.

351. —.]—**BUCKNAL v. ROISTON** (1709), *Prec. Ch.* 285; 24 *E. R.* 136; *sub nom.* *ANON.*, 2 *Eq. Cas. Abr.* 479, *L. C.*

Annotations:—**Consd.** *Worsley v. Demattos & Slader* (1758), 1 *Burr.* 467; *Edwards v. Harben* (1788), 2 *Term Rep.* 587. **Refd.** *West v. Skip* (1749), 1 *Ves. Sen.* 239; *Ryall v. Rowles* (1750), 1 *Ves. Sen.* 348; *Manton v. Moore* (1790), 7 *Term Rep.* 67.

352. —.]—*W.*, captain of a ship, pledged his chronometer, then in the possession of the makers, to debts., the owners of the ship, in consideration of their advancing him £50, & allowing him the use of the instrument during a voyage on which he was about to depart: after the voyage he placed it at the makers, & there pledged it to pltf., for whom the makers, being ignorant of the pledge to debts., agreed to hold it: the money advanced by debts. not having been repaid:—*Held*: the property in the instrument was in debts.

As to the first objection to the title of debts., the want of possession, under the agreement, can at the utmost amount to no more than a ground of fraud, to be submitted to the jury (*TINDAL, C.J.*).—**REEVES v. CAPPER** (1838), 5 *Bing. N. C.* 136; 1 *Arn.* 427; 6 *Scott*, 877; 8 *L. J. C. P.* 44; 2 *Jur.* 1067; 132 *E. R.* 1057.

Annotations:—**Refd.** *Flory v. Denny* (1852), 7 *Exch.* 581; *Walker v. Clyde* (1861), 10 *C. B. N. S.* 381; *Langton v. Waring* (1865), 18 *C. B. N. S.* 315; *Donald v. Suckling* (1866), *L. R.* 1 *Q. B.* 585; *Meyerstein v. Barber* (1866), *L. R.* 2 *C. P.* 38; *Burdick v. Sewell* (1883), 10 *Q. B. D.* 363; *Hilton v. Tucker* (1888), 39 *Ch. D.* 669; *Cochrane v. Moore* (1890), 25 *Q. B. D.* 57; *Mills v. Charlesworth* (1890), 25 *Q. B. D.* 421; *Morris v. Delobel Filpo* (1892), 66 *L. T.* 320; *Dublin City Distillery v. Doherty*, [1914] *A. C.* 823. **Mentd.** *Young v. Lambert* (1870), *L. R.* 3 *P. C.* 142.

353. —.]—A bill of sale of goods exe by a debtor to his creditor is not void, by reason of preference given over other creditors. If intended by the parties really to operate & to give the creditor the power of taking possession, it is good although not acted on by taking possession.—**EVELEIGH v. PURSORD** (1844), 2 *Mood. & R.* 539, *N. P.*

354. —.]—Where goods are assigned as security for an advance of money, upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, & upon further trust to sell them upon such default being made, the assignee has a sufficient possession to enable him to maintain trespass against a wrongdoer.

Such an assignment, though void as against creditors, is good as between the parties, & as between either party & a stranger.—**WHITE v. MORRIS** (1852), 11 *C. B.* 1015; 21 *L. J. C. P.* 185; 3 *L. T. O. S.* 256; 16 *Jur.* 500; 138 *E. R.* 778.

Annotations:—**Refd.** *Bowes v. Foster* (1858), 2 *H. & N.* 779; *Barker v. Furlong*, [1891] 2 *Ch.* 172. **Mentd.** *Haylock v. Sparke* (1853), 1 *E. & B.* 471; *Burling v. Harley* (1858), 3 *H. & N.* 271; *McMahon v. Lennard* (1858), 6 *H. L. Cas.* 970.

in insolvent:—*Held*: such deed in the circumstances so far as related to A.'s alleged debt was against his creditors.

355. —.]—An assignment by a judgment debtor to his father-in-law of his stock in trade as security for the purchase-money of the business, & for money advanced to pay debts, supported.—**SLADDEN v. SERGEANT** (1858), 1 *F. & F.* 322, *N. P.*

356. —.]—By a bill of sale a debtor assigned to debt., his creditor, all his household furniture, etc., stock, cattle, crops, personal estate & effects, "now being or hereafter to be upon or about his dwelling-house & premises, situate at, etc., or elsewhere in Great Britain," upon trusts for sale therein contained, to secure payment of a debt, which debtor thereby covenanted to pay "on demand being made for the same"; & the deed empowered debt., in default of payment "upon demand being made as aforesaid" to enter upon any premises in debtor's occupation, & to distrain the goods & chattels there found. Debt. went to the premises, & in the absence of debtor from home, made a demand of payment upon debtor's wife, which not being complied with, he thereupon seized & sold certain goods, & chattels of debtor, some of which were upon debtor's premises, & some of which were upon other premises not belonging to debtor, but all of which goods had been acquired by debtor subsequently to the bill of sale. Debtor having become bkpt., an action was brought by his assignees against debt., for the conversion of bkpt.'s goods: *Held*: the bill of sale was not void under 13 *Eliz. c. 5.*—**RELDING v. READ** (1865), 3 *H. & C.* 955; 6 *New Rep.* 301; 34 *L. J. Ex.* 212; 13 *L. T.* 66; 11 *Jur. N. S.* 547; 13 *W. R.* 807; 150 *E. R.* 812.

Annotations:—**Refd.** *Greenbirt v.* (1876), 35 *L. T.* 168; *Leatham v. Amor* (1878), 47 *L. J. Q. B.* 681; *Lazarus v. Andrade* (1880), 5 *C. P. D.* 318; *Re D'Epineuil* (2), *Tadman v. D'Epineuil* (1882), 6 *Ch. D.* 758; *Ch. v. Matthews* (1883), 11 *Q. B. D.* 808; *Joseph v.* (1884), 54 *L. J. Q. B.* 1. **Reeves v. Barlow (1884), 12 *Q. B. D.* 436; *Re Clarke, Coombe v. Carter* (1887), 36 *Ch. D.* 318; *Tailby v. Official Receiver* 13 *App. Cas.* 52.**

357. Proviso for avoidance on repayment. — **CRAMPHORNE v.** —, No. 334, *ante*.

358. ——— Payment by instalments — Power to grantee to take possession on default. — **MARTINDALE v. BOOTH**, No. 315, *ante*.

359. No proviso for possession by grantor until default. — A bill of sale of the furniture & effects of a trader, purporting to be absolute, & not containing any proviso as to the possession by the assignor until default, the giving of which was required by the the same being in fact a security:—*Held*: good, the possession being consistent with the fact of the bill of sale being a mtge.—**COOK v. WALKER** (1855), 25 *L. T. O. S.* 51; 3 *W. R.* 357.

360. Proviso for possession for six months or until execution. — **ALTON v. HARRISON, POYSER v. HARRISON**, No. 252, *ante*.

361. Transaction bona fide. — In a case stated by a county ct. judge, upon an interpleader summons, for the opinion of this ct., after setting out the facts under which a bill of sale had been given to secure a past debt, & a contemporaneous advance, & finding that the transaction was bona fide, the question submitted was, "whether the bill of sale was void as against the execution creditors, respa., seizing after the first instalment secured by the bill of sale became due, & whilst

BONNERJEE v. MATTLAND (1867), 11 *Moo. Ind. App.* 317.—**IND.**

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sect. 6, D., E. & F.; sub-sects. 7 & 8.]

debtor was allowed to remain in possession, & with his name over the door as it had been before":—*Held*: there being nothing to show that the deed was fraudulent, applt. was entitled to judgment.—*WEAVER v. JOULE* (1857), 3 C. B. N. S. 309; 140 E. R. 759.

Annotation:—*Mentd.* *Schroder v. Ward* (1863), 13 C. B. N. S. 410.

362. — Delay in taking possession.]—In 1824, A. leased to B. for twenty-one years, a colliery, with the right of putting up steam-engines, etc., for working it, subject to a proviso for re-entry on non-payment of rent or insolvency. B. erected on the colliery several steam-engines, affixed in the ordinary way to the soil, & afterwards, in 1827, assigned the colliery, with the engines, implements, etc., in use upon it, to trustees, in trust to permit B. to enjoy them until default in payment of an annuity granted by him; & on such default to take possession, & sell them & pay the arrears. In June, 1829, A. recovered possession of the premises in ejectment brought in pursuance of the proviso for re-entry. In Nov. 1829, the engines & other articles on the colliery were seized under a *fi. fa.* at the suit of an execution creditor of B.:—*Held*: the omission of the trustees to take possession on B.'s default in payment of the annuity did not avoid the assignment.—*MINSHALL v. LLOYD* (1837), 2 M. & W. 450; *Murph. & H.* 125; 6 L. J. Ex. 115; 1 Jur. 336; 150 E. R. 834.

Annotations:—*Mentd.* *Mackintosh v. Trotter* (1838), 3 M. & W. 184; *Wooton v. Woodcock* (1840), 7 M. & W. 14; *Elliott v. Bishop* (1854), 10 Exch. 496; *Wilde v. Waters* (1855), 16 C. B. 637; *Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Gough v. Wood & Co.*, [1894] 1 Q. B. 713; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523.

363. — Delay in registration of bill.]—Where A. advanced money in good faith to a person who appeared to be solvent, taking a bill of sale which included all debtor's stock-in-trade, book debts, & other property, but without taking delivery or registering the bill of sale until just in time to prevent its being avoided under the New South Wales Bills of Sale Act:—*Held*: his title thereunder prevailed against debtor's official assignee, no intent being shown to have existed at the date thereof to defeat or delay creditors.—*MORRIS v. MORRIS*, [1895] A. C. 625; 72 L. T. 879; *sub nom.* *MORRIS v. COOK'S OFFICIAL ASSIGNEE*, 64 L. J. P. C. 136; 44 W. R. 65; *sub nom.* *Re COOKE, MORRIS v. MORRIS*, 11 R. 554, P. C.

364. Assignments prima facie absolute.]—Assignment of furniture, etc., by a debtor to his creditors in satisfaction of their debts, retaining possession under a demise at a rent, & afterwards taking a re-assignment from some on payment of their debts, with interest, though it would be void as against creditors, established between the parties against the answer, insisting, that the deed, though absolute upon the face of it with a fraudulent purpose, was intended only as a security, & the circumstances precluding any legal remedy.—*BALDWIN v. CAWTHORNE* (1812), 19 Ves. 166; 34 E. R. 480, L. C.

364 i. Assignments prima facie
 —H., being indebted to R., & both being in pecuniary difficulties, made an absolute conveyance of his land to R., which was intended to secure the debt due to R., but was made absolute in form to deceive H.'s

creditors. Various subsequent dealings with the property took place with a view of securing the creditors of both parties, & by means thereof the interest of H. & R., if any, appeared to be a mere money charge on the property

E. Joint Possession.

365. Sale by husband to wife.]—The mere possession of goods is not sufficient to subject them to an execution issued against the person so possessing them, if it be satisfactorily proved that they were really & *bona fide* sold to a third person as a trustee for his wife, & possession taken by such third person.—*CROSS v. GLODE* (1797), 2 Esp. 574, N. P.

366. — Goods remaining in house where both live—Consistent with grant.]—A purchase by a married woman from her husband, through the medium of trustees for her separate use & appointment, may be sustained against creditors if *bona fide*, though the husband is indebted at the time, & even though the object is to preserve from his creditors for the family the subject of the purchase, in this instance, ancient family pictures, furniture, & other articles, of a peculiar nature & value. The circumstances of the comparative value of the consideration, the continued possession, according to the title, by the relation of the parties, the degree of notoriety, the want of an inventory, the satisfaction of some debts out of the property, etc., though circumstances of evidence, are not conclusive, as to the nature of the transaction.—*ARUNDELL (LADY) v. PHIPPS & TAUNTON* (1804), 10 Ves. 139; 32 E. R. 797, L. C.

367. Inquiry as to bona fides.]
DEWEY v. BAYNTON, No. 313, *ante*.

368. — —.]—A wife, who had separate estate, agreed to purchase from her husband some furniture & other personal chattels belonging to him, which were in the house in which she lived with him. She stipulated that a receipt for the purchase-money should be given to her, & instructed her solr. to draw the receipt. After the purchase-money had been paid to the husband he signed a receipt which the wife's solr. had prepared. This document acknowledged the receipt from the wife of the agreed sum, as the purchase-money "for all my furniture, plate, etc., which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by the husband to the wife, but they remained, as they had previously been, in the house in which the husband & the wife were living together. She subsequently sent part of the goods to her own bankers, & the remainder were afterwards taken in execution by a judgment creditor of the husband. In an interpleader issue between the wife & the execution creditor:—*Held*: the wife had a sufficient possession of the goods to take the case out of the Act, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title.—*RAMSAY v. MARGRETT*, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788; 10 T. L. R. 355; 1 Mans. 184; 9 R. 407, C. A.

Annotations:—*Consd.* *Withers v. Berry* (1895), 39 Sol. Jo. 559. *Foldd.* *French v. Gething*, [1922] 1 K. B. 236. *Reid.* *Re Satterthwaite, Ex p. Trustee* (1895), 3 Mans. 52; *Clapham v. Ives, Holmes, Claimant* (1904), 91 L. T. 69; *Re Rois, Ex p. Clough* (1904), 73 L. J. K. B. 929; *Re*

at the time *fi. fas.* against their lands were given to the sheriff:—*Held*: the writs bound their respective interests, & they should be sold in equity to pay the execution debts.—*BROCK v. SAUL* (1869), 16 Gr. 589.—*CAN.*

p. Salaman (1910), 80 L. J. K. B. 71; Re Lavey, Ex p. Trustee, [1918-19] B. & C. R. 116; Canvey Island Comrs. v. Preedy, [1922] 1 Ch. 179. Mentd. Rogers, Eungblut & Co. v. Martin (1910), 103 L. T. 527.

—.]—See **BILLS OF SALE**, Vol. VII., p. 115, Nos. 672-674, &, generally, **HUSBAND & WIFE**.

369. Joint possession of vendor & agent of vendee.—*BENTON v. THORNHILL*, No. 59, *ante*.

F. Where Delivery Impossible.

370. Mortgage of ship.—A delivery of the grand bill of sale of a ship at sea is equivalent to a delivery of the ship itself.

Where a ship was mortgaged at sea, with a proviso that the mtgor. should continue in possession till failure of payment of the mtge. money on demand; the grand bill of sale was delivered, & the mtgor. became bkpt. before the arrival of the ship, & the mtgee. took possession on her arrival, he may maintain trover against the assignee who took the ship from him, notwithstanding he made no demand either on bkpt. or his assignees.

There is a great difference between the sale of a ship at sea & of other goods. A person by being in possession of a ship does not thereby acquire any credit; because whoever is requested to advance money thereon will require to be shown how the other is owner; & if he has no bill of sale to produce his possession alone amounts to nothing. Therefore, it has been invariably held that the delivery of the grand bill of sale is a delivery of the ship itself. Then are there any false colours held out in this case? Pltf. took possession of the ship the very first moment that he could. Therefore, this conveyance is not within either the statute of Elizabeth or of James I. (*GROSE, J.*).—*ATKINSON v. MALING* (1788), 2 Term Rep. 462; 100 E. R. 249.

Annotations:—Refd. Gordon v. East India Co. (1797), 7 Term Rep. 228; Robinson v. Macdonnell (1816), 5 M. & S. 228.

See, generally, **SHIPPING**.

SUB-SECT. 7.—GRANTEE'S POSSESSION COLOUR-ABLE.

371. Grantor allowed to exercise acts of ownership.—If a party who obtains a bill of sale takes possession under it, but suffers the late owner of the goods to interfere or execute any act of ownership, it shall avoid the bill of sale as against a subsequent *bonâ fide* execution.—*PAGET v. PERCHARD* (1794), 1 Esp. 205, N. P.

SUB-SECT. 8.—DEED RETAINED BY GRANTOR.

372. General rule.—A. having received moneys belonging to B. privately, & without any

communication with B., prepared & executed a mtge. to him for the amount. A. retained the deed in his custody, for twelve years, & then died insolvent. After his death, the deed was discovered in a chest containing his title deeds:—*Held*: the deed was not an escrow, there being no evidence to show that it was executed conditionally, but it took effect from its execution, & was good against A.'s creditors.

I have the authority of the law for saying that the mere retainer of the deed will not affect its validity (*SHADWELL, V.-C.*).—*EXTON v. SCOTT* (1833), 6 Sim. 31; 58 E. R. 507.

Annotations:—Consd. Roberts v. Williams (1841), 11 L. J. Ch. 65. Apld. Hall v. Palmer (1844), 3 Hare, 532. Consd. Cracknall v. Janson (1879), 11 Ch. D. 1. Refd. Lloyd v. Attwood, Attwood v. Lloyd (1859), 3 De G. & J. 614; Cory v. Eyre (1862), 1 De G. J. & Sin., 149.

See, generally, **DEEDS**, Vol. XVII., pp. 213, 214.

373. Deed also revocable.—*TARBACK v. MARBURY*, No. 82, *ante*.

374. — Debts existing at date of settlement since paid.—*JENKYN v. VAUGHAN*, No. 411, *post*.

375. No evidence of insolvency.—Where a party to any instrument seals it, & declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, & there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid & effectual deed; & delivery to the party who is to take by the deed, or to any person for his use, is not essential.

The remaining question is this, whether this deed is void as against creditors under 13 Eliz. c. 5, or as against debt. as a purchaser under 27 Eliz. c. 4. As to creditors, there was no proof of outstanding debts at the time of the trial, nor any proof of there being any creditor except debt., & he may be considered in the double character of creditor & purchaser (*BAYLEY, J.*).—*Doe d. GARNONS v. KNIGHT* (1826), 5 B. & C. 671; 8 Dow. & Ry. K. B. 348; 4 L. J. O. S. K. B. 161; 108 E. R. 250.

Annotations:—Apld. Hall v. Palmer (1844), 3 Hare, 532. Consd. Xenos v. Wickham (1867), L. R. 2 H. L. 296. Refd. Grugeon v. Gerrard (1840), 4 Y. & C. Ex. 119; Roberts v. Williams (1841), 11 L. J. Ch. 65; Fletcher v. Fletcher (1844), 4 Hare, 67; Doe d. Richards v. Lewis, (1852), 11 C. B. 1035; Jeffries v. Alexander (1860), 8 H. L. Cas. 594; Pattle v. Hornibrook, [1897] 1 Ch. 25; Macedo v. Stroud, [1922] 2 A. C. 330. Mentd. Grant v. Hunt (1815), 1 C. B. 44.

376. At date of deed.—*EXTON v. SCOTT*, No. 372, *ante*.

377. Declaration of trust—To remedy misappropriation of funds.—The creditor of an insolvent debtor, who dies without having been adjudicated bkpt., is entitled to the benefit of any payment or security made or given by debtor, although such payment or security would in case of bkpey. have

PART I. SECT. 4, SUB-SECT. 7.

371 i. Grantor allowed to exercise acts of ownership.—*MERCHANTS BANK OF CANADA v. MCKENZIE* (1900), 18 C. L. T. Occ. N. 367; 20 C. L. T. Occ. N. 90; 13 Man. L. R. 19.—*CAN.*

o. Conveyance to debtor's nominee.—A married woman entered into a contract for the purchase of land; one of the terms being that the conveyance should be to herself. In payment of the principal part of the purchase money the husband assigned to the vendor a mtge. he held on other pro-

perty, which, so far as appeared, was his only means. He was not indebted at the time, but a month afterwards he indorsed a note for £40, which was not paid. The family, including the husband, went into possession of the land immediately after the purchase, & made improvements, but no deed was obtained, & a small balance of the purchase money remained unpaid for twelve years, when the money was raised by loan on the property, & the deed was taken to a son of the purchaser:—*Held*: this deed was void as against the holder of the note.—

WADDLE v. MCINTY (1888), 15 Gr. 261.—*CAN.*

PART I. SECT. 4, SUB-SECT. 8.

373 i. Deed also revocable.—A deed which the grantor has power to revoke & which he attempts to use as a shield against creditors cannot be otherwise than fraudulent & void; & retaining possession of the deed is a very strong circumstance to show that it was really intended as a shield.—*LEACOCK v. CHAMBERS* (1886), 3 Man. L. R. 645.—*CAN.*

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sects. 8 & 9.]

been set aside as a fraudulent preference. E. placed in the hands of her solr. a sum of money for investment. He died insolvent without investing the money, & after his death there was found in the safe at his office, a memorandum dated a fortnight before his death, the contents of which had not been communicated to E. By this memorandum, the solr. declared himself trustee of certain leaseholds then in mtge. to himself, & of a bill which he had indorsed to E., to secure the repayment of the sum placed in his hands. In a creditor's suit for the administration of the solr.'s estate:—*Held*: even if the solr. executed the memorandum with the knowledge of his insolvency, still E. was entitled to the benefit of the security as against the other creditors, for, as the solr. retained no benefit for himself, the gift was *bond fide* within 13 Eliz. c. 5.—*MIDDLETON v. POLLOCK, Ex p. ELLIOTT* (1876), 2 Ch. D. 104; 45 L. J. Ch. 293.

Annotations:—*Apprvd. New, Prance & Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19. *Apld. Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231. *Consd. Wigan v. English & Scottish Law Life Assoc. Assocn.*, [1909] 1 Ch. 291; *Glegg v. Bromley, Glegg, etc., Claimants* (1911), 81 L. J. K. B. 334. *Expld. Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478. *Apld. Radcliffe v. Abbey Road & St. John's Wood Permanent Bldg. Soc.* (1918), 87 L. J. Ch. 557. *Reid. Re Pidcock, Penny v. Pidcock* (1907), 51 Sol. Jo. 514.

378. ———.]—The solr. to a trust misappropriated the trust funds & subsequently in part discharge of his liability signed a declaration of trust appropriating to the trust property of his own which was in mtge. to deft. society. The solr. died insolvent & the trustees now claimed to redeem the mtge.:—*Held*: they were entitled to do so, the declaration not being revocable & not being void under either 13 Eliz. c. 5 or Deeds of Arrangement Act (c. 47).—*RADCLIFFE v. ABBEY ROAD & ST. JOHN'S WOOD PERMANENT BUILDING SOCIETY* (1918), 87 L. J. Ch. 557; 119 L. T. 512; 62 Sol. Jo. 667; [1918-19] B. & C. R. 81.

See, generally, TRUSTS & TRUSTEES.

SUB-SECT. 9.—CONVEYANCE IN ANTICIPATION OF EXECUTION OR PENDENTE LITE.

379. Sale after judgment—Knowledge of purchaser.]—*ANON.* (1572), Dal. 70, pl. 14; 123 E. R. 289.

380. ——— Before execution awarded.]—*FLEETWOOD'S CASE*, No. 91, *ante*.

See, generally, EXECUTION, Vol. XXI., pp. 524

381. ——— For good consideration.]—A sale of property for good consideration is not, either at common law or under 13 Eliz. c. 5, fraudulent & void, merely because it is made with the intention to defeat the expected execution of a judgment creditor.—*WOOD v. DIXIE* (1845), 7 Q. B. 892; 5 L. T. O. S. 286; 9 Jur. 798; 115 E. R. 724.

—*Follid. Hale v. Metropolitan Saloon Omnibus*

PART I. SECT. 4, SUB-SECT. 9.
p. Mortgage after judgment—
Whether intention fraudulent—
qualis consideration.]—The owner of real estate, subject to a mtge., sold

the equity of redemption to avoid executions at the suit of creditors, he being insolvent, & the vendee aware of that fact, & that his object was to place his property out of the reach of his creditors. The purchaser resold

the property for an advance of \$1,000, after the institution of proceedings to set aside the transaction, of which the party purchasing was aware:—*Held*: the transaction should be set aside, as having been made to hinder & delay

28 L. J. Ch. 777; *Darvill v. Terry* (1861), 6 H. & N. 807. *Apld. Lynch v. Coopinger* (1866), 14 W. R. 863. *Consd. Alton v. Harrison, Poyser v. Harrison* (1869), 20 L. T. 1001. *Reid. Edmunds v. Edmunds*, [1904] P. 362; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334; *Public Prosecutions Director v. Purdie & Clayton* (1914), 78 J. P. Jo. 186.

382. ———.]—A transfer by a judgment debtor of the stock, etc., on his farm, the price being paid to third parties, for rent, etc., held valid.

Up to the day of the delivery of the writ to the sheriff, the judgment debtor may sell his goods provided it is not a mere trick to evade the execution. The question is whether it is a real transaction. Here money not only passes, but is paid to third parties for rent, etc., so that clearly the payment was not colourable, & the price was really paid (*WILLES, J.*).—*BUNYARD v. SEABROOK* (1858), 1 F. & F. 321, N. P.

383. ———.]—A pawnbroker bought the stock of a trader in a hasty manner & without making any inquiries whether he was indebted, or why he wanted to sell in a hurry. There were other circumstances of suspicion as to the *bond fides* of the sale, particularly that the purchaser did not call the vendor as a witness; due change of possession took place, but no public manifestation of it was made. The vendor was at the time of the sale liable to process for debt, & a few days after the sale execution issued:—*Held*: (1) if *bond fide* for valuable consideration, a sale of goods is not invalidated by knowledge that an execution is intended; (2) there being proof of payment & change of possession, the circumstances of suspicion did not amount to proof of fraud, & the purchase was good against the execution creditor.

(3) I have only to consider whether the sale was *bond fide*, & on that point every case stands on its own merits (*KINDERSLEY, V.-C.*).—*HALE v. SALOON OMNIBUS CO.* (1859), 4 Drew. 492; 28 L. J. Ch. 777; 7 W. R. 316; 62 E. R. 189.

Annotations:—*Generally, Mentd. Thomson v. Barrett* (1860), 1 L. T. 268; *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313; *North Central Wagon Co. v. M. S. & L. Ry.* (1887), 35 Ch. D. 191.

384. ——— Intention to defeat execution.]—(1) A deed may be void as against creditors though full consideration is given for it, if it be in such a form as to defeat the creditors & be executed with that intention.

In June, 1854, pltf. recovered a judgment against E., as overseer of a parish, for £238, & three days after, an order *nisi* issued for an attachment. In Sept. following, E. conveyed all his estate & effects to his son, in consideration of his lodging, maintaining & clothing him for life, & paying £75 on his death, & indemnifying him against a mtge. debt. on the property, & which he secured by bond. The full consideration was not given, but the difference was not great. The ct., being of opinion that the deeds were made with a view of defeating pltf.'s execution, set aside the transaction as against the creditors.

(2) Form of decree on setting aside deeds partially, viz., as against creditors only.—*BOTT v. SMITH* (1856), 21 Beav. 511; 52 E. R. 957.

Annotation:—*As to (1) Reid. Re Doble, Ex p. Doble* (1878), 38 L. T. 183.

PART I.—CONVEYANCES IMPEACHABLE BY CREDITORS UNDER STATUTE.

385. — Intention to defeat or delay execution—Transfer colourable.]—An assignment of all a trader's stock, etc., nominally in consideration of a pretended debt, & a small additional advance, but really colourable & collusive & with intent to defeat execution creditors is fraudulent & void under 13 Eliz. c. 5, as against judgment creditors, & the assignor, being liable under that statute to criminal prosecution, is not bound to answer questions as to the true object of the transaction.—**MICHAEL v. GAY** (1858), 1 F. & F. 409, N. P.

386. Question of fact for jury.]—Although a deed which defeats or delays the sheriff on an execution must defeat & delay an execution creditor, & it may be matter of law whether it would delay or defeat the sheriff, yet, under 13 Eliz. c. 5, it is for the jury on all the facts whether that was the intent with which it was executed.—**HENDERSON v. LLOYD** (1862), 3 F. & F. 7, N. P.

387. Transfer intended to take effect.]—On an interpleader issue, there being strong evidence that claimant had been privy to a scheme to defeat & defraud the execution creditor, not only after, but before the judgment; & that, in pursuance of this scheme, he had taken a transfer of the property of debtor, his partner:—*Held*: nevertheless, though if it were merely meant as a trick & a device by way of pretended transfer, it was invalid, yet, if as between the parties it was intended to take effect, then, whatever its object, it was valid.—**LUFF v. HORNER** (1862), 3 F. & F. 480, N. P.

388. Mortgage after judgment—Whether intention fraudulent—Question of fact.]—In an interpleader issue between claimant & execution creditor, pltf. claiming under a bill of sale for alleged advances to the assignor, a son, the question is, whether the property was really intended to pass, & this will greatly depend upon whether the advances were really made; but it is not conclusive that the assignor's object was to evade an execution, because, except in cases of bkpcy. or insolvency, a debtor may prefer a particular creditor & pay him in money or in goods; & the question will be, whether he really meant to do so, or only to pretend & appear to do so, for the purpose of escaping the execution, the goods to be afterwards resumed by the assignor.—**SUTTON v. BATH** (1858), 1 F. & F. 152; *subsequent proceedings*, 3 H. & N. 382.

389. — — —.]—**ALTON v. HARRISON, POYSER v. HARRISON**, No. 252, *ante*.

390. Money actually lent.]—A bill of sale by way of mtge. of personal chattels, if executed as a security for money actually lent, is not fraudulent & void within 13 Eliz. c. 5, though its object is to defeat the expected execution of a judgment creditor.—**DARVILL v. TERRY** (1861), 6 H. & N. 807; 30 L. J. Ex. 355; 158 E. R. 333.

Annotations:—**Reid. Geisse v. Taylor & Hartland** (1905), 93 L. T. 534; **Glegg v. Bromley** (1911), 81 L. J. K. B. 334.

391. Transfer pendente lite—Criminal proceedings.]—If a man indicted for recusancy, conveys his leases & goods to others, upon feigned con-

siderations, to defeat the King of his forfeiture, & then flies overseas, it is within 13 Eliz. c. 5.—**PAUNCEFOOT v. BLUNT** (1593), cited in 3 Co. Rep. at p. 82 a; 76 E. R. 816, Ex. Ch.

Annotation:—**Consd. Twyne's Case** (1601), 3 Co. Rep. 80 b.

392. — — —.]—A purchase of an estate of tenant for life, who was outlawed & absconded, set aside in favour of creditors, the purchase being made at an under-value, & pending the prosecution at law against him, & with notice thereof.—**HERNE v. MEERES** (1687), 1 Vern. 465; 23 E. R. 591.

Annotations:—**Consd. Copis v. Middleton** (1817), 3 Madd. 410. **Mentd. Day v. Newman** (1788), 2 Cox, Eq. Cas. 77.

393. — — —.]—**PUBLIC PROSECUTIONS DIRECTOR v. PURDIE & CLAYTON** (1914), 78 J. P. Jo. 186.

394. — Action in tort.]—A. brings an action against B. for lying with his wife, after which B. assigns his estate to trustees in trust to pay the several debts mentioned in a schedule, & such other debts as he should name within ten days, then A. recovers £5,000 damage, & brings his bill to set aside this deed as fraudulent, & made to defeat him of his recovery, but held not to be fraudulent; pltf. being no creditor at making the deed, & his debt recovered, after founded in *maleficio*; but the others were real creditors, which it was conscientious to prefer, but for the surplus pltf. may come in.—**LEWKNER v. FREEMAN** (1699), Prec. Ch. 105; 1 Eq. Cas. Abr. 149; 24 E. R. 51; *sub nom. LEUKENER v. FREEMAN*, Freem. Ch. 236.

395. — Divorce proceedings—Wife's right to alimony.]—An assignment apparently fraudulent & colourable, by the husband of all his property after the commencement of a suit by the wife for divorce, cannot affect her title to alimony *pendente lite*.—**BROWN v. BROWN** (1828), 2 Hag. Ecc. 5; 162 E. R. 766.

396. — — —.]—Pending a suit which was instituted by a wife against her husband for a divorce, the husband conveyed his freehold & personal estates to trustees upon trust to pay out of the income certain mtges. affecting the real estates & certain scheduled bond creditors, & an annuity to himself, another annuity to his sons, & an annuity of £100 to his wife, if she withdrew the proceedings, which were then pending against him, & should not institute any others. The wife prosecuted the suit, & succeeded both in the *cts. below*, & ultimately before the Judicial Committee on appeal. A sentence of divorce was pronounced, & a permanent alimony ordered for her support. Writs of sequestration were issued to enforce payment, not only of that, but of arrears of interim alimony, which had been allowed the wife, & of her costs of suit. The sequestrators being unable by reason of the deed of conveyance to seize the property of the husband, the wife filed her bill to set aside the deed as fraudulent & void as against her. The *ct. declared* the deed of conveyance fraudulent & void, & affirmed the order of the *ct. below* so far as it gave pltf. relief for arrears of alimony, & the costs of the several proceedings, but reserved the question as to whether the decree was right, in giving pltf. a charge on the estates for future alimony.—**BLENKINSOPP v. BLENKINSOPP** (1852), 1 De G. M.

creditors.—**FORMAN v. HODGSON** (1865), 12 Gr. 150.—**CAN.**

q. — — — Notice.]—An acceptance by pltf. of a mtge. on goods which they knew belonged to C.

though already bound by debts' executions, with knowledge of the judgment recovered against C., rendered the whole transaction fraudulent & void against creditors.—**CAMERON v. PERRIN** (1887), 14 A. R.

565.—**CAN.**

r. Transfer pendente lite—Action for trespass—Consideration—Maintenance.]—**GRAY v. AYLES** (1907), 3 E. L. R. 487.—**CAN.**

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sects. 9 & 10.]

& G. 495; 21 L. J. Ch. 401; 18 L. T. O. S. 324; 16 Jur. 787; 42 E. R. 644, L. JJ.

Annotation:—Mentd. Re Barned's Banking Co., Ex p. Thornton (1867), 2 Ch. App. 171.

397. — Sult for tithes.]—Qu.: as to the validity of a deed of assignment, which deft. in a suit for tithes wherein a decree was obtained against him, executed before payment of the tithes & costs decreed, making over all his property to his attorney in the suit & others, in trust to pay the attorney the whole costs of the suit, & his creditors ratably, & residue to himself.—*CASBORNE v. BARSHAM* (1838), 2 J. P. 83; *subsequent proceedings* (1839), 2 Beav. 76; (1840), 5 My. & Cr. 113, L. C.

398. — Action for breach of promise—Settlor solvent without settled property.]—A master mariner was married at Hong Kong on May 31, 1881. In the following Aug. an action for breach of promise of marriage was commenced against him, & the writ served upon him at Hong Kong on Oct. 8. At the time of his marriage he was entitled to a legacy of £500, which had become vested in possession on the death of his mother, who had a life interest in it, on May 11, 1881. On Oct. 17, 1881, being still at Hong Kong, he made a voluntary settlement of the legacy upon trust during the joint lives of himself & his wife for her for her separate use, remainder for the survivor for life, remainder for the children of the marriage, remainder in default of children for himself absolutely. Judgment was obtained against him in the action on July 20, 1882, for £500, & in Nov. 1884, he was adjudicated bkpt. It appeared that when he executed the settlement he was able to pay his debts without the aid of the property comprised in the settlement, & that he did not know that he was entitled to the legacy until a few days before he executed the settlement, & he stated that in executing it he was not influenced by the action which had been commenced against him:—*Held:* there was not sufficient evidence to warrant a judge or jury in finding that the settlement was intended to "delay, hinder, or defraud creditors" within 13 Eliz. c. 5.

401 i. — Consideration inadequate.]—H., being sued in several actions, conveyed his lands & personalty to his son. The son had advanced to his father money amounting to about half the value of the property conveyed. The son was aware at the time of the conveyance that suits were entered against his father:—*Held:* the facts showed an intent to delay & hinder H.'s creditors, & the conveyance was invalid.—*PENTZ v. HAUGHN* (1912), 11 E. L. R. 282.—CAN.

401 ii. — — —.]—Where, within a month from the service of a writ of summons, to which there was no defence, the deft. caused the entire of his estate & effects to be sold by public auction, & the sale was made at an under-value, & was, to the knowledge of the purchaser, a contrivance to defeat & delay the plff.:—*Held:* the sale was fraudulent & void as against the assignees in bankruptcy of the vendor, under 10 Car. I., s. 2, c. 3.—*Re M'CUR, WHELAN v. M'CUR* (1878), 12 L. L. T. 37.—IR.

402 i. — Bond fide *Necessity for.*—On Aug. 5, 1903, J. commenced an action against E. to recover a debt of £59. On Aug. 10,

E. in consideration of natural love & affection & £1, & with the intention & effect of delaying J., assigned to his wife, plff., all his share & interest in his father's estate. On Aug. 12, judgment was signed by J. for £42; on Aug. 13, a writ of *fi. fa.* was issued to the sheriff to levy the sum of £42 against E. & on Sept. 4, the sheriff sold to deft. all the right, title & interest if any of E. in his father's estate for £50, out of which J.'s claim was satisfied. In a suit to administer the estate of E.'s father:—*Held:* as the assignment of Aug. 10, 1903, was with the *bond fide* intention of passing the property to plff., the assignment was not void under 13 Eliz. c. 5, & plff. was entitled to the share of E. in his father's estate subject to the payment by her of the sum of £50 to deft.—*JOHNSON v. JOHNSON* (1904), 4 S. R. N. S. W. 585.—AUS.

402 ii. — — —.]—The fact that an assignment was made with intent to avoid an execution, does not in point of law make it void, if it be *bond fide*, & for a valid consideration.—*DOAK v. JOHNSON* (1843), 4 N. B. R. (8 Kerr.) 319.—CAN.

402 iii. — — —.]—An insol-vent debtor being in expectation that

The question we have to decide is one of fact, whether this settlement was made with intent to defeat or delay creditors (CAVE, J.).—*Re WISE, Ex p. MERCER* (1886), 17 Q. B. D. 290; 55 L. J. Q. B. 558; 54 L. T. 720; 2 T. L. R. 550, C. A.

Annotations:—Consd. Carruthers v. Peake (1911), 55 Sol. Jo. 291. *Reid. Mackintosh v. Pogose* (1895), 72 L. T. 251; *Re Poppleton & Jones' Contract & Vendor & Purchaser Act, 1874* (1896), 74 L. T. 582; *Re Lane-Fox, Ex p. Gimblett*, [1900] 2 Q. B. 508; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

399. — Action for trespass—No considera-tion.]—13 Eliz. c. 5 extends to future as well as existing debts, & a deed having for its object to defraud future creditors is void under that statute. After notice of trial in an action of trespass, deft. executed a voluntary conveyance of real estate to his daughter. The verdict went against him, & he afterwards took the benefit of Insolvent Debtors Act:—*Held:* the conveyance was void under 13 Eliz. c. 5, it being intended to defeat plff. in the action.—*BARLING v. BISHOPP* (1860), 29 Beav. 417; 2 L. T. 651; 6 Jur. N. S. 812; 8 W. R. 631; 54 E. R. 689.

Annotations:—Consd. Re Wise, Ex p. Mercer (1886), 17 Q. B. D. 290. *Reid. Reese River Silver Mining Co. v. Atwell* (1869), L. R. 7 Eq. 347; *R. v. Hopkins* (1896), 65 L. J. M. C. 125.

400. — Consideration feigned.] — PAUNCE-FOOT *v. BLUNT*, No. 391, *ante*.

401. — Consideration inadequate.]—HERNE *v. MEERES*, No. 392, *ante*.

402. — Bonâ fide consideration—Necessity for.]—A deed of sale conveying real estate the property of a deft. in a suit then pending in the Supreme Ct. at Bombay:—*Held:* in the absence of satisfactory evidence of a *bonâ fide* consideration having been paid by the vendee, to be fraudulent & void, as against the creditors of the vendor, & to have been executed for the purpose of defeating a sequestration.—*MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALIY MAHOMED SHOOSTRY* (1854), 8 Moo. P. C. C. 90; 6 Moo. Ind. App. 27; 14 E. R. 35, P. C.

403. — — —.]—A., in July, 1856, while two actions, for debt & false imprisonment, were pending against him, executed two deeds, which purported to convey his property, for valuable consideration, to his stepson, deft. In Oct. 1857,

his property would be seized under execution conveyed to his father, who had a knowledge of his son's insolvency, land previously conveyed by the father to the son in consideration of the son's bond to support & maintain him & his wife for their lives. The father afterwards conveyed the land to the son's wife in consideration of her paying off a mortgage upon the land & agreeing to support the father & his wife:—*Held:* the conveyance from the son to the father, having been made *bond fide* & for valuable consideration, & not for the purpose of retaining a benefit to the son, was good under 13 Eliz. c. 5, though made for the purpose of preferring the father as against the other creditors.—*ATKINSON v. BOURGEOIS* (1899), 1 N. B. Eq. Rep. 641.—CAN.

402 iv. — — —.]—A transfer of property for the purpose of defeating an expected execution, although not necessarily a fraud, must in order to be a valid conveyance, be made for full value, & as between debtor & grantee be a *bond fide* transaction.—*SMITH v. ORLEAN* (1916), 34 W. L. R. 105; 10 W. W. R. 368; 9 Sask. L. R. 113.—CAN.

creditors.]—An assignment of goods in

A. was arrested for the debt & costs recovered in one of the actions, & shortly afterwards petitioned the Insolvent Debtors Ct. for his discharge from custody, & pltf., who had been his attorney in the action, was appointed the assignee of his estate & effects. A bill filed, alleging that the conveyances were not made for good consideration, or *bond fide*, but with the intent & purpose to delay, hinder, & defraud creditors, was dismissed, on the ground that the evidence failed to support the allegations. On appeal the decision was affirmed.—MARLOW v. ORGILL (1862), 6 L. T. 875; 8 Jur. N. S. 829, L. C.

404. —.] — PUBLIC PROSECUTIONS
DIRECTOR v. PURDIE & CLAYTON (1914), 78 J. P. Jo. 186.

SUB-SECT. 10.—POWER OR INTEREST RESERVED TO GRANTOR.

405. Power to revoke—General rule.]—PEACOCK v. MONK, No. 25, *ante*.

406. —.]—SMITH v. HURST, No. 427, *post*.

407. On payment of nominal consideration.]—If a person intermeddles with goods of which a gift has been made by covin in the lifetime of testator, he shall be considered as exor. *de son tort* although administration has been granted to him.

Testator was possessed of divers goods to the value of £250, & by covin to defraud his creditors made a gift of the goods to his daughters with a condition upon payment of 20s. that it should be

not necessarily void, though the intent & effect of it may be to defeat an execution, if the assignment be made *bond fide* for the benefit of other particular creditors, & there be a delivery & acceptance of such goods under the assignment before the execution is delivered to the sheriff.—KINNEAR v. WHITE (1813), 4 N. B. R. (2 Kerr) 235.—CAN.

t. conveyance made by debtor in good faith of his assets to pay his existing debts cannot be impeached by one who at the time has a right of action against him for a tort & subsequently recovers judgment, even though the conveyance is made because of the threatened action.—CAMERON v. CUSACK (1890), 17 A. R. 489.—CAN.

of property to a creditor for valuable consideration, even with intent to prevent it being seized under execution at the suit of another creditor, & to delay the latter in his remedies or defeat them altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing debt, & the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor.—MULCAHY v. ARCHIBALD (1897), 28 S. C. R. 523.—CAN.

b. — Without consideration—Parties affected.]—A voluntary settlement for the express purpose of defeating a person who has a cause of action against the settlor, but has not issued his writ, is fraudulent within 13 Eliz. c. 5, both as between the creditors & official assignee of the settlor & the trustees of the voluntary settlement,

& between such creditors & assignee & a purchaser from the trustees for value, but with notice, that the cause of action had accrued before the settlement.—GOODMAN v. HUGHES (1862), 1 W. & W. 202.—AUS.

c. — Share of partnership—Notice to co-partners.]—Action by husband & wife to set aside an assignment to a bank by the husband's execution debtor of his share or interest in the assets & business of a partnership. The assignment was made in Feb. 1896, as security for a past due debt exceeding the amount of the assignor's interest in the partnership. The husband recovered judgment against the assignor in May, 1896, in an action brought before the assignment, & placed execution in the sheriff's hands, who, without making any actual seizure of the partnership assets, purported to sell & convey to the wife all the undivided share or interest of the assignor exorable under execution in the partnership assets or business.—*Held*: the assignment was not invalid under Stat. Eliz., there being no evidence that it was made with intent to delay & defraud the husband in his action against the assignor. Under the law as it stood at the date of the assignment, notice thereof to the assignor's partners was not necessary to its validity.—RENNIE v. QUEBEC BANK (1902), 22 C. L. T. Occ. N. 171; 3 O. L. R. 541; 1 O. W. R. 286.—CAN.

d. — Knowledge of transferee.]—A *bond fide* transfer of property made by a debtor to a third party, cannot be considered invalid merely because the object of the sale, in the mind of both parties, was to defeat an expected execution.—WHITE v. STEVENS (1850),

void:—*Held*: this gift of goods is in itself fraudulent, as appears by the condition; & the covin is

132; 78 E. R. 1037.

Annotations:—Apld. Shears v. Rogers (1832), 3 B. & Ad. 362. Rejd. Re Mouat, Kingston Cotton Mills Co. v. Monat, [1899] 1 Ch. 831; Harrods v. Stanton, [1923] 1 K. B. 516.

408. — Existing debts since paid.]—LANE-FOX, *Ex p.* GIMBLETT, No. 287, *ante*.

409. — What amounts to—Power to mortgage at discretion of grantor.]—TARBACK v. MARBURY, No. 82, *ante*.

410. — Deed not disclosed—Void.]—TARBACK v. MARBURY, No. 82, *ante*.

Existing debts since paid.]

—A voluntary settlement of property, which contained a power to the settlor to revoke the deed, was executed in favour of the settlor's wife & children. The settlor kept the deed in his own possession, & informed no one of its existence up to the time of his decease, which took place in 1852, when he was in insolvent circumstances. He had large debts at the date of the settlement, some of which still remained due. Upon a bill, filed by a creditor whose debt arose subsequently to the execution of the deed:—*Held*: such a deed might be maintained, & inquiries as to the debts were directed.

If you can show that the person who executed the deed, though indebted at the time he made it, has since paid every debt, it is very difficult to say that he executed the settlement with an intention to defeat or delay creditors (KINDERSLEY, V.-C.).—JENKYN v. VAUGHAN (1856), 3 Drew.

7 U. C. R. 310.—CAN.

e. — — —.]—Where a transferee for value is not aware of any intention on the part of the transferor to defeat or delay his creditors, but has knowledge only of an impending execution against the transferor, such knowledge of itself is not sufficient to vitiate the transfer, & does not make the transferee a transferee, otherwise than in good faith.—ISHAN CHUNDRA DAS SARKAR v. BISHU SIRDAR (1897), 1 L. R. 24 Calc. 825; 1 C. W. N. 665.—IND.

f. — Alienation during attachment.]—Any private alienation of a property attached before judgment, during the continuance of the attachment, is void as against all claims enforceable under the attachment. The effect of an attachment of a property under Civil Procedure Code, whether made before or after decree, is the same, provided that in the former case a decree is made for pltf. at whose instance the attachment takes place.—JASU SINGH v. JANG LAL (1899), 1 L. R. 26 Calc. 531.—IND.

g. — Application of rule in India.]—The rule of *lis pendens* enunciated in Transfer of Property Act, s. 52, does not differ from the English rule & it protects parties to litigation against alienation by their opponents' pending suit.—MANJESHWARA KRISHNAYA v. VASUDEVA MALIYA (1917), 1 L. R. 41 Mad. 458.—IND.

h. Conveyance after judgment—To defeat judgment.]—Pltf. made a note in favour of his father-in-law, which the bill alleged had been given with the express understanding that the principal should never be called in by

Sect. 4.—Fraudulent intent and evidence thereof:
Sub-sects. 10 & 11.]

419; 25 L. J. Ch. 338; 26 L. T. O. S. 268; 2 Jur. N. S. 109; 4 W. R. 214; 61 E. R. 963.

Annotations:—*Consd. Barling v. Bishopp* (1860), 29 Beav. 417. *Apprvd. Freeman v. Pope* (1870), 5 Ch. App. 538. *Apld. Crossley v. Elworthy* (1871), L. R. 12 Eq. 158. *Reid. Re Lanc-Fox, Ex p. Glimblett*, [1900] 2 Q. B. 508.

— **In creditors' trust deed.]—***See* Sect. 2, sub-sect 3, C., *ante*.

412. Interest reserved to settlor—Until bankruptcy—Whether conclusive of fraudulent intent.]

—In 1858, a man, who was not then engaged in trade, & who owed no debts, made a voluntary settlement of a sum of £1000. The trusts of the deed were, a life estate to himself determinable on bkpcy., then a life estate to his wife for her separate use, then trusts for the children of the marriage, & an ultimate remainder to settlor. In 1873, he for the first time engaged in trade. In 1875, he was adjudicated bkpt.:—*Held*: the settlement was void *in toto* as against the trustee in the bkpcy.—*Re PEARSON, Ex p. STEPHENS* (1876), 3 Ch. D. 807; 35 L. T. 68; 25 W. R. 126.

Annotations:—*Overd. Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Reid. Re Detmold, Detmold v. Detmold* (1889), 40 Ch. D. 585.

413. ———.]—*Re HOLLAND, GREGG v. HOLLAND*, No. 167, *ante*.

414. ——— Annuity to wife—To be applied for

the payee, who, notwithstanding, sued on the note & recovered judgment. Plff. thereupon conveyed all his real estate to a third party to defeat the judgment. A demurrer to a bill filed to have the grantee declared a trustee for plff. or for payment of the alleged purchase money was allowed for want of equity.—*ROSENBERGER v. THOMAS* (1852), 3 Gr. 635.—CAN.

PART I. SECT. 4, SUB-SECT. 10.

412 i. Interest reserved to settlor—Until bankruptcy—Whether conclusive of fraudulent intent.]—A limitation over in case of settlor's insolvency does not afford sufficient proof that the deed is fraudulent & therefore void under 13 Eliz. c. 5.—*ROWE v. EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD.* (1895), 21 V. L. R. 762.—AUS.

k. ——— Future rents—To delay creditor.]—A debtor sold his property reserving by parol certain future rents to pay a creditor, which were sufficient for the purpose; the object was to delay the creditor, & to compel him to wait for payment until these rents should accrue:—*Held*: wholly void against the creditor, being a transaction to delay a creditor within 13 Eliz. as much as a transaction to defeat him altogether.—*MURTHA v. MCKENNA* (1867), 14 Gr. 59.—CAN.

l. ——— Resulting trust—For benefit of settlor.]—C. & Son under a deed of assignment of their real & personal property, in trust for the benefit of creditors, provided that certain first preference creditors should be paid in full; that certain second preference creditors should next be paid in full, & that other creditors who should become parties to the deed should next be paid *pro rata*, without preference or priority, & that the balance, if any, should be reconveyed by the assignee to C. & Son:—*Held*: the deed was void as hindering & delaying creditors within the meaning of 13 Eliz. c. 5. A resulting trust such as that created in favour of debtor will vitiate any deed

of assignment made with a similar object in view, & containing such a provision.—*UNION BANK OF CANADA v. WHITMAN* (1887), 20 N. S. R. (8 R. & G.) 194; 8 C. L. T. 381; 9 C. L. T. 213; *affd.* 16 S. C. R. 410.—CAN.

BROWN (1892), 31 N. B. R. 554.—CAN.

PART I. SECT. 4, SUB-SECT. 11.

418 i. General rule.]—There is no difference between 38 Vict. c. 5, s. 59 (Man.) & 13 Eliz. c. 5, except as to the preference clause in the former.—*TUCKER v. YOUNG* (1877), *Temp. Wood*, 186.—CAN.

418 ii. ———.]—Entering a defence to an action by one creditor & refraining from doing so in one by another creditor is not contrary to the statute.—*LABATT v. BIXEL* (1881), 28 Gr. 593.—CAN.

418 iii. ———.]—Where the jury found that T. to his own knowledge & that of the preferred creditors was unable to pay his debts in full, & that assignments to certain creditors of two policies of insurance & moneys secured thereby, after the larger portion of the property insured had been destroyed by fire, had been made under simulated pressure with the intent on the part of T. to give, & on the part of the preferred creditors to obtain, a preference over the other creditors of T.:—*Held*: the assignments were null & void as against the other creditors of T.—*IVEY v. KNOX* (1885), 8 O. R. 635.—CAN.

418 iv. ———.]—In order to create a fraudulent preference under Stat. 13 Eliz. as interpreted by R. S. O. 1877 (c. 95), not only must there exist a fraudulent intent in the mind of the mtgor., but also in that of the mtgee.—*HEPBURN v. PARK* (1884), 6 O. R. 472.—CAN.

418 v. ———.]—Where a deed of assignment containing preferences also contains provisions indicating a fraudulent intention as regards creditors, &

benefit of settlor.]—By ante-nuptial contract of marriage the husband bound himself, his heirs, exors., & representatives whomsoever, to pay to the wife an annuity "to be applied by her towards the expenses of my household & establishment, & that during all the days of my life." He secured the annuity on heritable property, & declared it to be his wife's separate estate free of the *jus mariti*:—*Held*:—the application of the annuity was for the husband's own benefit, & the wife had no title to it as against his creditors.—*BIRKETT v. PURDOM*, [1895] A. C. 371; 11 R. 184, H. L.

415. ——— Annuity.]—*RUSSEL v. HAMMOND*, No. 275, *ante*.

416. Discretion of trustees—To apply for benefit of settlor.]—*HOLMES v. PENNEY*, No. 158, *ante*.

417. Settlor retaining control of stock-in-trade.]—*WARE v. GARDNER*, No. 290, *ante*.

SUB-SECT. 11.—PREFERENCE OR EXCLUSION OF CREDITORS.

418. General rule.]—If A. indebted to B. & C. after being sued to judgment & execution by B. go to C. & voluntarily give him a warrant of attorney to confess judgment, on which judgment is immediately entered & execution levied on the same day on which B. would have been entitled

the deed is set aside on that ground, as fraudulent & void as against creditors, the preferences must also fall.—*COX v. WORRALL* (1894), 26 N. S. R. 366.—CAN.

418 vi. ———.]—An agreement to give security, made in good faith, may, even though it is indefinite in its terms, avail to rebut the presumption of intent to prefer, but where the giving of security is deliberately postponed in order to avoid injury to the debtor's credit, or to avoid the statutory presumption, the agreement to give the security is of no avail.—*WEBSTER v. CRICKMORE* (1898), 25 A. R. 97.—CAN.

418 vii. ———.]—If *bona fide* pressure is exercised by the transferee upon the debtor, & there is no fraud, the transfer should be upheld even if the inference is that the debtor was at the time insolvent & the transferee knew of his financial condition.—*BROWN v. BANK OF MONTREAL* (1917), 23 B. C. R. 68.—CAN.

418 viii. ———.]—To make a security given a creditor a fraudulent preference there must be a concurrence of intent on the part of both debtor & creditor. There must be an intent on the part of the debtor to give & on the part of the creditor to receive a preference, & mere suspicion is not enough. If the person taking the security be innocent of any fraudulent intent, he cannot be affected by the fact that there was such an intent, unknown to him, in the mind of the debtor. The mere fact that the execution of the security may have the effect, as a collateral result, of defeating or delaying creditors, is not enough if otherwise there is good consideration & *bona fides*.—*WOLFE v. SMITH*, [1923] 3 D. L. R. 54; 3 W. W. R. 375.—CAN.

418 ix. ———.]—Although it was held that certain securities given for certain pre-existing debts & future advances, were given when the grantor was in insolvent circumstances to the knowledge of the grantor & grantee, & were given to prefer the grantee over another

to execution & had threatened to sue it out, the preference so given by A. to C. is not unlawful, nor fraudulent within the meaning of 13 Eliz. c. 5.—**HOLBIRD v. ANDERSON** (1793), 5 Term Rep. 235; 101 E. R. 132.

Annotations:—**Apld.** **Pickstock v. Lyster** (1815), 3 M. & S. 371. **Consd.** **Goss v. Neale** (1820), 5 Moore, C. P. 19. **Refd.** **Glegg v. Bromley** (1911), 81 L. J. K. B. 334.

419. —. —.]—I have no doubt whatever that it is perfectly competent for a debtor to execute a bill of sale in order to favour a particular creditor, & give him a priority over an execution which is expected to be levied, & that, apart from the bkpcy. laws, there is nothing fraudulent in such a transaction (**MARTIN, B.**).—**GLADSTONE v. PADWICK** (1871), L. R. 6. Exch. 203; 40 L. J. Ex. 154; 25 L. T. 96; 19 W. R. 1064.

Annotations:—**Mentd.** **Hadfield's Case** (1873), L. R. 8 C. P. 306; **Johnson v. Pickering**, [1907] 2 K. B. 437.

420. —. —.]—**MIDDLETON v. POLLOCK, Ex p. ELLIOTT**, No. 377, *ante*.

421. —. —.]—**Re BAMFORD, Ex p. GAMES**, No. 129, *ante*.

422. —. —.]—**GLEGG v. BROMLEY**, No. 133, *ante*.

423. **Trusts for named creditors only—Part only of property assigned—No intention to defeat or delay remaining creditors.**—If a person, having several creditors, convey by deed the legal interest in part of his real & personal property to a trustee, in trust, after deducting the expenses respecting the trust, out of the rents & profits to pay half the surplus to the grantor for his own use, & the residue among certain creditors named in a schedule, without any intention of fraudulently delaying

the creditors not named in the schedule in obtaining their demands, the deed is good in law.—**ESTWICK v. CAILLAUD** (1793), 5 Term Rep. 420; 101 E. R. 236.

Annotations:—**Refd.** **Caillaud v. Estwick** (1794), 2 Aust. 381; **Glegg v. Bromley** (1911), 81 L. J. K. B. 334. **Mentd.** **Bach v. Meats** (1816), 5 M. & S. 200.

424. —. —. **Substantially all property assigned.**—**ALTON v. HARRISON, POYSER v. HARRISON**, No. 252, *ante*.

425. —. —. **Scheme bona fide for benefit of creditors—Some intentionally excluded.**—A deed of arrangement with creditors, which is intended to give effect to a *bona fide* scheme of arrangement for their benefit, is not void under 13 Eliz. c. 5, as tending to delay creditors, merely because it reserves a benefit to the debtor, nor because some of the creditors are intentionally excluded from its operation.

When this deed is looked at, I see no reason at all to draw the inference that it is anything but what it purports to be . . . that is a deed for the benefit of creditors . . . or for drawing the inference that it was intended to defeat or delay creditors by giving a benefit to the debtor (**VAUGHAN WILLIAMS, L.J.**).—**MASKELYNE & COOKE v. SMITH**, [1903] 1 K. B. 671; 72 L. J. K. B. 237; 88 L. T. 148; 51 W. R. 372; 10 T. L. R. 270; 47 Sol. Jo. 317; 10 Mans. 121, C. A.

426. **Trust for creditors executing deed only—Deed not executed—Evidence of bona fides.**—On a plea of *plene administravit*, it appeared that intestate, six months before his death, had assigned all his effects to trustees for the benefit of such of his creditors as should execute the deed

creditor, yet, as they were given & taken *bona fide*, with the object of enabling the grantor to continue his business & eventually pay his debts in full & in the sincere belief that by continuing his business the grantor would be able to pay his debts, the securities should not be set aside.—**CANADIAN BANK OF COMMERCE v. TREACY**, [1924] 2 D. L. R. 759; 2 W. W. R. 193.—**CAN.**

418 x. —. —.]—If a man owes another a real debt, & in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to vendee, & thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference.—**SUBA BIBI v. BALGOBIND DASS** (1886), L. L. R. 8 All. 178.—**IND.**

418 xi. —. —.]—An unequal disposition of property by a person in insolvent circumstances, & known to be so by the donee, will be set aside if impeached by creditors, except where the transferee has simply pressed a valid claim or made a purchase in good faith.—**ITANGILBHAI KALYANDAS v. VINAYAK VISHNU** (1887), L. L. R. 11 Bom. 666.—**IND.**

418 xii. —. —.]—In the absence of a law of bankruptcy, a preferential transfer of property to one creditor in satisfaction of an existing debt due to him is not fraudulent as to other creditors, although the debtor in making the transfer intended to defeat the claims, and the transferee had knowledge of such intention, if the only purpose of the latter is to secure his own debt and the property is not worth materially more than the amount of his debt. It makes no difference that the transfer is of the whole of the estate of the debtor.—**HAKIM LAL v. MOOSHABAR SAHU** (1907), L. L. R. 34 Calc. 999.—**IND.**

n. **Assignment to one creditor—With directions to pay others.**—Deft., a trader, on Aug. 11, 1909, executed a bill of sale of certain described goods in favour of N., who resided out of the province, & was not an official assignee therefor. It was recited in the instrument that deft. was indebted to certain creditors, & had agreed to transfer the property for the purpose of having it sold & the proceeds distributed by N. among the creditors. At the same time an agreement between the deft. & N. was executed, in which it was expressly declared that N. was trustee, as to all property assigned to him, for the creditors whose names were set out in the schedule to the bill of sale. Pltfs. were judgment creditors of deft., & their name was not in the schedule. Upon an interpleader application by a sheriff who had seized, under pltfs.' execution, property claimed by N. under the bill of sale:—**Held**: the bill of sale & agreement did not constitute an assignment for the general benefit of creditors under Assignments Act, 1906, being for the benefit of a scheduled list of creditors, & not for the benefit of creditors generally; if it was an assignment, it was for the special benefit of a particular creditor. Not being an assignment for the general benefit of creditors for one purpose, it could not be for any other purpose; & therefore, it could not be void under s. 5 of the Assignments Act, because not made to an official assignee.—**CANADIAN BANK OF COMMERCE v. DAVIDSON** (1910), 15 W. L. R. 530; 3 Sask. L. R. 403.—**CAN.**

o. **Assignment for creditors—Creditor taking larger sum than due.**—A bond & warrant of attorney taken by a creditor for a larger sum than is due to him are void as against other creditors, under 13 Eliz. c. 5, & together with the judgment thereon will be set aside on the application of

another creditor, whose debt may be defeated thereby.—**BROUS v. EAGLES** (1834), N. B. Dig. 783.—**CAN.**

p. —. —. —.]—In an assignment for the benefit of creditors one preferred creditor was to receive more than was due him from the assignor on an understanding that he would pay certain debts due from the assignor to other persons amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to, nor named in the deed of assignment:—**Held**: as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignor, who had parted with all his property, they would be hindered & delayed in the recovery of their debts, & the deed was, therefore, void under Stat. Eliz.—**McDONALD v. CUMMINGS** (1895), 21 S. C. R. 321.—**CAN.**

q. —. —. **Power to sell on credit.**—An assignment for benefit of creditors provided that the assignee should, as soon as convenient, collect all outstanding credits, sell the real & personal property assigned by auction or private contract, as a whole or in portions, for cash or on credit. No fraudulent intention of defeating or delaying creditors was shown:—**Held**: the authority to sell upon credit did not, *per se*, invalidate the deed, & it could not on that account be impeached as a fraudulent preference.—**SLATER v. BADENACH** (1884), 10 S. C. R. 296.—**CAN.**

r. —. —. **Preference to firm—Of which assignee is a member.**—An assignment is void under Stat. Eliz. as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member & provides for allowance of interest on the claim of the said firm until paid, & the assignee is permitted to continue

Sect. 4.—Fraudulent intent and evidence thereof:
11. *Sect. 5: Sub-sect. 1.]*

of assignment. The deed was executed by himself & the trustees, but not by any other creditor:—*Held*: the administrator might give in evidence advertisements published soon after the execution of the deed, stating where the deed lay for execution by the creditors, & calling a meeting of creditors as to the sale of the effects, & also a resolution of that meeting, that the effects should be sold, as this evidence went to show that the deed was acted upon, & was a *bona fide* & not a fraudulent deed.—*STROUD v. DANDRIDGE* (1844), 1 Car. & Kir. 445.

427. Assignment to one creditor—With discretion to pay others.]—Debtor executed a deed, expressed to be for the better management of his affairs & for the liquidation of his debts & engagements, & he thereby conveyed & assigned his real & personal estate & effects to one of his creditors, leaving it to the discretion of the creditor in what order & in favour of what creditors the proceeds should be applied, & giving him power of management & sale, & to negotiate & enter into arrangements & apply the proceeds of the estate & property in carrying them into effect, such powers to terminate with his life or upon his resignation; & the debtor then went abroad, that the arrangement of his affairs might be facilitated by his absence:—*Held*: (1) the deed was not framed to secure any debt due to the creditor to whom the conveyance & assignment was made, & the deed, independently of the grantee being a creditor, & of any communications with the other creditors, was a mere deed of management; (2) it was competent to the debtor to revoke it; (3) it was fraudulent & void against other creditors.

A debtor cannot vest his property in one of his creditors for the purpose of protecting himself against his other creditors. A deed executed for such a purpose is fraudulent & void against the latter, & the creditor taking such a conveyance is a party to the fraud, & cannot be in a better position than the debtor. In the case of a deed vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but, in cases of deeds

purporting to be executed for the benefit of creditors, the question, whether the trusts can be revoked, altered, or modified, depends on the circumstances of the case; & therefore, when it appeared that communications had taken place with creditors of the grantor not parties to the deed, the ct., in treating the deed as against the parties to it as fraudulent, directed inquiries as to the interests of the creditors not parties.

A deed which a debtor has power to revoke, & which he attempts to use as a shield against his creditors, cannot be otherwise than fraudulent & void against them.

I am not prepared to hold that the law of this country will permit a debtor to vest his property in one of his creditors for the mere purpose of protecting himself against the claims of his other creditors, or that a deed executed for such a purpose can be otherwise than fraudulent & void against the creditors whose interests are affected by it. Such a deed, although upon the face of it for the benefit of the creditors, is in truth a deed for the benefit of the debtor (*TURNER, V.-C.*).—*SMITH v. HURST* (1852), 10 Hare, 30; 22 L. J. Ch. 289; 20 L. T. O. S. 303; 17 Jur. 30; 68 E. R. 826.

Annotations:—As to (3) Apld. New, Franco & Garrard's Trustee v. Hunting, [1897] 2 Q. B. 19. Generally, Mentd. Coventry v. Gladstone (No. 2) (1868), 37 L. J. Ch. 492; Re Cowbridge Ry. (1868), L. R. 5 Eq. 413.

428. — Deed concealed.]—A trader in embarrassed circumstances in July, 1882, assigned substantially the whole of his property, including his stock-in-trade, book debts, & the goodwill of his business, to a single creditor, in consideration, as expressed in the deed, of the release by that creditor of a debt of £3,271 then owing to him by debtor. In fact, at the date of the assignment, only £1,370 was due by the assignor to the assignee, & the real consideration was the release by the assignee of that debt, & a secret verbal agreement between him & the assignor that he should undertake the payment of the assignor's debts, either the whole of his debts, or, at any rate, his trade debts. On the same day the assignor entered into a written agreement to manage the business as the servant of the assignee at a weekly salary. The assignee, a few days before the execution of the deed, but after the arrangement between the parties had been come to, paid out some

in the same possession & control of business as he previously had, though no one of these provisions taken by itself would have such effect.—*KIRK v. CHISHOLM* (1896), 26 S. C. R. 111.—CAN.

a. — Partnership assets—No provision for separate creditors of partners.]—Under a trust deed assignment the assets of a partnership business upon trust to sell the same & divide the proceeds among all the creditors of the assignors, without any words of distribution such as, or either of them being added:—*Held*: the deed provided only for the payment of the joint creditors, & not the separate creditors of the partners, & in the absence of any satisfactory arrangement being agreed upon, the deed must be set aside on the ground that it constituted a preference.—*CUNNINGHAM v. CURTIS* (1897), 5 B. C. R. 472.

b. — Reference to two creditors. O. Co. was insolvent to the knowledge of its secretary-treasurer, & was indebted to the bank, which held an of the co.'s book debts.

The secretary-treasurer was also liable to the bank as surety for the co. The co. gave the brother of the secretary-treasurer a chattel mortgage & an assignment of the book debts held by the bank, the money raised being paid to the bank in discharge of the co.'s obligations & of the liability of the secretary-treasurer as surety. The money raised on the mortgage was supplied by the brother of the secretary-treasurer, personally:—*Held*: the transaction should be set aside in so much as it gave an unjust preference to the bank & the secretary-treasurer over other creditors to the extent that they were not at the time of the mortgage already protected by the assignment of book accounts held by the bank.—*STECHEE LITHOGRAPHIC CO. v. ONTARIO SKED CO.* (1911), 20 O. W. R. 760; 3 O. W. N. 409; 22 O. L. R. 577; 46 S. C. R. 540.—CAN.

a. Mortgage to one creditor—Proof of bona fides.]—Although a debtor may be at liberty under Stat. Eliz. to prefer a creditor by creating a mtge. in his favour, still, if the preference given is only colourable to

secure that creditor, & in reality for the fraudulent purpose of defeating other creditors, & such purpose is known to the preferred creditor, who lends himself to it, not for the purpose of obtaining security for his debt, but of aiding the fraudulent purpose of his debtor, the element of *bona fides* is wanting, which is necessary for the protection of the transaction under the Act.—*KNOX v. TRAVER* (1877), 24 Gr. 477.—CAN.

b. —.]—In 1869 C. lent money to N. on an express agreement that it was to be secured by mtge. on certain property; & on July 3 following the mtge. was given accordingly; & on Aug. 2, the mtgor. became insolvent:—*Held*: the mtge. was valid.—*ALLAN v. CLARKSON* (1870), 17 Gr. 570.—CAN.

c. Conveyance to one creditor—Subsequent judgment creditor.]—Where a conveyance of land was made by the father to a daughter, while an action for slander against the father was pending, of which the daughter was aware, in satisfaction of a *bona fide* pre-existing debt to the extent of the full value of the land:—*Held*: the

executions for the assignor, & shortly after the execution of the deed he paid an arrear of rent which the assignor owed to his landlord. The business was, after the execution of the deed, carried on by the assignor in his own name, just as it was before, there being nothing to show that he was not the real, as well as the apparent, owner of it, though he was in fact acting under the directions of the assignee. None of the other creditors knew of the assignment. In Mar. 1883, the assignor was adjudged bkpt. At the date of the bkpcy. nearly all the trade debts due by the assignor at the date of the deed had been paid in the course of carrying on the business:—*Held*: the deed was void against the assignor's creditors under 13 Eliz. c. 5.

The intention was to do that which the deed in fact did, namely to hide from the creditors the real facts of the case, & thereby, not to defraud them, but to hinder & delay them in enforcing their legal rights (FRY, L.J.).—*Re SINCLAIR, Ex p. CHAPLIN* (1884), 26 Ch. D. 319; 53 L. J. Ch. 732; 51 L. T. 345, C. A.

Annotations:—*Distd. Re Cranston, Ex p. Cranston* (1892), 9 Morr. 160. *Reid. Re Sills, Shears v. Goddard* (1896), 3 Mans. 24; *Re Sharp, Ex p. Gundry v. Johnston* (1900), 83 L. T. 416.

conveyance being attacked under 13 Eliz. c. 5, by one who became a creditor by judgment obtained in the action of slander after the conveyance, & there being no other creditors, the preferring of one creditor was no ground for setting aside the conveyance as fraudulent & void.—*GUROFSKI v. HARRIS* (1896), 27 O. R. 201; 23 A. R. 717.—CAN.

PART I. SECT. 5, SUB-SECT. 1.

d. *General rule.*—A sale made with intent of both vendor & vendee, to defeat the creditors of the former, is void in equity, whether the sale was or was not intended to take effect as between the parties to it.—*WOOD v. IRWIN* (1869), 16 Gr. 398.—CAN.

e. —.—.]—To maintain a sale impeached by creditors, it is not sufficient to prove that the transaction was really intended to pass the property; for although the sale may have been *bona fide*, with intent to pass the property, yet if made with intent by vendor & purchaser to defeat & delay creditors, it would be void.—*MERCHANTS BANK OF CANADA v. CLARK* (1871), 18 Gr. 594.—CAN.

f. —.—.]—If one purpose of a sale & conveyance is to defeat a creditor, the sale is, in equity, void as to him.—*SCOTT v. BURNHAM* (1872), 19 Gr. 234.—CAN.

g. —.—.]—A deed by a devisee to defeat a creditor of his own, is void against the devisor's creditors also.—*JOHNSTON v. SOWDEN* (1872), 19 Gr. 224.—CAN.

h. —.—.]—Where a deed is made with intent to delay, hinder, or defraud a particular creditor, it is not necessary to establish a specific intention to delay, hinder or defraud the particular creditor or creditors who attack the deed. The intent to delay, hinder, or defraud one creditor renders the transaction void as to all.—*MUNRO v. McDONALD* (1894), 26 N. S. R. (14 R. & G.) 349.—CAN.

k. —.—.]—Where a transfer, though in part for valuable consideration, is, as regards the other part, only an arrangement to defeat creditors it is wholly void against creditors both under Transfer of Property Act, s. 53, & under 13 Eliz. c. 5, & cannot be upheld to the extent to which it is supported by consideration.—*CHIDAM-*

BARAM CHETTIAR v. SAMI AIYAR (1906), 1. L. R. 30 Mad. 6.—IND.

l. —.—.]—*BHIKABHAI MULJIBHAI PATEL v. PANACHAND* (1919), 1. L. R. 43 Bom. 707.—IND.

m. —.—.]—To make void a voluntary conveyance it must clearly appear to have been executed for the purpose of defrauding creditors.—*WIXON v. COTTER* (1786), 1 Ridg. Parl. Rep. 295.—IR.

1. *Partial avoidance—Whether allowed.*—Where it can be shown that the disposition of an unpaid balance is fraudulent as against creditors, such disposition can be frustrated by a suit under the Stat. Eliz.—*MCLEAN v. CHISHOLM* (1895), 27 N. S. R. 492.—CAN.

n. *Effect of avoidance—Rights of parties claiming under settlements.*—An equitable mtgo. by deposit of title deeds had been created for \$1,000 by a son in favour of his mother, who had advanced him that sum. The mother subsequently delivered the title deeds to the party in favour of whom a voluntary settlement had been created, but it was not intended to be a transfer of the \$1,000 due to the mother:—*Held*: the effect of the delivery of the deeds was to extinguish the claim on the land for the \$1,000, & in a decree declaring the settlement void as against creditors the beneficiary under the settlement was not entitled to any lien in respect of this amount.—*MARURET v. MITCHELL* (1879), 26 Gr. 435.—CAN.

o. —.—.]—In an action to have a deed of assignment set aside for the benefit of creditors on the ground that it is void under Stat. Eliz. neither moneys paid to preferred creditors, nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them.—*TAYLOR v. MCKINNON* (1896), N. S. R. (17 R. & G.) 162.—CAN.

p. —.—.]—Where an assignment has been held void under 13 Eliz. c. 5, & the result of such decision is that a creditor who had subsequently obtained judgment against the assignor &, notwithstanding the assignment, sold all the debtor's personal property

Fraudulent preference in bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 804 et seq.

SECT. 5.—AVOIDANCE.

SUB-SECT. 1.—IN GENERAL.

429. *Conveyance valid until impeached.*—Voluntary settlement, void against creditors, good to other purposes.—*CURTIS v. PRICE* (1805), 12 Ves. 89; 33 E. R. 35.

Annotations:—*Reid. Lewis v. Rees* (1856), 3 K. & J. 132. *Mentd. Wykham v. Wykham* (1811), 18 Ves. 395; *Colmore v. Tyndall* (1828), 2 Y. & J. 605; *Baker v. Sowter* (1847), 10 Beav. 343; *Kavanagh v. Morland* (1853), 18 Jur. 185; *Beaumont v. Salisbury* (1854), 19 Beav. 198; *Denman v. Jones* (1867), 16 L. T. 787; *Boileau v. Carter* (1869), 4 Ch. App. 230; *Cooper v. Kynock* (1872), 7 Ch. App. 398.

430. —.—.]—*SHEARS v. ROGERS*, No. 264, ante. —.— *Protection of bona fide purchasers for value.*—See Sect. 3, ante.

431. *Partial avoidance—Whether allowed.*—*FRENCH v. FRENCH*, No. 39, ante.

432. —.—.]—*GOLDSMITH v. RUSSELL*, No. 228, ante.

so transferred, becomes entitled to all the personal property of the assignor levied upon by him under his execution, such creditor has no legal right & no equity to an account or to follow moneys received by the assignee or paid by him under such assignment in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible.—*CUMMING v. TAYLOR* (1898), 28 S. C. R. 337.—CAN.

q. —.—.]—*Deft. A. & B. exchanged lands by contemporaneous conveyances & pltf., suing on behalf of himself & all other creditors of A., brought action to set aside the conveyance of A.'s lands to B. The trial judge found that the conveyance of A.'s lands to B. was fraudulent & void as against A.'s creditors & ordered that it should be set aside & the lands re-vested in A. for the benefit of his creditors, but refused to make any direction as to the lands conveyed by B. to A. The conveyance of the last-mentioned lands was subsequently registered by pltf.'s solicitor, & it was contended that pltf. was also entitled to claim the proceeds of the property thereby conveyed:—*Held*: the registration of the deed of B.'s lands to A. should be vacated & the lands re-vested in B. free & clear of any cloud thereon caused by the registration of the deed.—*PRINGLE v. OLIMNITSKY* (1908), 17 O. L. R. 38; 11 O. W. R. 871.—CAN.*

r. —.—.]—Where the amount paid by H. for R.'s claims was completely inadequate, & some of R.'s creditors obtained charging orders against his claims on the proceeds of the lands:—*Held*: creditors who had obtained charging orders were, under Fraudulent Conveyances Act, entitled to avoid the assignment to H., & at the utmost it could only stand as a security for so much as had been actually paid by him.—*ROCHE v. HANSARD* (1856), 5 I. Ch. R. 14; 8 Ir. Jur. 246.—IR.

s. —.— *Extent of* estate acquired by a purchaser from a party against whom a judgment has been recovered declaring him to have obtained the property in fraud of creditors remains subject to the rights of the creditors. In such case the creditors have a charge on the lands to the extent of the purchase money

5.—Avoidance: Sub-sects. 1 & 2, A. & B.]

433. —.]—TURNLEY v. HOOPER, No. 211, ante.

434. Effect of avoidance—Right of parties claiming under settlements—To compensation out of other assets of settlor—Settlement on children.]—SNEED v. OULPEPPER (LORD & LADY), No. 24, ante.

See, further, EQUITY, Vol. XX., pp. 499 et SETTLEMENTS.

SUB-SECT. 2.—WHO MAY AVOID.**A. In General.**

435. General rule.]—This Act does not extend only to creditors but to all others who had cause of action or suit or any penalty or forfeiture, etc. (*per* CUR.).—PAUNCEFOOT v. BLUNT (1593), cited in 3 Co. Rep. at p. 82 a; 76 E. R. 816, Ex. Ch.

Annotation:—*Consd.* Twyne's Case (1601), 3 Co. Rep. 80 b.

B. Parties.

436. General rule.]—An assignment of goods in fraud of creditors is valid as between parties to the deed, & as between either party & a stranger. A sheriff claiming to seize the goods on behalf of a judgment creditor is a stranger within this rule,

if he does not prove the legal authority under which he seized on behalf of such creditor. For this purpose it is sufficient, in trespass for the seizure, if he prove the writ; & there is some evidence of the writ, if pltf. puts in the sheriff's warrant to his officer, & that recites a writ at the suit of the judgment creditor. The judge, in an action brought against the sheriff as above, left it to the jury to say whether or not the parties to the alleged fraudulent conveyance meant any thing to pass by it; the jury found in the negative; & a verdict was taken for deft. The case went to the jury without notice of any proof that the sheriff acted under a writ sued out by the judgment creditor, the effect of the recital in the warrant being overlooked by all parties. A new trial was moved for on the ground that the sheriff, if standing in the situation of a stranger, could not impeach the deed; & the ct. was of this opinion; but, on showing cause, the effect of the recital in the warrant was pointed out, & admitted by the ct.:—*Held*: a new trial ought not to be granted on the ground merely that the cause had been tried on an assumption that the alleged fraud would be a defence to the sheriff, without taking the jury's opinion on the effect of the recital as showing his right to make such defence.—BESSEY v. WINDHAM (1844), 6 Q. B. 166; 14 L. J. Q. B. 7; 8 Jur. 824; 115 E. R. 64.

Annotations:—*Apld.* Phillpotts v. Phillpotts (1850), 10 C. B. 85. *N.F.* White v. Morris (1852), 11 C. B. 1015. *Refd.* Bowes v. Foster (1858), 27 L. J. Ex. 262. *Mentd.* Haylock v. Sparke (1853), 1 E. & B. 471.

unpaid, but the purchaser is not bound to pay over again the purchase moneys already paid.—PECK v. SUN LIFE ASSURANCE CO. OF CANADA (1905), 11 B. C. R. 215.—CAN.

1. ———.]—In 1896, J. mortgaged land to his wife to secure \$3,750. In 1907 he transferred his interest in the land to her. This transfer was made without consideration, & solely at the suggestion of J., who said that he told his wife that there was then about \$7,000 due on the mortgage & the property was of about that value. At the date of the transfer J. was indebted to pltf. in a large sum, & was in insolvent circumstances. Pltf., having obtained judgment against J., sought in an action against him & his wife a declaration that the transfer was void as against them & J.'s other creditors, & also asked that the transfer should be set aside & the registration thereof vacated:—*Held*: at the date of the transfer, J. believed that the property was worth more than the amount due upon the mortgage, & his sole object in making the transfer was to put his interest in the property beyond the reach of creditors & therefore, the transfer should be declared void as against pltf.; but pltf. were not entitled to a judgment setting the transfer aside or vacating its registration. With the above declaration pltf. would be in a position to proceed to realise under execution upon their judgment, & a purchaser at a sale under the execution would be entitled to be registered as owner, subject to the mortgage to the wife.—UNION BANK OF CANADA v. JOHNSON (1910), 13 W. L. R. 519; 3 Alta. L. R. 207.—CAN.

a. Mistaken belief as to liability.]—When a security intended to be given for the benefit of one supposed to be equitably entitled, although in preference to another creditor, which would itself be unimpeachable, has been given by mistake to a wrong person, & that person the wife of the grantor, the transaction, although the

grantee had been apparently influenced by motives of personal advantage, was held not necessarily to be impeachable.—GRANGER v. LATHAM (1869), 2 Ch. Ch. 419.—CAN.

b. Absence of fraud.]—In an action by a creditor for an amount due on a mtge., & to set aside a conveyance of personal property, where the transaction complained of was not made with intent to defeat the claims of creditors, or to give a preference, & no collusion or fraud was proved:—*Held*: as none of the creditors were judgment & execution creditors, in the absence of fraud, pltf. could not set aside the transaction under Stat. Eliz. & although under 48 Vict. c. 26, s. 2 (O.), it might possibly be that the transaction should be held to be void as against creditors as having the effect of defeating, delaying, or prejudicing creditors, yet as the sale was not a sham, or a colourable one, but was a real transaction & *bona fide*, pltf. failed on that branch of the case.—BUILDING & LOAN ASSOCN. v. PALMER (1886), 12 O. R. 1.—CAN.

PART I. SECT. 5, SUB-SECT. 2.—A.

435 i. General rule.]—In a suit to declare a conveyance to a wife void as against creditors, it was alleged that the land had been conveyed by the father of the wife to the husband after executing his will, whereby he devised the same property to his said daughter, under such pressure & undue influence as would have rendered the deed liable to be impeached on those grounds; but the ct. refused to try such issue, as the creditors of the husband were entitled to make out of his interest in the property at the time of the conveyance impeached what they could towards satisfaction of their claims.—PECK v. EASTMAN (1867), 13 Gr. 137.—CAN.

435 ii. ———.]—The protection of 13 Eliz. c. 5, is not confined to creditors only, but extends to creditors & others who have lawful actions.—OLIVER v.

MCLAUGHLIN (1893), 24 O. R. 41.—CAN.

435 iii. ———.]—Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it cancelled. The test is reasonable apprehension of serious injury. Whether that exists or not, depends upon the circumstances of each case.—KOTRABASSAPPAYA v. CHENVIRAPPAYA (1898), 1 L. R. 23 Bom. 375.—IND.

c. Assignee for creditors.]—A creditor's assignee, not himself a creditor, cannot sustain an action to set aside a fraudulent conveyance or transfer made by debtor, prior to the assignment under which he claims to be such assignee.—LUMSDEN v. SCOTT (1883), 4 O. R. 323.—CAN.

PART I. SECT. 5, SUB-SECT. 2.—B.

436 i. General rule.]—Declaration on a covenant made by deft. to pltf., whereby he covenanted to pay pltf. £37 10s. & interest. Deft. pleaded that the covenant was contained in a chattel mtge. made by him at pltf.'s request, & to hinder, defeat, & defraud his creditors, & without consideration:—*Held*: a covenant executed as above is only void as against third parties, & not between the parties to it; & pltf. was entitled to judgment.—SCOBLE v. HENSON (1862), 12 C. P. 65.—CAN.

436 ii. ———.]—MASSEY-HARRIS Co. v. WARENER, 17 C. L. T. Occ. N. 409.—CAN.

436 iii. ———.]—When a debtor has absolutely conveyed all his interest in the land on which he resides by a conveyance valid & binding on him, even when set aside by the ct. as against creditors, the claim that the land is an exemption under Judgments Act, R. S. M., c. 80, s. 12, can no longer be maintained.—ROBERTS v. HARTLEY (1902), 14 Man. L. R. 284.—CAN.

437. —.]—WHITE v. MORRIS, No. 354, *ante*.

438. —.]—Where an instrument has been entered into between two parties for a purpose which may be considered fraudulent as against a third party, it may yet be binding as between themselves. A supposed fraudulent intention as to third parties cannot be interpolated in construing an instrument as to the rights of the contracting parties. Mere suspicion of a fraudulent intention to protect property against the just claims of third parties, will not suffice to establish the fact that the transaction was wholly colourable as between the original parties to the instrument, as such a transaction is not as between themselves rendered void, because it may have the effect of defeating the claims of creditors.—SHAW v. JEFFERY (1860), 13 Moo. P. C. C. 432; 3 L. T. 1; 15 E. R. 162, P. C.

439. The grantor—Alienation by deed—Without consideration—Gift.]—HAWES v. LEADER (1610), 1 Brownl. 111; Yelv. 196; Cro. Jac. 270; 123 E. R. 698.

Annotation:—Apld. Doe d. Roberts v. Roberts (1819), 2 B. & Ald. 367.

440. — Alienation not by deed—Absence of consideration.]—Pltf., being in difficulties & fearing that some of his creditors would issue execution against his goods, agreed with deft., who was also a creditor, that there should be a pretended sale of them to him. For this purpose, an invoice was made out & a receipt given to deft. for a sum therein stated to be the purchase-money, & possession of the goods was delivered to deft. Afterwards, deft. sold the goods as his own, whereupon pltf. brought trover:—Held: no property in the goods passed to deft., & pltf. was not precluded from showing that no payment was in fact made & that the transaction was not a real, but a pretended sale.—BOWES v. FOSTER (1858), 2 H. & N. 779; 27 L. J. Ex. 262; 30 L. T. O. S. 306; 4 Jur. N. S. 95; 6 W. R. 257; 157 E. R. 322.

Annotations:—Folld. Taylor v. Bowers (1876), 1 Q. B. D. 291. Rejd. Ashpitel v. Bryan (1863), 3 B. & S. 474. Lee v. L. & Y. Ry. (1871), 6 Ch. App. 527.

441. — Settlement on children of grantor.]—SNEED v. CULPEPPER (LORD & LADY), No. 24, *ante*.

439 i. The grantor—Alienation by deed—Gift.]—Pltf. caused the land in question to be conveyed to his wife, deft., & registered the deed without her knowledge. His motive was to avoid payment of an anticipated claim against him:—Held: he could not succeed in an action to compel her to re-convey the land to him.—MCAULEY v. MCAULEY (1909), 18 Man. L. R. 544.—CAN.

439 ii. —.]—A deed of gift, valid & operative between the parties thereto, cannot be avoided because in another suit between different parties it has been held to be fraudulent as against creditors.—RAMANUGRA NARAIN v. MAHASUNDUR KUNWA (1873), 12 B. L. R. P. C. 433.—IND.

d. — Absolute bill of sale—For valuable consideration—On suggestion of grantor.]—In an action to set aside a bill of sale as fraudulent against pltf., who was a creditor, & as far as the evidence disclosed, the only creditor of the grantor, it appeared that pltf. himself had advised upon & drawn up the bill of sale:—Held: that he had no *locus standi* to attack it; & on the facts the conveyance was not fraudulent.—BOULTBEE v. ROLLS (1895), 4 B. C. R. 137.—CAN.

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442. — Absolute bill of sale—For valuable consideration—Though possession retained by grantor.]—STEEL v. BROWN & PARRY, No. 328, *ante*.

443. — Bill of sale of ship—Grantors retaining possession.]—A. & B., owners of a ship, executed an absolute bill of sale to C. & D. for a nominal consideration. There was a parol agreement between them that C. & D. should accept bills for the accommodation of A. & B.; that the ship should be a security to C. & D. for any advances they should make on such acceptances, & that until defaults made by A. & B. in providing for the acceptances, the ship should remain in their possession & management. The ship was registered in the names of C. & D.; but A. & B. remained in the possession & management of her, appeared to the world as owners, & obtained credit from appearing so. Before default made by A. & B. in providing for the acceptances, C. & D. became bkpts., & their assignees immediately seized & sold the ship. A. & B. afterwards became bkpts.:—Held: trover for the ship could not be maintained by their assignees against the assignees of C. & D., for the parol agreement could not be set up against the bill of sale, & the case did not come within 21 Jac. 1, c. 19, the ship having been seized by defts. before the bkpry. of A. & B., & though the bill of sale unaccompanied by possession might be void as against creditors, it was binding upon A. & B. & their assignees.—ROBINSON v. M'DONNELL (1818), 2 B. & Ald. 134; Holt, N. P. 612, n.; 106 E. R. 316.

Annotation:—Rejd. Re Baldwin, Ex p. Foss (1858), 2 D. G. & J. 230.

444. — Voluntary trust for future children.]—A man unmarried cannot recall a voluntary trust deed which he executes for the benefit of future children; nor can he relieve himself from a provision in the conveyance to the trustee, under which the income of the trust property is to be paid to him at the discretion of a third person.—PETRE v. ESPINASSE (1834), 2 My. & K. 496; 39 E. R. 1034.

Annotation:—Rejd. Hall v. Hall (1873), 28 L. T. 383.

445. — Voluntary settlement with limitations as on marriage—No marriage in contemplation.]—

e. — Intention to defraud creditors—Illegal purpose not executed.]—The fact that the purpose with which a man has put property into his wife's name as a trustee for him is to defraud his creditors does not prevent him from afterwards recovering the property from her, or her representatives after her death, provided that the illegal purpose has in no respect been carried into effect.—Re PERPETUAL EXECUTORS & TRUSTEES ASSOCN. OF AUSTRALIA, LTD. (1917), 23 C. L. R. 185.—AUS.

f. —.]—Where land has been voluntarily conveyed to the grantee to hold it for some illegal purpose, & that purpose has not been carried out, the grantor is not prevented from taking proceedings to recover back the land.—MULLIGAN v. (1888), 5 Man. L. R. 225.—CAN.

g. —.]—Lands which at the time of the transaction would be exempted from seizure & sale under execution were purchased by S. & with the intention of protecting them from pursuit by his judgment creditor, he caused them to be conveyed to his wife, on a parol agreement with her that the title should remain in her name until the judgment debt was

The debt was subsequently paid by S. & he brought suit against his wife for a declaration that she held lands in trust for him & for reconveyance:—Held: the ct. should not grant relief to the husband against the consequence of his unlawful attempt to delay & hinder his creditor, although the illegal purpose had not been carried out.—SCHUEKMAN v. SCHUEKMAN (1916), 52 S. C. R. 625.—CAN.

h. —.]—Where it appears that the purpose of a person transferring property to his wife was to protect it against creditors, though it did not result in any creditor being prejudiced, the ct. should not assist such person in obtaining the restoration of his property.—TRUMBELL v. TRUMBELL, [1919] 2 W. W. R. 198.—CAN.

k. —.]—Pltf. whom several decrees for money were outstanding, with the object of protecting his properties from the claim of the decree-holders, executed a deed of relinquishment in favour of deft. declaring that the properties belonged to the latter: the decrees were ultimately set aside on appeal & pltf. sued to recover possession of the properties on declaration of his right thereto:—Held: where the intention to commit

VOIDABLE AND VOIDABLE CONVEYANCES.

Sub-sect. 2, B., C. & D. (a).]

A single woman, not immediately contemplating marriage, transferred a sum of stock to which she was absolutely entitled to trustees, upon trust to pay the dividends to her until she should marry; & after her marriage, upon trust to pay the dividends to her separate use for her life; & after her decease to pay the same to her husband for his life, or until his bkpcy., & after his decease or bkpcy., in trust for the children of the settlor; & if no child, for such person or persons, as she should by deed or will appoint & in default of appointment, upon trust for her next of kin:—*Held*: the settlement was irrevocable.

(2) In a bill filed by the settlor for the purpose of setting aside the settlement, the mtgee. of her interest under the settlement joined as a co-pltf.:—*Held*: he could obtain no relief in such a suit.

The other pltf. claims, as a purchaser, under 27 Eliz. c. 4, against the parties claiming under the voluntary settlement; but he cannot stand upon this ground, for the settlement is of stock, & settlements of personal property are not within 27 Eliz. c. 4. Consequently the purchaser, not having the protection of the statute cannot have a better title than the settlor, from whom he purchased (PEPYS, M.R.).—*BILL v. OURETON* (1835), 2 My. & K. 503; 4 L. J. Ch. 98; 39 E. R. 1036.

Annotations:—As to (1) *Reid. Malcolm v. Scott* (1843), 3 Hare, 39; *Wilding v. Richards* (1845), 1 Coll. 655; *Griffith v. Bloket's*, *Griffith v. Lunell* (1849), 7 Hare, 299; *Fawcett v. Cowland* (1884), 26 Ch. D. 191. As to (2) *Reid. Davies v. Quarterman* (1840), 4 Y. & C. Ex. 257; *Hughes v. Stubbs* (1842), 1 Hare, 476; *Meek v. Kettlewell* (1842), 1 Hare, 464; *Anderson v. Wallis* (1843), 7 Jur. 119; *Henriques v. Bensusan* (1872), 20 W. R. 350.

446. ——— Intention to defraud creditors—Illegal purpose executory.—Pltf., being in embarrassed circumstances, in pursuance of an agreement between him & A., made over all his stock-in-trade to A., & fictitious bills of exchange were given by A., in pltf.'s favour. Possession of the

fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him is *benami*, & pltf. was entitled to recover.—*JADU NATH PODDAR v. RUP LAL PODDAR* (1906), 1 L. R. 33 Cal. 967; 10 C. W. N. 650. —IND.

l. ———.] — *GIRDHARLAL PRAYAGDATT v. MANIKAMMA* (1913), 1 L. R. 38 Bom. 10. —IND.

m. ———.] — A debtor cannot institute an action to set aside a deed made by him on the ground that it is fraudulent as against his creditors & his assignee can stand in no better position.—*DIEHL v. WALLACE* (1905), 2 W. L. R. 21. —CAN.

n. ———.] — Where property has been conveyed *benami* with the object of placing it beyond the reach of creditors, & the fraudulent purpose has been carried into effect, the real owner ought not to be permitted to succeed in a suit instituted by him for recovery of the property. A distinction exists between such a case & a case where the fraud has not been carried into execution.—*KALICHARAN PAL v. RASIK LAL PAL* (1895), 1 L. R. 23 Cal. 962, n. —IND.

o. ———.] — When property has been conveyed to another person with the object of defrauding creditors, & the fraud has been carried out, the owner cannot succeed in a suit to recover possession.—*HONAPA v. NARSAPA*

(1898), 1 L. R. 23 Bom. 406. —IND.

p. ———.] — A party, [who conveys property to another for no consideration to shield such property from the claims of creditors, cannot set up the fraudulent nature of the transaction when creditors have been defrauded thereby. Even where no creditors have been defrauded, if, in a suit to which the vendor & vendee are parties, the *bona fides* of the transaction is alleged & upheld, the vendor cannot, in a subsequent suit, get rid of the effect of the decree collusively obtained as between himself & the vendee, when such decree had been obtained in a proceeding intended to carry out the fraud.—*KONDETI KAMA ROW v. NUKAMMA* (1908), 1 L. R. 31 Mad. 485. —IND.

q. ———.] — Where a colourable transfer is made for the purpose of enabling the transferor to defraud his creditors, & where the intended fraud has been wholly or partially carried into effect, the ct. will not lend its aid to enable the transferor, who has thus defrauded his creditors, to get his property back from the transferee.—*GOVINDA KUAR v. LALA KISHUN PRASAD* (1900), 1 L. R. 28 Cal. 370. —IND.

r. ——— Intention to avoid expected execution.—*Refusal to compel reconveyance.*—Pltf. had executed a conveyance of land without consideration, to avoid an execution expected,

goods was given to A., together with an inventory but no bill of sale was executed by pltf. The object of the transaction was to prevent pltf.'s creditors getting hold of the goods, & so being paid in full. Deft. was a creditor for £100 & was cognisant of what was concocted between pltf. & A. After A. had removed the goods from pltf.'s premises, two meetings of pltf.'s creditors were held, but no compromise was effected with the creditor. Some months afterwards A. executed a bill of sale of the goods to deft. for the alleged purpose of securing the debt due from pltf. to deft., but pltf. was no party to the bill of sale nor did he sanction or know of it. Pltf. having demanded the goods from A. & deft. brought an action against deft. for the detention:—*Held*: the fraudulent purpose not having been carried out, pltf., was not relying on the illegal transaction but was entitled to repudiate it, & recover his goods from A. & deft. had no better title than A., as he knew how A. had become possessed of the goods.—*TAYLOR v. BOWERS* (1876), 1 Q. B. D. 291; 46 L. J. Q. B. 39; 34 L. T. 938; 24 W. R. 499, C. A.

Annotations:—*Consd. Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620. *Reid. Wilson v. Strugnell* (1881), 7 Q. B. D. 548; *Re Great Berlin Steamboat Co.* (1884), 54 L. J. Ch. 68; *Kearley v. Thomson* (1890), 24 Q. B. D. 742; *Petherpermal Chetty v. Munandy Servai* (1908), 24 T. L. R. 462; *Gordon v. Metropolitan Police Chief Comr.*, [1910] 2 K. B. 1080.

See, generally, CONTRACT, Vol. XII., pp. 283, 284, Nos. 2318–2325.

447. ——— Marriage settlement—Persons entitled in events volunteers.—By a marriage settlement the wife's property was settled, after life estates in the husband & wife & in default of children, in the event of the wife surviving, on her, & in the event of the husband surviving, as the wife should by will appoint, & in default, on her next of kin, excluding the husband:—*Held*: the trust in favour of the next of kin could not be revoked, & although there was no possibility of issue, the husband & wife together were not

upon the secret trust or understanding that when called upon the grantee would reconvey; the ct., under these circumstances, refused to enforce a reconveyance, & a bill filed for that purpose was dismissed with costs.—*EMES v. BARBER* (1869), 15 Gr. 679. —CAN.

s. ———.] — A. about to be tried for perjury, being advised by his solicitor that if he was convicted all his property would be forfeited to the Crown, conveyed all his property to trustees upon trust for his wife & children:—*Held*: the settlor could not set aside the settlement, because the erroneous advice of his solicitor acted on by the client was a pure mistake of law; & the settlement was not improperly framed for the purpose of carrying into effect the proposed object. Also the settlor & the trustees were not ignorant of the effect of the deed.—*DAVIES v. SHERWILL* (1885), 4 N. Z. L. R. 50 (S. C.). —N.Z.

t. ——— Marriage settlement—Assignment to creditors.] — In an action brought by a divorced husband to reduce a disposition *omnium bonorum*, granted by him in favour of his creditors, in so far as it conveyed his rights under his marriage contract, on the ground that these were alimentary & excluded from the diligence of his creditors:—*Held*: in so far as pursuer's rights had not been forfeited, they had been validly assigned to his creditors.—*HARVEY v. LIGERT*

entitled to the corpus of the settled fund.—PAUL v. PAUL (1882), 20 Ch. D. 742; 51 L. J. Ch. 839; 47 L. T. 210; 30 W. R. 801, C. A.

Annotation:—*Reid*. Meredyth v. Meredyth, [1895] P. 92.

C. Privies.

448. Though creditors.]—STEEL v. BROWN & PARRY, No. 328, *ante*.

449. —.]—A debtor executed a voluntary assignment of the greater part of his estate to his sons, the deed being prepared with the concurrence & under the direction of a creditor to a large amount. Debtor appointed this creditor one of his exors., who acted for seven years. The voluntary deed, if good, left debtor's estate insolvent, & no steps were ever taken by the creditor to impeach it:—*Held*: there being no evidence of ignorance or mistake on the part of the creditor, the deed was not void under 13 Eliz. c. 5, & could not be impeached by the creditor or any one claiming under him.—OLLIVER v. KING (1856), 8 De G. M. & G. 110; 25 L. J. Ch. 427; 27 L. T. O. S. 29; 2 Jur. N. S. 312; 4 W. R. 382; 44 E. R. 331, L. JJ.

450. Persons claiming under grantor—Personal representatives of grantor.]—HAWES v. LEADER (1610), 1 Brownl. 111; Yelv. 196; Cro. Jac. 270; 123 E. R. 698.

Annotation:—*Reid*. Doe d. Roberts v. Roberts (1819), 2 B. & Ald. 367.

451. —.]—ORLABAR v. HARWAR (1695), Comb. 348; 90 E. R. 521.

452. — Personal representatives.]—A man went through the ceremony of marriage with the sister of his deceased wife two days after executing a deed by which certain shares belonging to him were vested in trustees upon trusts, which were in effect trusts for the absolute benefit of the woman, without any power of revocation. The parties lived together as man & wife until the death of the man, after which event a bill was filed by his legal personal representative to have the settlement declared void, as founded on a bad & illegal consideration:—*Held*: the bill not being on behalf of creditors, relief could not be granted.

WOOD (1872), 10 Macph. (Ct. of Sess.) 33; 44 Sc. Jur. 207, H. L.—SCOT.

a. — Provision to issue of children not revocable.]—A conveyance in an ante-nuptial contract of marriage in favour of the children of the marriage & the issue of such children is fractional & is not gratuitous nor testamentary, but onerous & obligatory, & is not revocable by the spouses as regards the issue of the children.—MACDONALD v. SCOTT, [1893] A. C. 642.—SCOT.

PART I. SECT. 5, SUB-SECT. 2.—C.

b. Persons claiming under grantor—Widow.]—A person being embarrassed, proposed to assign a policy on his life, in trust, first to secure certain advances, & then for his wife. The advances were made & the assignment executed, but no trust in favour of the wife was declared, or was required by the lender as a condition of the loan. Subsequently the trustee made further advances to the settlor, & in his evidence stated that the settlor might have absorbed the whole amount if he, the trustee, had seen fit to advance it. After the death of the settlor all the advances were paid, & the residue of the insurance moneys invested for the benefit of the widow:—*Held*: so far as the

interest of the widow was concerned, the settlement was void.—COTTON v. VANSITTART (1873), 20 Gr. 244.—CAN.

c. — Assignee for creditors.]—Apart from statutory provision, an assignee for the benefit of creditors is in no better position than his assignor to impeach previous conveyances by the assignor, & cannot be treated as occupying the place of the creditors for that purpose.—MCKENZIE & MCGOWAN v. BELL-IRVING (1892), 2 B. C. R. 241.—CAN.

d. — Assignee of a policy—Fraud by assignor.]—The assignee of a policy cannot recover on it if fraud is established against his assignor.—NORTH BRITISH & MERCANTILE INSURANCE Co. v. TOURVILLE (1895), 25 S. C. R. 177.—CAN.

e. — Wife of judgment debtor—Fraudulent assignment.]—Application by wife of judgment debtor for payment out to her of moneys paid into ct. by a garnishee, was dismissed upon grounds that the assignment under which she claimed was fraudulent & void as against the judgment creditors.—*Re* CURRIE (1914), 14 E. L. R. 246.—CAN.

PART I. SECT. 5, SUB-SECT. 2.—D. (a).

1. General rule.]—A simple contract

—AYERST v. JENKINS (1873), L. R. 16 Eq. 275; 42 L. J. Ch. 690; 29 L. T. 126; 38 J. P. 37; 21 W. R. 878, L. C.

Annotations:—*Consd.* Pawson v. Brown (1879), 13 Ch. D. 202. *Distd.* Phillips v. Probyn, [1899] 1 Ch. 811.

453. — Committee of lunatic grantor.]—Upon bill by son, committee of father a lunatic, to set aside a voluntary settlement by him, motion for deft. to let the house, sell the furniture, etc., & bring the whole into ct., refused, pltf. not consenting.

If it is not consented to, I cannot do it. As to the fraud, there must be some creditor to complain of that; & he must put himself into a situation to complain by getting judgment for his debt, & stating, that by the settlement he is defrauded (LORD THURLOW, C.).—COLMAN v. CROKER (1790), 1 Ves. 160; 30 E. R. 280, L. C.

Annotation:—*Reid*. Lister v. Turner (1846), 5 Hare, 281.

454. — Assignees in bankruptcy.]—ROBINSON v. M'DONNELL, No. 443, *ante*.

455. Mortgagee.]—BILL v. CURETON, No. 445, *ante*.

D. Creditors.

(a) In General.

456. Effect of bankruptcy proceedings.]—In bkpey. & insolvency, the assignees are the only persons who can take proceedings in respect of the estate.

A bill alleged that, in 1848, A. executed a fraudulent assignment of his property, to defeat pltf.'s rights under a decree; that A. took the benefit of the Insolvent Act in 1859; that the assignee had declined to take any proceedings without an indemnity which pltf., through poverty, was unable to give. To this bill, filed against the assignee & the trustees, to set aside the fraudulent deed, a general demurrer was allowed.—DAVIS v. SNELL (1860), 28 Beav. 321; 2 De G. F. & J. 463; 3 L. T. 45; 6 Jur. N. S. 1134; 8 W. R. 458; 54 E. R. 389, L. C.

457. Whether lien or charging order on property conveyed necessary.]—In order to entitle a

creditor may sue to have a conveyance set aside as fraudulent & preferential.—RAE v. McDONALD (1886), 13 O. R. 352.—CAN.

g. —.]—A creditor under 13 Eliz. c. 5, is a person who has a claim arising out of a legal or equitable or statutory obligation which when it becomes fixed or determined or crystallised into a judgment entitles him to share in the general assets of the debtor. A person whose claim arises out of an agreement which has to do with, or is secured by, a specific piece of property which in itself is sufficient to satisfy, & is available for the satisfaction of, such claim, is not a creditor within 13 Eliz. c. 5.—ARNOLD v. FLEMING, [1923] 1 D. L. R. 1026; 1 W. W. R. 70.—CAN.

h. —.]—A claim to set aside a deed of settlement as fraudulent & void as against creditors can only be made by creditors whose claims are not barred by limitation.—BURJORJI DORAJI PATEL v. DHUNBAI (1891), 1 L. R. 16 Bom. 1.—IND.

457 i. Whether lien or charging order on property conveyed necessary.]—The recording of a certificate of a judgment gives the judgment creditor such a lien upon the land of the debtor as to enable him without having issued an execution to proceed in Ch. to set

Sect. 5.—Avoidance: Sub-sect. 2, D. (a) &

creditor of a living debtor to set aside a fraudulent conveyance under 13 Eliz. c. 5, it is not necessary that the creditor should have any lien or charging order on the property comprised in the conveyance; but in the absence of such lien the ct. will not apply the property in satisfaction of the creditor's claim.—**REESE RIVER SILVER MINING CO. v. ATWELL** (1869), L. R. 7 Eq. 347; 20 L. T. 163; 17 W. R. 601.

(b) Whether Existing or Subsequent Creditors.**458. Where settlor not indebted at date of deed.]**

—**WALKER v. BURROWS**, No. 277, *ante*.

459. — No intention to defraud.] — HOLLOWAY v. MILLARD, No. 235, *ante*.**460. — — —.] — BATTERSBEE v. FARRINGTON**, No. 280, *ante*.**461. — Intention to defraud — Settlement with a view to entering on hazardous trade.] — MACKAY v. DOUGLAS**, No. 283, *ante*.**462. — —.] — Re LANE-FOX, Ex p. GIMBLETT**, No. 287, *ante*.**463. Settlor solvent at date of deed — Intention to defraud.] — RICHARDSON v. SMALLWOOD**, No. 303, *ante*.**464. — —.] — GUGEN v. SAMPSON**, No. 186, *ante*.**465. Settlor indebted at date of deed.] — MONTAGUE v. SANDWICH (LORD)** (1797), cited in 12 Ves. at p. 148; 33 E. R. 61, n.

Annotation:—**Folld. Kidney v. Coussmaker** (1806), 12 Ves. 136.

466. — But not insolvent.] — To impeach a settlement after marriage under 13 Eliz. c. 5, the husband must be proved to have been indebted at the time, & to the extent of insolvency. The creditor not producing any evidence, his bill was

dismissed, with liberty to file another.—**LUSH v. WILKINSON** (1800), 5 Ves. 384; 31 E. R. 642.

Annotations:—**Consd. Kidney v. Coussmaker** (1806), 12 Ves. 136; **Holloway v. Millard** (1816), 1 Madd. 414. **Refd. Glaister v. Hower** (1802), 8 Ves. 195; **Skarf v. Soulbey** (1849), 1 Mac. & G. 364; **Beavan v. Oxford** (1856), 6 De G. M. & G. 507; **Ware v. Gardner** (1869), 17 W. R. 439.

467. — —.] — Settlement after marriage fraudulent only as against creditors at that time. The settlement coming out in the answer to a bill by creditors, claiming under a devise for debts, they are entitled to inquiry:—KIDNEY v. COUSSMAKER, WILLIAMS v. COUSSMAKER, WILLIAMS v. KIDNEY (1806), 12 Ves. 136; 33 E. R. 53.

Annotations:—**Consd. Holloway v. Millard** (1816), 1 Madd. 414. **Refd. Gibbs v. Ogler** (1806), 12 Ves. 413; **Skarf v. Soulbey** (1849), 1 Mac. & G. 364. **Mentd. Judd v. Pratt** (1808), 15 Ves. 390.

468. — Debts remaining unpaid.] — JENKYN v. VAUGHAN, No. 411, *ante*.

469. — No evidence of fraudulent intention.] — In 1842 testator executed a voluntary bond, payable after his death, & in 1850, he made a voluntary settlement in favour of other parties. His assets proved insufficient to pay the bond:—Held: (1) there was not sufficient ground for holding that the deed was fraudulent as against the bond creditors; (2) the onus of proving the deed to be fraudulent attached to the obligees of the bond.—DENING v. WARE (1856), 22 Beav. 184; 4 W. R. 523; 52 E. R. 1078.

470. Settlor undischarged bankrupt—Settlement of after-acquired property.] — In the year 1840 B. was adjudged bkpt., & assignees were appointed, but his final examination was adjourned *sine die*, & he never obtained his certificate. In 1849 B. became entitled to certain leasehold property under a grant from the Crown, dated in that year, & in the following year he executed an assignment of this property to trustees upon certain voluntary trusts in favour of his two daughters, who were then unmarried, & their respective

aside a prior fraudulent conveyance of the land.—**CALDWELL v. KINSMAN** (1847), 2 N. S. R. (James), 398.—CAN.

k. — Mortgage—Insufficiency of security.] — Mortgagees of land are not, merely by reason of their position as such, creditors of the mtgor. within 13 Eliz. c. 5, nor is the mtgo. debt a debt within that statute, unless it is shown that the mtgo. security at the time of the alleged fraudulent conveyance was of less value than the amount of the loan.—CROMBIE v. YOUNG (1894), 26 O. R. 191.—CAN.

l. — — —.] — A mtgee. whose mtgo. appears to be sufficient to realise his claim is not a creditor within the meaning of 13 Eliz. c. 5.—DAVIES v. DANDY, [1920] 2 W. W. R. 126; 30 Man. L. R. 306; 53 D. L. R. 134.—CAN.

m. — — —.] — DAVIS v. CAVERS, [1923] 1 D. L. R. 883; 1 W. W. R. 274.—CAN.

n. Action by creditors—Right to continue after assignment.] — An action begun by creditors of an insolvent to set aside a transaction in fraud of creditors, before an assignment by the insolvent for the benefit of creditors under R. S. O. 1887, c. 124, can be prosecuted by the creditors after an assignment has been made, for the assignment has not the effect of transferring the existing cause of action to the assignee.—GAGE v. (1891), 14 P. R. 126.—CAN.

o. Local rule—Canada, *van.*] — By the law of Saskatchewan, a transfer made in fraud of creditors is void as against creditors; & all creditors, no matter where resident, are entitled to the benefit of that law.—MINOR GROCERY CO. v. DUTCH (1913), 23 W. L. R. 270; 3 W. W. R. 904; 10 D. L. R. 126; 6 Sask. L. R. 44.—CAN.

p. — — —.] — Stat. Eliz. is not in force in Saskatchewan. A person having only a claim for damages for tort is not a creditor within the meaning of Fraudulent Preferences Act, R. S. S., 1920, c. 204.—HUS v. LAKIN, [1924] 3 W. W. R. 841; [1925] 1 D. L. R. 38.—CAN.

PART I. SECT. 5, SUB-SECT. 2.—D. (b).

q. General rule.] — 13 Eliz. c. 5, & Fraudulent Conveyances Act, R. S. O. 1914, c. 105, s. 1, being for the protection of creditors & others, it is not necessary that pltf. in an action to set aside a conveyance as fraudulent shall be a creditor at the time the action is brought.—HOPKINSON v. WESTERMAN (1919), 45 O. L. R. 208; 16 O. W. N. 5.—CAN.

459 l. Where settlor not indebted at date of deed—No intention to defraud.] — When deft. incurred the liability for C., he was in affluent circumstances, & continued to be so for a year after the conveyance impeached, after which period the liability to pltf. was incurred:

—Held: pltf. was not, in respect of his own claim, in a position to impeach the conveyance, & could not be in a better position than the prior creditors, who clearly could not have avoided the transaction, the settlement having been made when the settlor in a pecuniary point of view was well able to make it.—VINDIN v. FRASER (1881), 28 Gr. 502.—CAN.

r. Settlor indebted at date of deed—Evidence of fraudulent intention.] — A. being largely indebted to B. & Co. & the owner in fee of certain real estate, conveyed the same to his son, without consideration. B. & Co. recovered judgment against A., & issued execution against his lands in May, 1864, but in Feb. previous the son had conveyed the premises to D., taking for the purchase money his promissory notes not yet due & still unpaid. Evidence establishing collusion between A., his son, & D., was adduced:—Held: both the conveyances were fraudulent, & the lands held subject to B. & Co.'s judgment debt.—BUCHANAN v. DINGLEY (1865), 11 Gr. 132.—CAN.

s. — — —.] — Where a person had feloniously possessed himself of certain securities, & invested a portion of the money realised in the purchase of real estate, the conveyance of which he procured to be made to his wife, in order to its being preserved in the event of proceedings being taken by the party robbed:—Held: the conveyance was void as

children, & of certain of his sons also. Afterwards both of the daughters married, & one of them had children, & all these parties were debtors to this suit. After the date of the bankruptcy B. became indebted, as a simple contract debtor, to plaintiff, who now filed this bill on behalf of himself & all the other subsequent unsatisfied creditors of B., for the purpose of setting aside the settlement of 1850, & rendering the leasehold estate available for their payment, & he made the official assignees & creditors debtors in his suit:—*Held*: even assuming all plaintiff's allegations upon this bill to be true, there was no ground whatever upon which plaintiff could sue the parties claiming under the settlement.—*COLLINS v. BURTON* (1859), 4 De G. & J. 612; 28 L. J. Ch. 943; 34 L. T. O. S. 57; 5 Jur. N. S. 1113; 7 W. R. 689; 45 E. R. 238, L. JJ.

471. Settlor insolvent at date of deed.]—A trader, doing business to the amount of £100,000 *per annum*, executed two voluntary settlements in favour of his wife, the first being two years & the second one year before his death. By the first he settled two policies of assurance, each for £1,000; by the second he settled his furniture, worth about £1,000. An inquiry into the state of his affairs having been directed, it was found that at the date of the first settlement his debts would have exceeded his assets by £1,293, & at the date of his second settlement his debts were £10,726 over his assets. A bill was filed by a creditor whose debt was contracted after the first but before the second settlement, to set aside both deeds. No debt was proved to exist which had been contracted at the date of the first settlement:—*Held*: as settlor's debts exceeded his assets when both deeds were executed, he was then insolvent, & the deeds must be declared fraudulent & void as against plaintiff & his other creditors.—*TAYLOR v. COENEN* (1876), 1 Ch. D. 636; 34 L. T. 18.

:—*Consd. Re Butterworth, Ex p. Russell* (1882), 19 Ch. D. 588. *Reid. Re Mouat, Kingston Cotton Mills Co. v. Mouat*, [1899] 1 Ch. 831.

472. Settlement rendering settlor insolvent — Debts remaining unpaid.]—*FREEMAN v. POPE*, No. 301, *ante*.

473. Settlement an act of bankruptcy.]—A deed for the transfer of a trader's property is not void as against future creditors, although the execution

of it be an act of bankruptcy, under 6 Geo. 4, c. 16, s. 3.—*OSWALD v. THOMPSON* (1848), 2 Exch. 215; 7 L. J. Ex. 234; 154 E. R. 470.

Annotation:—*Reid. Partridge & Cross v. Johnston & Smith* (1848), 12 L. T. O. S. 153.

474. Creditor at date of deed—Amount of prior debt paid—But balance of indebtedness increased.]—A. made a voluntary assignment of a sum of money, being at the time indebted to B. on balance of a running account. A. afterwards made payments to B., exceeding in amount the balance due at the date of the assignment; but the balance continually increased. The assignment was set aside at the suit of B.—*WHITTINGTON v. JENNINGS* (1834), 6 Sim. 493; 3 L. J. Ch. 157; 58 E. R. 679.

475. Subsequent creditor — Judgment debts.]—*TARBACK v. MARBURY*, No. 82, *ante*.

476. — Bond debts.]—A voluntary conveyance is bad against bond debts contracted afterwards, in a court of equity.—*ST. AMAND v. JERSEY (COUNTESS DOWAGER)* (1717), 1 Com. 255; 92 E. R. 1059.

477. —.]—*PROCTOR v. WARREN*, No. 124, *ante*.

478. — In respect of breach of covenant prior to deed.]—*RICHARDSON v. SMALLWOOD*, No. 303, *ante*.

479. — If actually delayed.]—*GRAHAM v. FURBER*, No. 336, *ante*.

480. — Possible benefit to settlor.]—*HOLMES v. PENNEY*, No. 158, *ante*.

481. — Intention to defraud.]—*BAILING v.* No. 399, *ante*.

482. —.]—If the debt of a creditor by whom a voluntary settlement is impeached existed at the date of the settlement, & the remedy of the creditor is defeated or delayed by the existence of the settlement, the fact that the settlor retained sufficient money to pay all the debts owing by him at the time of making the settlement will not take the case out of the operation of 13 Eliz. c. 5.

But where the voluntary settlement is impeached by subsequent creditors, it is necessary for them to show, either that it was made with express

against creditors, under 13 Eliz. c. 5.—*REID v. KENNEDY* (1874), 21 Gr. 86.—*CAN.*

471 i. Settlor insolvent at date of deed.]—Interpleader issue directed to try the question of 1,300 shares in the R. Co., standing at the time of seizure in the name of W. against who debtors had recovered judgment & issued execution under which sheriff seized. Plaintiff claimed the shares under an assignment from W.:—*Held*: from the evidence it was clear that when W. executed the agreement to plaintiff he had no other assets with which to pay the bank's claim against him & was therefore insolvent; & the assignment was void as against the bank under Assignments Act, ss. 38 to 42.—*POTTS v. IMPERIAL BANK OF CANADA* (1908), 8 W. L. R. 583.—*CAN.*

477 i. Subsequent creditor.]—In Apr. 1859, M. made a voluntary conveyance of shares in a ship to his son. In Mar. 1860, the sheriff, under a *ven. ex.* against M., sold to S. The son on Mar. 24, 1863, confirmed this title by a voluntary deed to S., who

on the same day conveyed to plaintiff. S. had in Dec. 1861, intred. to one T., who on Mar. 28, 1863, assigned to plaintiff. All these conveyances were duly registered at the custom house:—*Held*: debt., who was not a creditor of M. until long after the deed to his son, was not in a position to impeach plaintiff's title.—*VINDIN v. WALLIS* (1864), 24 U. C. R. 9.—*CAN.*

t. — No evidence of fraudulent intent.]—Debt. B., carrying on a thriving business, & possessed of personal property of about \$1,000, his debts not exceeding half that sum, in 1876 bought some land which he had conveyed to his wife, who had been instrumental in increasing the earnings of her husband. All debts due by B. at the time of the settlement had been paid before the institution of this suit by plaintiff, whose debt had accrued after this conveyance:—*Held*: plaintiff was not in a position to impeach the conveyance, as it had not been made with a view of placing the property beyond the reach of future creditors.—*COLLARD v. BENNETT* (1881), 28 Gr. 556.—*CAN.*

a. —.]—*REAL ESTATE LOAN CO. OF CANADA v. YORKVILLE & VAUGHAN ROAD CO.* (1885), 9 O. R. 464.—*CAN.*

b. —.]—Where a debt for which judgment was recovered was incurred more than a year after the gift from debtor to his wife, & it was not shown that the property conveyed constituted the whole or even a substantial part of the property owned by debtor at the time, the conveyance should not be held to be fraudulent.—*CANADA SUPPLY CO. v. ROBB* (1910), 20 Man. L. R. 33.—*CAN.*

c. —.]—In the absence of any express intention to defraud, a voluntary deed will not be set aside at the instance of a creditor whose debt comes into existence after its date, if all creditors existing at the date of the deed have been paid off.—*Re KELLEHER*, [1911] 2 I. R. 1.—*IR.*

d. — Evidence of fraudulent intent.]—A. being embarrassed made a deed of land to his son in 1864, in alleged pursuance of a prior ment, but he remained in

Sect. 5.—Avoidance: Sub-sect. 2, D. (b) & (c), E., F. & G.; sub-sect. 3.]

intent to "delay, hinder or defraud creditors," or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts.—**SPIRETT v. WILLOWS** (1865), 3 De G. J. & Sm. 293; 5 New Rep. 255; 34 L. J. Ch. 365; 11 L. T. 614; 11 Jur. N. S. 70; 13 W. R. 329; 46 E. R. 649, L. C.

Annotations:—**Consd.** **Freeman v. Pope** (1870), 5 Ch. App. 538; **Sedgwick v. Place** (1871), 25 L. T. 307; **Re Lano-Fox, Ex p. Gimblett**, [1900] 2 Q. B. 508. **Reid**. **Smith v. Cherrill** (1867), L. R. 4 Eq. 390; **Re Bamford, Ex p. Games** (1879), 12 Ch. D. 314; **Re Johnson, Golden v. Gillam** (1881), 20 Ch. D. 389; **Glegg v. Bromley** (1911), 81 L. J. K. B. 334.

483. — Successful action brought after settlement—Tort committed before settlement.] —**CROSSLEY v. ELWORTHY**, No. 274, *ante*.

484. Secured creditor—Equitable mortgagee.] —**LISTER v. TURNER**, No. 711, *post*.

& kept the deed in his own hands, unregistered for fifteen months; there were other circumstances against the good faith of the transaction:—**Held**: the deed was void as against subsequent creditors, the prior creditors having been paid.—**STEVENSON v. FRANKLIN** (1869), 16 Gr. 139.—**CAN.**

e. — Prior debt barred.] —A subsequent creditor cannot uphold an action to set aside a voluntary conveyance under 13 Eliz. c. 5, merely on the ground that a debt of prior date to the conveyance is still unpaid, if such prior debt has become barred by lapse of time.—**STRUTHERS v. GLENNIE** (1887), 14 O. R. 726.—**CAN.**

PART I. SECT. 5, SUB-SECT. 2.—
D. (c).

1. (General rule.) —A judgment creditor cannot before issuing execution at law maintain a suit to impeach a conveyance by the judgment debtor as fraudulent under 13 Eliz. c. 5.—**YANDELL v. HECTOR** (1867), 4 W. W. & A.B. 1.—**AUS.**

g. —.—The fact that a simple contract creditor has sued out a writ of attachment against an absconding debtor does not afford any ground for coming to the Ct. of Ch. to have a conveyance alleged to be fraudulent as against the creditors of the debtor set aside. Before the Ct. can be called upon to do so, the creditor must establish his right to recover at law.—**WHITING v. LAWBRASON** (1859), 7 Gr. 603.—**CAN.**

h. —.—In a suit by a judgment creditor to set aside a fraudulent settlement, & to realise his judgment, praying a sale of the property on default in payment, if the sale prove abortive:—**Seem**: the usual order for redemption, or in default foreclosure, will be granted; at all events it would be so if the judgment debt was subject to a prior mtge. which the judgment creditor would be entitled to redeem.—**COMMERCIAL BANK OF CANADA v. COOKE** (circa 1860), 1 Ch. Ch. 203.—**CAN.**

k. —.—A second mtgee., as such, cannot impeach a prior registered mtge. as fraudulent & void against creditors, but a judgment creditor, having accepted a mtge., does not lose his rights as a judgment creditor.—**WARREN v. TAYLOR** (1862), 9 Gr. 59; 8 C. L. J. O. S. 243.—**CAN.**

l. —.—A judgment creditor, although entitled to priority over others, may file a bill on behalf of himself & others, to have a deed declared fraudulent against creditors.

Indebtedness of grantor—As evidence of fraudulent intent.]—See Sect. 4, sub-sect. 5, *ante*.

(c) Judgment Creditors.

485. Only if for bona fide debt — Judgment by confession.] —Goods were taken in execution in the possession of S. who had them by virtue of a sale from G. upon which S. brought an action. Deft. insisted that the sale to S. was fraudulent against him, he being a creditor by judgment.

If the judgment was upon a point tried, then he need not prove the consideration, but it shall be intended good; but if it be a judgment by confession, he ought to prove it to be for a just debt, otherwise he shall not overthrow the sale, though it be fraudulent; for it is good against all but creditors for a just debt *bona fide* due (**HOLT, C.J.**).—**SANDERS v. —** (1694), Holt, K. B. 327; Skin. 586; 90 E. R. 1081.

—**WESTERN CANADA LOAN & SAVINGS Co. v. SNOW** (1890), 6 Man. L. R. 606.—**CAN.**

m. —.—One who has a right of action for tort & subsequently recovers judgment is not a creditor within Assignments & Preferences Act, so as to be in a position to attack under that Act a transaction entered into by the tortfeasor before the action was commenced.—**ASHLEY v. BROWN** (1890), 17 A. R. 500.—**CAN.**

485 i. Only if bona fide debt—Judgment by confession.] —When it is not clearly shown that a person in whose favour a judgment as confessed is a *bona fide* creditor for a certain sum, the judgment will not be sustained against a subsequent creditor.—**SHERATON v. SHERATON** (1886), 25 N. B. R. 534.—**CAN.**

n. In garnishee proceedings.] —A judgment debtor, having a supposed interest as tenant by curtesy in land, which was not & never had been claimed by him, joined in a conveyance thereof by his daughter to a purchaser, reciting that he was entitled to that estate. A judgment creditor attempted to garnish the purchase money in the hands of the solr. who acted for the daughter, the latter claiming the whole of the purchase money, while the judgment debtor now expressly disclaimed any interest therein, having joined in the conveyance at the instance of the solr. for the purchaser, who was also the solr. for the judgment creditor:—**Held**: the money in the hands of the daughter's solr. could not be garnished by the judgment creditor.—**PALMER v. LOVETT** (1892), 14 P. R. 415.—**CAN.**

o. —.—**DONOHUE v. HULL & Co.** (1895), 24 S. C. R. 683.—**CAN.**

p. Conveyance absolute in form—(Creditor allowed to redeem.) —A debtor conveyed his land in fee for a sum greatly below its value, but continued in possession without paying rent. The heir of his vendee several years afterwards sold & conveyed the land, the sale having been brought about & managed by the debtor, & the purchaser was shown to have had notice of the indebtedness & other material circumstances. A creditor afterwards sued out an execution against the lands of the debtor, under which his interest in this property was sold for 5s. to the execution creditor, who filed a bill to set aside the sale by the original owner, & have himself declared the owner of the land. The Ct. refused this, but gave him a right to redeem by virtue of his judgment.—**WILSON v. SHIER** (1858), 6 Gr. 630.—**CAN.**

q. Judgment on acknowledgment—Voluntary settlement—Priorities.] —Where a debt, the remedy for which is barred by Stat. Lim., is acknowledged by the debtor & judgment is recovered therefor, a voluntary settlement made before such acknowledgment, & before the remedy was barred, is void as against a *fi. fa.* issued on the judgment.—**IRWIN v. FREEMAN** (1867), 13 Gr. 465.—**CAN.**

r. Transfer to son — To avoid father's creditors.] —J. contracted to purchase from M. on credit a wood lot, 32, & to secure the price, £400, the purchaser's father gave a mtge. on his farm: this mtge. not being paid, was foreclosed. Shortly afterwards, M. being still willing to receive his money, J. sold lot 32 for £300, which sum went to M.; part of the remaining £100 was satisfied by delivering to M. a pair of horses raised on the farm, valued at £62 10s.; & W., another son of the owner, agreed to pay the balance, £37 10s. The farm, by arrangement between all the parties, was conveyed to W., who was not more than twenty-one years old, if so much:—**Held**: these transactions were, as respects the father & sons, a mere roundabout way of securing the farm from the creditors of the father, & the farm was ordered to be sold to pay *pltf.*, an execution creditor of the father.—**MCDONALD v. McLEAN** (1869), 16 Gr. 665.—**CAN.**

s. Effect of registration of judgment—On subsequent conveyance by debtor.] —The registration of a certificate of judgment binds & charges the land of the judgment debtor, though it may be his actual residence or home, & the creditor may take proceedings to realise whenever the debt ceases to be entitled to claim the property as his exemption. In such circumstances, when the debtor has made a conveyance of his home, which is fraudulent against creditors under 13 Eliz. c. 5, the creditor is entitled to an immediate order for sale of the property to realise the amount of the judgment & costs.—**ROBERTS v. HARTLEY** (1902), 14 Man. L. R. 284; 22 C. L. T. Occ. N. 185; 23 C. L. T. Occ. N. 53.—**CAN.**

t. —.—Deft. conveyed land to her son without consideration because she thought she might thereby prevent the sale of the land to realise *pltf.*'s claim, & both she & her son admitted that fact in this action, & that the property was the mother's. *Pltf.* sought a declaration that the land belonged to the mother & that the son held it only as trustee for her & asked a sale of the land to satisfy the lien of his registered judgment:—**Held**: *pltf.*

486. In garnishee proceedings—Whether in same position as judgment creditor.]—EDMUNDS v. EDMUNDS, No. 3, *ante*.

487. ———.]—GLEGG v. BROMLEY, No. 133, *ante*.

E. The Sheriff.

488. General rule.]—TURVIL v. TIPPER (1625), Lat. 222 ; 82 E. R. 356.

Annotations:—*Reid*. Imray v. Magnay (1843), 11 M. & W. 267. *Mentd.* Tyler v. Leeds (1817), 2 Stark. 218.

489. Subsequent execution *bonâ fide*.]—PAGET v. PERCHARD, No. 371, *ante*.

490. Second execution—First execution not proceeded with.]—In Mar., the then sheriffs of London seized the goods of debtor by virtue of a *fi. fa.* An officer was put in possession of the goods; but the execution creditor directed the sheriffs not to sell, & debtor continued to have the control of his goods until Nov., when another execution creditor sued out a *fi. fa.*, directed to the succeeding sheriffs of London:—*Held*: the latter were bound to levy under this second *fi. fa.*, & it was their duty, when they found the officer of the former sheriffs in possession, to inquire into the facts; & if they had done so, they would have learned that the first execution was fraudulent.—LOVICK v. CROWDER (1828), 8 B. & C. 132 ; 2 Man. & Ry. K. B. 84 ; 6 L. J. O. S. K. B. 263 ; 108 E. R. 992.

Annotation:—*Reid*. Imray v. Magnay (1843), 11 M. & W. 267.

491. ——— First execution fraudulent.]—IMRAY v. MAGNAY, No. 27, *ante*.

492. Duty of sheriff to prove authority.]—GLAVE v. WENTWORTH (1842), 6 Q. B. 173, n. ; 115 E. R. 67.

Annotations:—*Consd.* White v. Morris (1852), 11 C. B. 1015. *Mentd.* McMahon v. Lennard (1858), 6 H. L. Cas. 970.

493. ———.]—BESSEY v. WINDHAM, No. 436, *ante*.

See, generally, SHERIFFS & BAILIFFS.

was entitled to the declaration asked for, but not to a sale, as the property was exempt, it being the actual residence & home of the judgment debtor, & not worth more than \$1,500.—LOGAN v. REA (1903), 14 Man. L. R. 543 ; 24 C. L. T. Occ. N. 30.—CAN.

a. Scope of rules—Canada.]—Con. rule 1008, notwithstanding the heading Summary Inquiries into Fraudulent Conveyances, is not limited to cases of equitable interest arising under fraudulent conveyances, but applies to a case where a judgment creditor is seeking to make available the interest of his debtor under an agreement for the purchase of land.—PETERS v. STONESS (1889), 13 P. R. 235.—CAN.

b. ——— Ontario.]—A *pltf.* suing for a tort is not a creditor within the meaning of the Ontario statutes as to preferences.—GURORSKI v. HARRIS (1896), 27 O. R. 201 ; *affd.* 23 A. R. 717.—CAN.

c. ———.]—Where *pltf.*'s judgment was in Ontario:—*Held*: a transfer of assets in Alberta could not be taken to be made with the intention of defeating her execution & defrauding her; as the Ontario statutes have no such extra-territorial effect as to invalidate a transaction outside of the Province; & even if the transaction in Alberta would have

been void if it had taken place in Ontario, this did not confer a cause of action upon *pltf.*, either as execution creditor or suing on behalf of herself & all other creditors justifying a recovery against the donee.—PERRY v. PERRY, [1924] 4 D. L. R. 1177 ; 54 O. L. R. 613.—CAN.

PART I. SECT. 5, SUB-SECT. 2.—E.

492 i. Duty of sheriff to prove authority.]—In trespass against a sheriff for seizing *pltf.*'s goods under an attachment issued under Absconding Debtors Act against the goods of a third party, by whom they had been sold to *pltf.* before the attachment:—*Held*: to support a defence that the sale was fraudulent & void against creditors under 13 Eliz. c. 5, the sheriff must prove that a debt had been due from the absconding debtor to the attaching creditor.—(GRANT v. McLEAN (1834), 3 O. S. 443.—CAN.

PART I. SECT. 5, SUB-SECT. 2.—G.

d. Reconveyance by voluntary grantee—Evidence of fraudulent intent.]—Deft. having entered into a business partnership, at the instigation of his wife conveyed certain land to her to prevent its becoming liable to creditors of the new firm. He, then, as agent of his wife, placed the property in the hands of *pltf.*, a land agent, to or exchange, & through him an

F. Trustees in Bankruptcy.

494. General rule.]—A conveyance of lands which is fraudulent & void against the creditors of the conveying party, within 13 Eliz. c. 5, is void also as against his assignee on his insolvency, who represents the creditors; & the assignee may recover back the lands in ejectment.—DODD. GRIMSBY v. BALL (1843), 11 M. & W. 531 ; 12 L. J. Ex. 328 ; 1 L. T. O. S. 148 ; 152 E. R. 916.

Annotations:—*Reid*. Holmes v. Penney (1856), 3 K. & J. 90. *Mentd.* Billiter v. Young (1856), 6 E. & B. 1.

See, also, Nos. 250, 290, 456, *ante*; & generally, BANKRUPTCY, Vol. V., pp. 837 *et seq.*

G. Creditors under Voluntary

495. Instrument under seal—Bond creditor.]—A creditor under a voluntary post-obit bond is as much entitled to the benefit of 13 Eliz. c. 5, as any other creditor.

Testator, having executed a voluntary post-obit bond for securing an annuity of £100 to his daughter-in-law for her life, afterwards made a voluntary settlement, from & after his decease, in favour of his widow & child, comprising all his property, except about £300, & before his death acquired only about £1,000 more:—*Held*: the settlement was void under the statute as against the bond creditor.

The costs of the suit to have priority over the trustees' costs & testator's debts.—ADAMES v. HALLETT (1868), L. R. 6 Eq. 468 ; 18 L. T. 789.

Annotations:—*Reid*. *Re* Mouat, Kingston Cotton Mills Co. v. Mouat, [1899] 1 Ch. 831. *Mentd.* *Re* Hamilton, Trench v. Hamilton (1895), 64 L. J. Ch. 365.

496. ——— Onus of proof of fraudulent intent.]—DENING v. WARE, No. 469, *ante*.

SUB-SECT. 3.—EFFECT OF RELEASES AND ACQUIESCENCE.

497. Acquiescence.]—STEEL v. BROWN & PARRY, No. 328, *ante*.

agreement for exchange was arranged. *Pltf.* sued the wife for his commission, & recovered a verdict against her, but while the action was pending she reconveyed the land to her husband. There was no consideration for any of these conveyances. In an action to set aside the reconveyance as fraudulent & void against the creditors of the wife:—*Held*: the wife had an interest in the property which could be made available to her creditors for the payment of her debts, & the conveyance from her was made with intent to defeat, delay, & prejudice her creditors, & as the evidence showed she was unable to pay her debts in full, it fell within 48 Vict. c. 26, s. 2 (O), & was void.—JOHNSON v. CLINE (1884), 16 O. R. 129.—CAN.

PART I. SECT. 5, SUB-SECT. 3.

497 i. Acquiescence.]—The owner of an equitable interest in lands under a contract of purchase, conveyed his interest to *pltf.*, his brother-in-law, & subsequently while in possession of the land assigned the contract to third parties in consideration of their giving him a lease of the premises. A lease was subsequently executed in the presence of & witnessed by *pltf.* *Pltf.* some time afterwards filed a bill impeaching the assignment & lease as fraudulent:—*Held*: the bill dismissed

Sect. 5.—Avoidance: Sub-sect. 3. Sect. 6: sect. 1.]

498. ———.]—OLLIVER v. KING, No. 449, ante.

499. ——— Whether mere delay a bar.]—Mere delay in applying to set aside a creditors' deed for fraud is in itself no ground for refusing such an application, if the position of the parties be not altered.—*Re PULLEN, Ex p. WILLIAMS* (1870), L. R. 10 Eq. 57; 39 L. J. Bcy. 1; 18 W. R. 406.

Annotation:—*Mentd. Re Harper, Ex p. Linsley* (1873), 42 L. J. Bcy. 109.

500. ———.]—A specialty creditor brought an action to set aside a conveyance as fraudulent under 13 Eliz. c. 5, nearly ten years after the death of the grantor. Pltf. had been aware of the facts during the whole of that period, & gave no satisfactory reason for his delay:—*Held*: as pltf. was coming to enforce a legal right his mere delay to take proceedings was no defence, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside on equitable grounds a deed which was valid at law.—*Re MADDEVER, THREE TOWNS BANKING Co. v. MADDEVER* (1884), 27 Ch. D. 523; 53 L. J. Ch. 998; 52 L. T. 35; 33 W. R. 286, C. A.

Annotations:—*Reid. Re Mouatt, Kingston Cotton Mills Co. v. Mouatt* (1899), 68 L. J. Ch. 390; *Edmunds v.*

with costs.—*DAVISON v. WELLS* (1868), 15 Gr. 89.—**CAN.**

497 II. ———.]—M. being indebted to J. in Jan. 1859, executed a settlement of lands in favour of his family, reserving to himself a life estate. M. subsequently became further indebted to J. In Mar. 1861, J. having been informed of this settlement, procured a copy of it. In Nov. 1862, J. proceeded to register two judgments against the lands put in settlement, & in the affidavits stated that M. was tenant for life. In a cause petition J. also stated that M. was tenant for life. M. admitted to J. that the object of the settlement was to protect the lands from any debt. In 1867 M. died. J. filed a bill to impeach the settlement as fraudulent & void:—*Held*: J. must be taken to have been an assenting party to the provisions of the settlement, & the bill, so far as it sought to impeach it, should be dismissed.—*JACKSON v. M'CREA* (1872), 6 L. L. T. 131.—**IR.**

e. ——— By wife—Husband acting as agent.]—A husband in 1862, settled property on his wife to her separate use without power of anticipation, but continued to deal with it as his own, though as she alleged as her agent. Out of the produce of this land, other land was purchased in the name of the wife in Oct. 1883; & the husband two months later became insolvent. On suit by his assignee against his wife to have her declared a trustee for the assignee of the land in her name:—*Held*: the wife's assent to such a course of dealing by her husband with the first mentioned land disentitled her from claiming the money against her husband's estate; & the transfer of Oct. 1883 should enure to the assignee's benefit.—*HASKER v. SUMMERS* (1884), 10 V. L. R. 201.—**AUS.**

f. ——— Subsequent creditor.]—Where A. impeached a conveyance of land to M., wife of K., on the ground that the land was really bought with K.'s money, & was bought & conveyed to M. at K.'s direction, with the intent of delaying & hindering pltf. & other creditors of K., & no fraudulent intent was proved, & it appeared that pltf. himself was consulted with regard to

the matter, & knowing all the circumstances of K.'s financial position, expressed his approval of what was done; & pltf. was not then a creditor of K., but only became so subsequently by indorsing & paying a promissory note for a liability incurred by K. prior to the impeached conveyance:—*Held*: in these circumstances pltf. could not have the deed set aside as a fraud upon him.—*FERGUSON v. FERGUSON* (1881), 9 O. R. 218.—**CAN.**

g. ——— Where benefits accepted from voidable estate.]—When a person having power to avoid a voidable estate, & to hold by a prior legal title, has derived benefits under the deed creating the voidable estate, & then enters his entry will, in the absence of positive evidence, he deemed an act of confirmation, rather than avoidance.—*MASSEY v. BATWELL* (1843), 5 L. Eq. R. 382; 4 Dr. & War. 56.—**IR.**

h. Release—By parties executing assignment.]—Assignments held fraudulent before 22 Vict. c. 96, s. 19, C. S. U. C. c. 26, s. 18, for exacting a release in full from those executing.—*McDONALD v. PUTNAM* (1859), 7 Gr. 395.—**CAN.**

k. ———.]—Where a release in an instrument is absolute, the non-payment of an instalment does not revert the parties back to their original position, & the validity of the original assignment is not in question.—*BENEDICT v. RUTHERFORD* (1861), 11 C. P. 213.—**CAN.**

l. ———.]—Where there are joint & separate creditors, a deed of composition & discharge, although providing for all the creditors & dealing with all the estates, is invalid under Act of 1875, s. 56, unless the assent of the requisite proportion of the creditors of each class, joint & separate, is obtained.—*Re CODE & CRAIN* (1879), 3 A. R. 555.—**CAN.**

m. ———.]—A. conveyed property in trust for the benefit of his creditors, preferring *inter alia* R. & his wife. By the terms of the deed the creditors who signed it released A. from all claims & demands up to that date, & R. signed the deed. R. subsequently commenced an action against

Edmunds, [1904] P. 362; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334. *Mentd. Re Gorton, Dowse v. Gorton* (1889), 60 L. T. 305.

See, generally, ESTOPPEL, Vol. XXI., pp. 136 et seq.

501. Release—In inspectorship deed—Property conveyed not disclosed.]—*MACKAY v. DOUGLAS*, No. 283, ante.

SECT. 6.—REMEDIES AND PRACTICE.

SUB-SECT. 1.—REMEDIES.

See, now, Law of Property Act, 1925 (c. 20), s. 172.

502. Whether mesne profits allowed.]—This ct. only removes fraudulent conveyances out of the way, but will not decree profits back against the original debtor & owner of the estate, received *pendente lite*, in favour of judgment creditors, from the filing of the bill.—*HIGGINS v. YORK BUILDINGS Co.* (1740), 2 Atk. 107; 26 E. R. 467, L. C.

Annotation:—*Reid. Blenkinsopp v. Blenkinsopp* (1852), 1 De G. M. & G. 495.

503. Whether property conveyed applied to creditor's claim.]—*REESE RIVER SILVER MINING Co. v. ATWELL*, No. 457, ante.

A., & recovered a judgment by default for the amounts directed to be paid by the trust deed. On an application by a subsequent judgment creditor of A. to set aside this judgment as fraudulent:—*Held*: R. having released A. by the trust deed from all debts, there was no consideration to support the judgment as to his claim.—*SHERATON v. SHERATON* (1886), 25 N. B. R. 544.—**CAN.**

n. ——— Of a mortgage—Without consideration.]—Where the interest of a mtgce. is of a nature to bring it within Stat. Eliz., if it can be seized under C. L. P. Act, or can be compulsorily applied to the payment of debts:—*Held*: a discharge of it without consideration is a gift or alienation within the prior statute, & the mtgce. would be seizable had it not been discharged.—*BANK OF UPPER CANADA v. SHICKLUNA* (1863), 10 Gr. 157.—**CAN.**

o. ——— Of one of two joint debtors.]—Where one of two joint debtors is released from liability by a document in its terms absolute, there being nothing in the document itself, or in the circumstances to show that the creditor's rights against the other joint debtor are reserved; the effect is, that both debtors are relieved from liability.—*HIP ON INSURANCE EXCHANGE & LOAN Co., LTD. & HONG KONG & MANILA YUAN SHENG EXCHANGE & TRADING Co., LTD. v. LI PO YUNG, LI PO KAM KWOK YIK TING v. LI PO YUNG & LI PO KAM* (1909), 4 Hong Kong L. R. 190.—**HONG KONG.**

p. ———.]—A person claiming under a dissecisor may obtain a release from the dissecisor, notwithstanding he has previously executed what purported to be a conveyance in fee to a third person, void for fraud as well as for want of interest in the grantor.—*WHITLA v. M'INTOSH* (1814), 2 O. S. 10.—**CAN.**

PART I. SECT. 6, SUB-SECT. 1.

502 i. Whether mesne profits allowed.]—*BLACKWOOD v. GREGG* (1833), Haynes & Jo. 310.—**IR.**

503 i. Whether property conveyed applied to creditor's claim.]—An owner of land, subject to mtgce. created by himself & his wife, being in insolvent

504. Whether settled funds can be attached.]—In July, 1882, pltf. obtained a judgment against W. for £574 in an action for breach of promise of marriage commenced in August, 1881. In May, 1881, W. became entitled to a legacy of £500 under a will of which deft. was exor. This legacy was in hand & ready to be paid over in October, 1881. On May 31, 1881, & before the legacy became actually payable to W., he married; & on Oct. 17, 1881, he by deed between himself of the one part & deft. of the other part assigned the £500 to deft. upon trust to invest the money & pay the annual income to his wife for her separate use for life, & afterwards upon other trusts. On Jan. 4, 1883, pltf. obtained an order, under C. L. P. Act, 1854 (c. 125), s. 61, attaching any sum or sums of money then in or which might come to the hands of deft. to answer the judgment recovered by her against W. Upon an issue directed to try whether on Jan. 4, 1883, there was

a sum of money which pltf. was entitled, under R. S. C. Ord. 15 & under C. L. P. 1854 (c. 125), to attach in the hands of deft. to satisfy pltf.'s judgment debt against W.:—*Held*: even assuming the settlement of Oct. 1881, to be impeachable, there was nothing in the nature of a debt, either legal or equitable, due or accruing due from deft. to W., the judgment-debtor, which could be attached to satisfy the judgment-debt.—*VYSE v. BROWN* (1884), 13 Q. B. D. 199; Cab. & El. 223; 48 J. P. 151; 33 W. R. 168.

Annotation:—*Reid. Glegg v. Bromley* (1911), 81 L. J. K. B. 331.

505. Appointment of receiver.]—IDEAL BEDDING CO., LTD. v. HOLLAND, No. 176, ante.

See, generally, RECEIVERS.

506. Ancillary relief—Injunction to prevent receipt of property by assignee.]—IDEAL BEDDING CO., LTD. v. HOLLAND, No. 176, ante.

circumstances, sold the equity of redemption to a *bona fide* purchaser, the wife joining in the conveyance. The larger portion of the consideration, a promissory note, she paid over to J. for an equity of redemption in other lands. An execution creditor of the husband impeached the transaction as fraudulent under Stat. Eliz.:—*Held*: a fraudulent device to defeat creditors, & pltf. entitled to follow the consideration paid to J. into the lands conveyed to the wife.—*FLEURY v. PRINGLE* (1878), 26 Gr. 67.—**CAN.**

503 II. —.]—H. obtained from debtor an absolute conveyance of land as security, which was attacked by pltf., a subsequent execution creditor of the grantor, as a fraudulent preference. H. insisted that the conveyance was *bona fide*, while the grantor alleged it had been obtained by fraud. In the circumstances, H. claiming to hold the land only as security for the amount due him, & the ct. being satisfied of the *bona fides* of the transaction:—*Held*: an account be taken of the amount due H., & the land sold; the proceeds to be applied first in payment of the amount due H. for principal, interest, & costs, & the balance as in ordinary fraudulent conveyance cases.—*SOMMERVILLE v. RAE* (1881), 28 Gr. 618.—**CAN.**

503 III. —.]—Semble: where one creditor, having obtained property from debtor in fraud of other creditors, has realised the property, & received the proceeds in a shape that cannot be earmarked, another creditor who has thereby been defrauded, cannot make the preferred creditor account for the proceeds, & has no other remedy than that prescribed by 13 Eliz. c. 5, s. 2.—*DAVIS v. WICKSON* (1882), 1 O. R. 369.—**CAN.**

q. —.]—Grantee's possession colourable.]—Although the object with which property is conveyed to another may be to protect it against creditors of the actual purchaser, yet the property belongs to such purchaser. The grantee having no interest in the property may convey it to the true owner at any time, & creditors of the former have no right to have the conveyance set aside to obtain that which does not really belong to their debtor.—*GIBBONS v. TOMLINSON* (1891), 21 O. R. 489.—**CAN.**

r. —.]—Where moneys arising from a feigned sale of goods, fraudulent & void against creditors, were at the commencement of the action in the hands of the nominal purchaser, a deft. & party to the transaction:—*Held*: the moneys to be paid into ct. for distribution among creditors of insolvent, & in default of payment execution should issue for

the amount.—*MASURET v. STEWART & LAMPMAN* (1892), 22 O. R. 290.—**CAN.**

s. —.]—Where pltf., to defeat the claims of creditors, executed a colourable conveyance, & the transferee successfully resisted the creditors of pltf. from seizing the property in execution, & then conveyed to a third party, who took possession:—*Held*: there is a distinction between cases in which fraud was only attempted, & those in which it was actually carried into effect; & in the latter class of cases the ct. by granting relief to the wrongdoer would be making itself a party to the fraud.—*GOBERDHAN SINGH v. RITU ROY* (1896), 1 L. R. 23 Cal. 968.—**IND.**

t. —.]—Purchase of insolvent estate—Liability to account.]—Insolvent having made an assignment of all his estate for the benefit of creditors, his stock-in-trade was purchased by his wife from the assignee. Defts., who were creditors, & one was the sole inspector of the estate, became responsible to the assignee for payment of the purchase money, & by a secret arrangement received security from the wife upon the goods purchased by her, not only for the amount for which they had become responsible, but also for the full amount of their claims as creditors of the husband. In an action for an account:—*Held*: the estate was entitled to the benefit of whatever advantage defts. derived from the transaction, & they should account to the assignee for the difference between the amount of their claims & the amount they would have received by way of dividend from the estate.—*SEOSWORTH v. ANDERSON* (1895), 24 S. C. R. 699; 23 O. R. 573.—**CAN.**

a. Ancillary relief.]—Action by a creditor to set aside a conveyance by debtor to his wife, as fraudulent:—*Held*: a proper case in which to register a certificate that pending the action no order could be made to vacate it.—*FOSTER v. MOORE* (1886), 11 P. R. 447.—**CAN.**

b. Form of decree—Valid severable transaction.]—In a prior action B. was held to be entitled to a conveyance from defts. of a quarter interest in certain mineral claims. In that action the named defts. were only nominal defts., the real interest in the claims belonging to one F. After judgment B. conveyed to G. nine-tenths of his interest in consideration of moneys advanced & an undertaking by G. to pay the costs of that & another action & by a subsequent deed the remaining one-tenth in consideration of \$500 payable by instalments. F. after-

wards by assignment from B. perfected his right in the above mentioned judgment. In an action by G. against F. for a declaration that he was entitled to the quarter interest:—*Held*: the transfer to G. of the nine-tenths was champertous, & the ct. would not interfere to assist one claiming under a title so acquired, but the transfer of the one-tenth was valid, being made for good consideration, & severable from the other part of the transaction.—*GIEGERICH v. FLEUTOR* (1904), 10 B. C. R. 309; 35 S. C. R. 327.—**CAN.**

c. —.]—Where property fraudulently acquired in wife's name.]—Where it was found that property had been acquired & money invested by a husband in the name of his wife for the purpose of defeating creditors:—*Held*: there must be an accounting & a decree issue that the property belongs to the husband & the proceeds received by the wife from the sale of furniture owned by the husband be paid to a receiver.—*MCCURDY v. NEVE* (1923), 51 N. B. R. 123.—**CAN.**

d. Delay in attacking—Whether position of parties altered.]—There is no objection to a creditor's right to set aside a deed as fraudulent where the position of the parties to the impeached conveyance has not been materially altered by the delay.—*CURRIE v. GILLESPIE* (1874), 21 Gr. 267.—**CAN.**

e. —.]—Limitations.]—A fraudulent deed remains so to the end of time, though it may not be effectively impeachable because of purchasers for value without notice having intervened, or because of the claims of all creditors having been barred or extinguished by lapse of years.—*BOYER v. GAFFIELD* (1886), 11 O. R. 571.—**CAN.**

f. —.]—Trites v. HUMPHRIES (1899), 2 N. B. Eq. Rep. 1; 19 C. L. T. Occ. N. 407.—**CAN.**

g. —.]—A voluntary conveyance of land cannot be successfully attacked under 13 Eliz., c. 5, on the basis of a debt due at the time of the conveyance but barred by lapse of time before the commencement of the action to attack.—*KEDDY v. MORDEN* (1905), 15 Man. L. R. 629.—**CAN.**

h. —.]—In an equitable action to set aside a deed of assignment, containing a preference in favour of the creditors under Stat. Eliz., where there has been long delay in the bringing of the action, the ct. must regard the proceedings with suspicion, & will not lend its aid to the action without some clear & reasonable explanation.—*PEPPER v. McDONALD* (1906), 38 N. S. R. 540.—**CAN.**

k. Where creditor's claim under \$40.]

Sect. 6.—Remedies and practice: Sub-sects. 1 & 2, A. & B.]

507. Form of decree.]—BOTT v. SMITH, No. 384, ante.

508. — Where possibility of surplus.]—IDEAL BEDDING CO., LTD. v. HOLLAND, No. 176, ante.

SUB-SECT. 2.—PRACTICE.

A. In General.

509. Notice of intention to impeach—Right to impeach denied—Duty to use due diligence.]—

—A creditor for an amount under \$40 cannot attack a conveyance of land as voluntary or fraudulent & he cannot improve his position by bringing his action on behalf of other creditors.—*ZILLIAX v. DEANS* (1891), 20 O. R. 539.—CAN.

PART I. SECT. 6, SUB-SECT. 2.—A.

1. Pleadings—Fraudulent intent.]—Where pltf. alleges & proves that land, which stands in defts.' name was brought with pltf.'s money & was transferred to & is held by deft. as trustee for pltf., & seeks to compel deft. to transfer the land to pltf. it is not a defence that the land was originally transferred to deft. in order to defeat pltf.'s creditors unless it is also alleged & proved that that object was wholly or partly carried into effect.—*PAYNE v. McDONALD* (1908), 6 C. L. R. 208.—AUS.

m. ———.]—Fraud, or want of consideration for a deed, can only be set up by grantor or those claiming under him.—*HICKMAN v. NORTH BRITISH INSURANCE CO.* (1870), 13 N. B. R. (2 Han.) 235.—CAN.

n. ———.]—In a suit impeaching a conveyance for fraud, the bill stated that grantor for a professed valuable consideration conveyed the land; & the conveyance was made with intent of deft. to defeat, delay, & defraud pltf., & other creditors.—*Held*: this sufficiently stated a want of consideration for the conveyance, & the object was to defeat, hinder, & delay creditors under 13 Eliz. c. 5.—*SAWYER v. LINTON* (1876), 23 Gr. 43.—CAN.

o. ———.]—It is not sufficient in a bill impeaching a conveyance as fraudulent against creditors to allege that it was made for the purpose & intent of defrauding, etc., without alleging the purpose & intent to have been those of grantor.—*WESTERN CANADA LOAN & SAVINGS CO. v. SNOW* (1890), 6 Man. L. R. 317.—CAN.

p. ———.]—THOMSON v. BARRATT (1890), 24 N. S. R. (12 R. & G.) 136.—CAN.

q. ———.]—*Seem*: a bill by a judgment creditor to set aside a conveyance on the ground of fraud is sufficient if it avers that execution upon the judgment was avoided by the conveyance, though it does not aver a return to the execution.—*WILBY v. WATK* (1894), 1 N. B. Eq. Rep. 31.—CAN.

r. ———.]—Where pltf. claims certain shares of stock by way of gift by means of a transfer from deceased, & the question is that of gift or no gift, it is no defence to attack the gift as fraudulent & void against creditors.—*MONTGOMERY v. HUNTER*, [1919] 2 W. W. R. 461.—CAN.

not distinctly

charged.—Where a bill was filed to impeach a deed as colourable, & the evidence showed it to be fraudulent, if not colourable, & the same statements would have been necessary had the bill sought to impeach it on the ground of fraud.—*Held*: no objection that the bill had not sought to set it aside on that ground, or assigned fraud as an alternative ground of relief.—*COMMERCIAL BANK OF CANADA v. COOKE* (circa 1860), 9 Gr. 524.—CAN.

t. — Alternative allegation.]—It is sufficient to swear either that debtor has parted with his property to prevent its being taken in execution, or that he has made some secret or fraudulent conveyance for that purpose.—*MAXWELL v. FERRIE* (1858), 8 C. P. 11.—CAN.

a. — Representative capacity of creditor.]—A bill to set aside a conveyance as fraudulent against creditors was filed by five distinct persons who held overdue notes, on behalf of themselves & all other creditors of deft.:—*Held*: on demurrer, there was no misjoinder, & the bill sufficiently showed it to be on behalf of all creditors.—*TURNER v. SMITH* (1879), 26 Gr. 198.—CAN.

b. ———.]—The non-avowment that pltf. sues on behalf of all other creditors is not ground for demurrer, but a mere informality.—*SCANK v. DUCKETT* (1883), 3 O. R. 370.—CAN.

c. ———.]—Where in an action by a simple contract creditor to set aside a bill of sale & for an injunction, there are no allegations that there are other creditors than pltf., action can not be brought under Preferential Assignment Act (Sask.), or 13 Eliz. c. 5.—*LANKIN v. WALKER* (1909), 12 W. L. R. 320.—CAN.

d. ———.]—In an action by a simple contract creditor it is not necessary in the statement of claim to make any allegation of the existence of other creditors. It is sufficient for pltf. to allege that he brings the action on behalf of himself & all other creditors, & if there are in fact no other creditors, it does not follow that a simple contract creditor must forego all claim to relief until after he has proceeded to judgment & execution.—*GRUNKERT v. JONAT*, [1924] 3 D. L. R. 503; 2 W. W. R. 801.—CAN.

e. — Party to fraud.]—Amongst other defences, in an action on a covenant to pay contained in a chattel mtge., deft. set up that the mtge. in question was given for the purpose of defeating & delaying creditors of the mtgor., & that pltf., mtgee., was aware of that at the time, & aided & abetted deft., & that by reason thereof the mtge. was void & the covenant could not be enforced against deft.:—*Held*: even if the defence was proved, deft., being a party to the fraud, should not be allowed to set it up as an answer to

A creditor having filed a bill for the purpose of establishing the validity of his security in priority to a voluntary settlement executed by the debtor whilst he was indebted, & having succeeded in his claim & been paid his debt, sent to the trustees of the settlement a notice, announcing his intention of impeaching the settlement, & warning them against parting with any of the funds in their hands. The trustees replied, that unless proceedings were taken within one month, they should disregard the notice. Proceedings were not taken within the month. On motion by the *cestui que trust* under the settlement, for an injunction to restrain the creditor from continuing the notice, it was ordered that the trustees should be at

his liability on the covenant.—*MILLICAN v. HEADON* (1885), 8 O. R. 503.—CAN.

f. ———.]—If deft. wishes to set up in answer to an action to declare him a trustee of land the defence that the land was conveyed to him for a fraudulent purpose he must in his pleading specifically say so, & admit his own criminality in joining in a criminal act. If pltf. can make out his case without disclosing the alleged fraud, deft. will not be allowed to show, as a reason why pltf. should not recover, the fraud in which deft. himself participated.—*DAY v. DAY* (1889), 17 A. R. 157.—CAN.

g. ———.]—Where deft. pleaded that the deed was a sham deed & without consideration, & had been executed by him merely to save the land from creditors:—*Held*: plea was good, & it was open to deft. to defend his possession by showing that the real transaction between himself & pltf. was to defraud, whether a third party or his creditors generally.—*BABAJI v. KRISHNA* (1893), 1 L. R. 18 Bom. 372.—IND.

h. — Nihil debet.]—In an action to set aside a conveyance in fraud of creditors, deft. desiring to meet the action by setting up that as there was no debt due fraud could not exist, must allege these objections in his pleadings.—*SYNDICAT LYONNAIS DU KLONDYKE v. MCGRADY* (1905), 36 S. C. R. 251.—CAN.

k. — Allegations of indebtedness.]—In the statement of claim in an action brought to recover a debt & for an injunction to prevent debtor from making further transfers of his property & for a declaration that transfers already made are fraudulent & void, it must be clearly alleged: (a) That deft. is indebted to pltf., showing in what way & that the debt existed at the time of the transfer; (b) that there were at the time other creditors of debt; & (c) that, after parting with the assets in question, debtor had not enough property left to meet his liabilities.—*TRADERS BANK OF CANADA v. WRIGHT* (1908), 8 W. L. R. 208.—CAN.

l. ———.]—Where a creditor is seeking, on behalf of himself & all other creditors, to have a conveyance declared fraudulent & void, it is only necessary to allege & prove that he had a claim against debtor & not that the claim had been carried to judgment.—*MCDERMOTT v. OLIVER* (1915), 43 N. B. R. 533.—CAN.

bb. — Amendment of—Setting up new grounds.]—Where a bill was filed to set aside a conveyance as having been made to hinder creditors, on grounds which pltf. failed to substantiate, but the evidence of grantee himself showed that on other grounds pltf. was entitled to relief, leave was given him to amend, setting forth

liberty to deal with the income of the further order, according to the trusts of the

W. R. 984.

B. Parties.

510. Where grantor dead—Executor only necessary.]—PEACOCK v. MONK, No. 25, ante.

such grounds.—**WATSON v. MCCARTHY** (1864), 10 Gr. 416.—CAN.

n. Refusal of judge—To put point to jury.]—A sale & conveyance for valuable consideration, paid at the time, of the grantor's interest in land to his father-in-law, was impeached as being fraudulent as against creditors under 13 Eliz. c. 5. The jury was asked whether the deed was a *bond fide* transaction, a deed made for a valuable consideration, or whether it was fraudulently made, as a mere scheme or contrivance for the purpose of delaying, hindering, or defrauding creditors; & the judge refused to add, that if they believed the consideration was paid to cover the property & protect it from creditors, they should find against the deed.—**Held:** the charge was unobjectionable.—**SMITH v. MOFFATT** (1869), 28 U. C. R. 486.—CAN.

PART I. SECT. 6, SUB-SECT. 2.—B.

o. Where grantor dead—Administrator necessary.]—In a suit by simple contract creditors of an intestate to set aside as fraudulent under 13 Eliz. c. 5, a conveyance testate, an administrator of intestate's appointed by the Probate Ct., is a necessary party, though there are no personal assets of intestate. The failure to make the administrator a party is not a ground of demurrer, but may be taken advantage of under 53 Vict. c. 4, s. 54.—**TRITES v. HUMPHRIES** (1899), 2 N. B. Eq. Rep. 1; 19 C. L. T. Occ. N. 407.—CAN.

p. — Cestuis qui trust necessary.]—Where the widow & children of deceased beneficiary would be entitled under an attacked deed to a share of an estate & so were interested in maintaining the deed:—**Held:** they were necessary parties to the action attacking it; notwithstanding that the exors. of the will of grantor's son had been made parties, who as they took nothing under the deed & did not represent the infant children of their testator had been made parties unnecessarily.—**FONSECA v. JONES** (1911), 21 Man. L. R. 168.—CAN.

q. — Widow as executrix necessary.]—Pltf. alleging that he was a creditor of R. & that shortly before his death, R. conveyed all his land & transferred all his personal property to his wife, whom he named extrix., sued the wife, charging the conveyance & transfer as voluntary & fraudulent & void against creditors. Deft. had not applied for probate of R.'s will, & alleged that she had not intermeddled with his assets, which according to her contention were non-existent:—**Held:** pltf. could sue the wife as extrix. *de son tort*, describing her as extrix.—**COLEMAN v. RYAN** (1923), 55 O. L. R. 182.—CAN.

512 l. Beneficiaries under conveyance—Though not parties to deed.]—Where after the execution of a mtge. a voluntary deed had been executed by the mtgee., purporting to vest all his property in trustees; & he alleged this deed void as obtained from him fraudulently; & that some of the *cestui que trust* had released their interest under the deed, & others had

not any part in obtaining nor had executed it:—**Held:** such other *cestuis que trust* must be made parties to the suit.—**ROGERS v. ROGERS** (1850), 2 Gr. 137.—CAN.

r. Marriage settlement—Where settlor not necessary.]—Where A. in embarrassed circumstances hastened the marriage of his daughter, & made a conveyance of all his real estate to a trustee for the benefit of his daughter & the issue of the intended marriage; upon a bill filed by a judgment creditor against the husband & wife & their infant children:—**Held:** settlor not a necessary party.—**COMMERCIAL BANK OF CANADA v. COOKE** (1862), 9 Gr. 524.—CAN.

assignees to set aside a settlement by insolvent on the marriage of his daughter with a secret trust in his own favour, charged that insolvent deft. was in the enjoyment of the property. A demurrer by insolvent, on the ground that he was not a proper party, was allowed.—**WILSON v. CHISHOLM** (1865), 11 Gr. 471.—CAN.

t. Fraudulent conveyance—By one of joint debtors—Both necessary parties.]—To a bill by an execution creditor of two joint debtors, to set aside conveyances by one of them as fraudulent & void against creditors, grantor was a deft.:—**Held:** if grantor was a necessary party, his co-debtor should be a party also.—**PYPER v. CAMERON** (1867), 13 Gr. 131.—CAN.

Wife proper — wife to husband—Inchoate right of dower at law obtained by a wife in land conveyed to her husband makes her a proper party deft. to a suit to set aside a conveyance made to her husband by fraud in which the wife is alleged to have assisted.]—**McFARLAND v. McFARLAND** (1881), 9 P. R. 73.—CAN.

b. — Simple contract creditor—Grantor necessary.]—Since Judicature Act, in an action by a simple contract creditor claiming merely to set aside a conveyance as fraudulent against creditors, debtor & grantor is a necessary party as well as grantee.—**GIBBONS v. DARVILL** (1888), 12 P. R. 478.—CAN.

—.]—**BURNS v. MATEJKA** (1912), 1 D. L. R. 837; 19 W. L. R. 863.—CAN.

d. — To several grantees—Joiner of parties.]—Action by pltf. on behalf of himself & all other creditors of deft., asking for judgment upon two overdue promissory notes & seeking to obtain execution for such claim, & also a previously recovered judgment against two parcels of land, fraudulently conveyed to two other defts. A motion was made to strike out the name of one or other of the grantees as improperly joined in the same action:—**Held:** it was possible under the present practice to combine two such causes of action, which, if well founded, had a common root in a fraudulent transfer, & here there would be no practical inconvenience in trying both on the same record.—

511. Mortgagee from purchaser under conveyance impeached.]—**OOPIS v. MIDDLETON**, No. 247, ante.

512. Beneficiaries under conveyance—Though not parties to deed.]—A father being indebted to his children, assigned property to a trustee to pay them: the children were not parties to the deed, but were cognisant thereof:—**Held:** in a suit by the creditors to set aside the deed, the children

HEATON v. McKELLAR (1889), 13 P. R. 81.—CAN.

e. — Judgment creditor—Grantor not necessary.]—To a bill by a judgment creditor to set aside a fraudulent conveyance made by his debtor before judgment & to have the land sold to pay the debt, debtor is neither a necessary nor a proper party.—**BANK OF MONTREAL v. BLACK** (1894), 9 Man. L. R. 439.—CAN.

f. — — — —.]—**GALLAGHER v. BEALE** (1909), 14 B. C. R. 247.—CAN.

g. — — — —.]—**GUNN v. VINEGRATSKY** (1911), 17 W. L. R. 54; 20 Man. L. R. 34.—CAN.

h. — — — —.]—**MILLS v. HARRIS & CRASKE** (1915), 8 W. W. R. 536; 8 Sask. L. R. 116.—CAN.

k. — Grantor retaining an interest in lands.]—Where in an action to set aside a fraudulent conveyance, it is alleged that grantor still has an interest in the lands conveyed & it is asked that these lands be sold, the grantor is a proper party.—**UNION BANK v. MOUNTAIN** (1916), 34 W. L. R. 101; 10 W. W. R. 237.—CAN.

l. — Chattel mortgage.]—In an action to set aside a chattel mortgage as fraudulent against creditors, the judgment debtor is a proper deft.—**WOLFE v. SMITH**, [1922] 1 W. W. R. 1283.—CAN.

m. Creditor sues as representative of all creditors.]—Where a creditor simply seeks to have a deed made by debtor declared fraudulent & void, he must sue on behalf of himself & all other creditors.—**LONGWAY v. MITCHELL** (1870), 17 Gr. 190.—CAN.

aa. —.]—Where a suit is instituted by a judgment creditor, who has not placed an execution against lands in the hands of the sheriff, in order to set aside a deed as fraudulent, he must sue on behalf of all creditors of deft., & the fact that the deed was made by a third party in consideration of money paid by debtor does not alter the rule in this respect.—**MURPHY v. WILSON** (1879), 27 Gr. 1.—CAN.

bb. —.]—A bill to set aside a fraudulent deed by a simple contract creditor, whether the debtor is living or dead, should be filed on behalf of pltf. & all other creditors.—**COLVER v. SWAYZE** (1879), 26 Gr. 395.—CAN.

cc. —.]—**CREDIT FONCIER FRANCO-CANADIEN v. SCHULTZ** (1895), 10 Man. L. R. 417.—CAN.

dd. —.]—Under Judicature Act the reason for a non-judgment creditor suing on behalf of all other creditors as well as himself, in an action to set aside a transfer of property by debtor, is gone.—**ALBERTSON v. SECORD** (1912), 20 W. L. R. 64; 1 D. L. R. 804; 1 W. W. R. 657; 6 Alta. L. R. 73.—CAN.

ee. —.]—Pltf., if not a judgment creditor, must bring action on behalf of himself & all other creditors, but his omission to do so is a mere informality, which may be amended on application after the trial.—**BRINKLE v. REGAL SHOE CO., LTD.** (1914), 20 B. C. R. 314.—CAN.

ff. —.]—A suit under Transfer

Sect. 6.—Remedies and practice: Sub-sect. 2, B. & C.]

were necessary parties, & the cause could not proceed without them.—*TRENCHARD v. FINCH* (1835), 1 Coop. temp. Cott. 370; 4 L. J. Ch. 177; 47 E. R. 901.

of Property Act, s. 53, to obtain a declaration that a conveyance is voidable is voidable at the instance of creditors of transferor, must be brought by or on behalf of all creditors, & the suit unless so framed would not be maintainable.—*HAKIM LAL v. MOONSHAHAR SAHU* (1907), 1 L. R. 34 Cal. 999.—IND.

t. — Wife entitled to alimony.]—Where plff. filed her bill for alimony, alleging that a conspiracy had been entered into between her husband & the other deft. to prevent her realising any alimony, & for that purpose her husband had fraudulently conveyed all his lands to co-deft., but plff. had not recovered judgment & execution:—*Held*: she could only sue in a representative capacity on behalf of herself & all other creditors.—*CAMPBELL v. CAMPBELL* (1881), 29 Gr. 252.—CAN.

a. — Effect of settlement before judgment.]—Before judgment in an action by a creditor, on behalf of himself & all other creditors, to set aside a fraudulent conveyance, plff. may settle the action on any terms he thinks proper, & no other creditor can complain; but where judgment has been obtained by plff., it enures to the benefit of all creditors, & deft. cannot get rid of it by settling with plff. alone.—*CANADIAN BANK OF COMMERCE v. TUNNING* (1893), 15 P. R. 401.—CAN.

b. — Where debtor arrested on former judgment.]—A creditor is not prevented from suing on behalf of himself & all other creditors to set aside judgments alleged to have been fraudulently recovered against debtor by reason of having arrested debtor upon a judgment recovered in a former action.—*WARD v. CLARK* (1895), 4 B. C. R. 71.—CAN.

c. — Conspiracy to defraud—Unnecessary parties.]—Where a brother of debtor was made deft., as well as debtor & his grantee, it being alleged by plffs., who sued on behalf of themselves & other creditors, that all defts. entered into a conspiracy to defeat & defraud creditors:—*Held*: as plffs. could not succeed upon the conspiracy claim, for they could show no special damage accruing to them, & could not recover damages on behalf of a class, there was no ground for making debtor's brother a party.—*CANADA CARRIAGE CO. v. LEA* (1905), 11 O. L. R. 171; 6 O. W. R. 633.—CAN.

d. — Alberta, Canada.]—The words creditors & others in 13 Eliz. c. 5, read in conjunction with the Assignments Act (Alta.), 1907, c. 6, s. 44, include a surety.—*ROBERTSON v. WILSON* (1915), 31 W. L. R. 708; 8 W. W. R. 1008.—CAN.

e. Where grantor abroad—Not necessary party.]—To a bill to set aside a conveyance as void against grantor's creditors, where grantor, to whom a small balance was due, resided abroad:—*Held*: not a necessary party.—*SCOTT v. BURNHAM* (1872), 19 Gr. 234.—CAN.

f. Settlement on wife—Where husband not necessary.]—Where a settlement for a wife's separate use was made in pursuance of an anti-nuptial agreement, & the husband was a party to & signed both deeds, but took no direct interest under them:—*Held*: the

husband was not a necessary party to a suit to impeach the settlement.—*SINNOT v. HOCKIN* (1882), 8 V. L. R. 205.—AUS.

g. — —.]—In proceedings against a married woman to obtain a conveyance of property vested in her, it is not necessary to join her husband as a party.—*BOUSTEAD v. WHITMORE* (1875), 22 Gr. 222.—CAN.

h. — —.]—*MURDOCH v. O'SULLIVAN* (1878), 25 Gr. 392.—CAN.

k. — —.]—In an action by a creditor to set aside a conveyance by debtor to his wife, it is usually necessary to join debtor as deft. for the purpose of establishing the debt & obtaining judgment against him, but, where that is the subject of another action against him in the district or county ct., he is not a proper or necessary party to the action to set aside the conveyance. The transferee is the sole necessary deft.—*WINNIPEG PAINT & GLASS CO. v. LACKMAN*, [1923] 3 W. W. R. 361.—CAN.

l. — Dual capacity of trustee.]—W. while insolvent, assigned to the cashier of a bank a policy on his life, in trust, to pay certain bills in the bank, & then to hold the moneys for the benefit of his wife & children. W. died, & the trustee received the insurance money, paid the bills, & claimed a right to apply the surplus in paying off other liabilities of W. to the bank. Upon a bill filed by the widow & children:—*Held*: the trustee should pay over the balance, with interest; & being the cashier of the bank who had received the benefit of the moneys, he sufficiently represented the bank, & it was not necessary to make the institution itself a party.—*WHITTEMORE v. LEMOINE* (1863), 10 Gr. 125.—CAN.

m. — —.]—Plff. as assignee for the benefit of creditors sued on behalf of creditors to set aside as fraudulent a mtge. made by assignor, while insolvent, to defts. Defts. set up as a defence (*inter alia*) a judgment for foreclosure on the mtge. to which plff. as assignee was a party deft.:—*Held*: plff. acted in a dual capacity as assignee of mtgor.'s equity of redemption, & also as a trustee for creditors; in the former capacity he was made deft. in the foreclosure action, in which he could not have set up the fraud of his assignor, nor was he bound to have counterclaimed for his present cause of action; while in this action he was suing as trustee for creditors, & in another right.—*GLASS v. GRANT* (1888), 16 O. R. 233.—CAN.

n. — Death of assignee—Subsequent action by creditors.]—Where an assignment had been made to a sheriff who died shortly after, & proceedings were subsequently taken in their own names by judgment creditors of the assignor to set aside a transfer of property as fraudulent:—*Held*: plffs. suing alone had no *locus standi* to maintain the action.—*BROWN v. GROVE* (1889), 18 O. R. 311.—CAN.

o. — Adding assignee as plaintiff.]—W. executed an assignment for the benefit of his creditors, whereby the exclusive right of action became vested in the assignee. Plffs. obtained

513. — Beneficiaries made parties—Joinder of personal representatives unnecessary.]—An equitable mtge. having been made by deposit of a lease, the mtgee. discovered that the mtgor. had assigned the lease by voluntary settlement in trust for his wife & children. On the death of the mtgor., a bill was filed to have the settle-

an order, giving them leave to take proceedings in the name of the assignee but for their own exclusive benefit, to set aside the conveyance & then applied for an order adding or substituting the assignee as plff. The consent of the assignee was not filed:—*Held*: the assignee could not be added as a plff. without his consent in writing being filed, but plffs. had the right to proceed under the order by bringing a new action in the name of the assignee, to which his consent would not be necessary.—*BANK OF LONDON v. WALLACE* (1889), 13 P. R. 176.—CAN.

p. Action by assignee—Against preferred creditor—Debtor not necessary.]—Debtor is not a proper party to an action by his assignee against a creditor to set aside a preferential transfer.—*BEATTIE v. WENGER* (1897), 24 A. R. 72.—CAN.

q. Where defendant is agent or arbitrator—Grantor necessary—For discovery & costs.]—The only object of making debtor or grantor a party is for the purpose of discovery & costs; & the right to make a person a party for these purposes is confined to cases in which deft. fills the position of agent or arbitrator; & even that practice has been disapproved.—*BANK OF HAMILTON v. WINTERS* (1911), 16 W. L. R. 218.—CAN.

r. Grantor failing to comply with statutory requirements—Grantor not necessary.]—The fact that a bill of sale, or a transfer of a homestead, may be void from failure to comply with statutory requirements, does not make it necessary or proper to join the grantor or judgment debtor. The conveyances are either good as between him & the grantee, in which case he has no interest, or they are void, in which case the judgment creditor's execution will attach.—*ADVANCE RUMELY THRESHER CO. v. HOLIBOFF*, [1923] 2 W. W. R. 84.—CAN.

s. — Of property bound by registered judgment—Both necessary parties.]—In an action against a husband alone for the sale of land vested in his wife by an unregistered deed, which plff. claimed was bound by a registered judgment against deft., plff. applied to add the wife as a party deft. & alleged that the land was deft.'s property & had been mortgaged by him with other lands to a bank; & that at deft.'s request the land was conveyed to his wife who gave no consideration for it, but held it solely as a trustee for deft.:—*Held*: both husband & wife were proper parties, although deft. in his statement of defence had denied that he had any interest in the land.—*SHIELDS v. ADAMSON* (1904), 14 Man. L. R. 703.—CAN.

aa. — For benefit of children—Wife only necessary.]—Where a husband voluntarily transfers property to his wife for the benefit of herself & her children, the children are not necessary parties to an action to set aside the transfer as fraudulent & void against creditors, since the wife, being a trustee & a beneficiary sufficiently represents the children.—*KILGOUR v. ZASLOVSKY & ROSENFELD* (1914), 30 W. L. R. 303; 7 W. W. R. 446; 25 Man. L. R. 14, 22; 19 D. L. R. 420.—CAN.

Different estates—Adding parties.]

ment declared void as against the mtgee. & the wife & children & trustee were made defts.:—*Held*: the personal representatives of the settlor were not necessary parties to the suit.—*BOSTOCK v. SHAW* (1846), 15 L. J. Ch. 257; 7 L. T. O. S. 25; 10 Jur. 107.

C. Interlocutory Proceedings.

514. Discovery—Whether parties to deed must give.]—The penalties imposed by 13 Eliz. c. 5, on the parties to deeds which by that statute are declared void, are not grounds on which a deft. to a suit in equity can decline to make the usual affidavit of documents.—*BUNN v. BUNN* (1864), 4 De G. J. & Sm. 316; 3 New Rep. 679; 10 L. T. 211; 12 W. R. 561; 40 E. R. 941, L. JJ.

See, generally, DISCOVERY, Vol. XVIII., pp. 55 et seq.

515. Interrogatories—Refusal by defendant to answer—As incriminating.]—To a bill to set aside a conveyance as fraudulent, under 13 Eliz. c. 5, deft. by his answer, refused to answer any portion of it, on the ground that the statute imposed a forfeiture & six months' imprisonment. After the time for excepting had expired, pltf. amended his bill, by striking out the allegations of fraud, & by attempting to remove the objection, & he again filed the interrogatories. Deft. by answer, again insisted on the objection, & that the proceeding of pltf. was a mere snare, & he refused to answer any portion of the bill. The ct. came to the conclusion that the two bills were substantially the same, & the answer to the first being deemed sufficient, deft. was not bound to answer the second.—*WICH (OR WICK) v. PARKER* (1856), 22

Beav. 59; 27 L. T. O. S. 163; 2 Jur. N. S. 582; 4 W. R. 452; 52 E. R. 1029.

Annotation:—Mentd. Clogg v. Edmonson (1856), 22 Beav. 125.

See, generally, DISCOVERY, Vol. XVIII., pp. 238 et seq.

See, also, No. 385, ante.

516. Interim injunctions—Third party with power of appointment over settled funds—Restrained from exercise of power until hearing.]—By deed, a father & son settled certain real estate to the use of the father for life, & after his decease to the use of the son, if then living, in fee; & a power was reserved to the father & son of revoking the uses & appointing new uses. By a subsequent deed, the son being at the time insolvent, the father & son revoked the old uses in favour of the son, & appointed the estate to such uses as the father should appoint, & in default of appointment to the use of the son absolutely. The son was afterwards adjudicated bkpt., & a bill was filed by the creditors' assignees to set aside the latter deed as fraudulent. Upon a motion in the cause an injunction was granted, restraining the father until the hearing from exercising his power under the deed in favour of a purchaser for value, but without interfering with the exercise of his power in favour of volunteers.—*BEYFUS v. BULLOCK* (1869), L. R. 7 Eq. 391; 20 L. T. 166; 17 W. R. 526.

517. — Assignment of policy of insurance — Policy moneys invested & able to be traced — Assignee restrained from dealing with investment pending trial.]—*Re MOUAT, KINGSTON COTTON MILLS Co. v. MOUAT*, No. 20, *ante*.

See, generally, INJUNCTION.

— *ADAMS v. WATSON MANUFACTURING Co., LTD.* (1888), 16 A. R. 2; 15 O. R. 218.—CAN.

b. Creditors deed—Right of creditors not named to sue trustees—Without joining other creditors.]—An alleged creditor seeking to rank on the assigned estate of debtor can bring an action against trustees of an ordinary deed of assignment, asking a declaration that he is entitled to share ratably with other creditors, although he has not signed the deed & admitted creditors who have signed the deed are not necessary parties.—*WEBSTER v. RAE* (1893), 19 V. L. R. 717.—AUS.

c. — — — — —.]—To a creditor's bill to set aside a conveyance to a trustee for other creditors, the *cestuis que trust* are not necessarily parties defts. It is discretionary with the ct.—*LEACOCK v. CHAMBERS* (1886), 3 Man. L. R. 645.—CAN.

d. — — — — —.]—*Trustees necessary.*—Where a bill is filed to impeach a conveyance to trustees for the benefit of creditors, whether such an assignment is or is not in insolvency, the trustees are necessary parties.—*WYLIE v. MCKAY* (1873), 20 Gr. 421.—CAN.

PART I. SECT. 6, SUB-SECT. 2.—C.

514 i. Discovery—Whether parties to deed must give.]—*RURAL MUNICIPALITY OF MOUNT HOPE No. 279 v. FINDLAY*, [1919] 1 W. W. R. 397.—CAN.

e. — — — — —.]—*Failure to produce—Right to move to dismiss bill.*—In a suit to set aside a conveyance as fraudulent against creditors, one sitting of the ct. having been lost, deft., the grantee, moved to dismiss the bill for want of prosecution:—*Held*: the failure of

deft. to comply with an order to produce did not deprive him of the right to move to dismiss.—*ELLIOTT v. GARDNER* (1880), 8 P. R. 409.—CAN.

f. — — — — —.]—Where pltf., judgment creditors, served a notice of motion on a *bond fide* purchaser without notice, calling on him to appear & state the nature of his claim, & either maintain or relinquish the same:—*Held*: motion must be dismissed, as the purchaser could not be called upon to defend himself in such a proceeding.—*BANK OF MONTREAL v. CONDON* (1896), 11 Man. L. R. 366.—CAN.

g. Interrogatories — Plain'iff applying to examine defendant before claim.]—In an action by creditors of deft. R. to set aside conveyances by him to deft. G. as fraudulent, pltf. swore that it was necessary to have an examination of defts. before delivering the statement of claim, in order that it might be framed with proper particularity as to the fraud, of which he had no personal knowledge, & a local judge, upon the application of pltf. *ex parte*, made an order for such examination:—*Held*: the order should not at any rate have been made *ex parte*; & in this case the order should not have been made at all, the position of a deft. resisting a claim as to which he has no personal knowledge, & of a pltf. advancing such a claim, being vastly different.—*HOOKY v. GILBERT* (1887), 12 P. R. 114.—CAN.

h. Injunctions — Execution creditor's action.]—The ct. has power to grant an interim injunction, *quia timet* in a fraudulent conveyance action brought by an execution creditor.—*CLINTON v. SELLARS* (1908),

6 W. L. R. 788; 1 Alta. L. R. 129.—CAN.

k. — — — — —.]—*Non-judgment creditor — To prevent transfer of property.*—The ct. will not at the instance of a non-judgment creditor interfere by injunction to prevent a transfer of property by debtor.—*FAIRCHILD v. EIMSLIE* (1909), 2 Alta. L. R. 115.—CAN.

l. Creditor's right to impeach — Not to be delayed by an inquiry.]—A creditor has a right to impeach a fraudulent conveyance of the estate of debtor, & though it be alleged that sufficient remains to pay his debt, he shall not be delayed by an inquiry to that effect.—*CHAMLEY v. DUNNANY (LORD)* (1807), 2 Sch. & Lef. 690.—IR.

m. Order for commencement of proceedings—Where issue of fraud to be determined by action.]—A memorandum of transfer dated prior to the issue of the certificate of title was tendered for registration. Earlier on the same day a charging order against vendor's interest was obtained & registered. Registration of the transfer being refused, application was made to the ct. for cancellation of the charging order, on the ground that it was subject to equities, & the transfer entitled to priority. The application was opposed on the ground that the transfer had been made with the intent to defeat & defraud creditors:—*Held*: the issue of fraud must be determined in an action, & an order was made that the judgment creditor commence proceedings within fourteen days, otherwise registration of charging order to be cancelled.—*Re LORAM, TONSON, GARLICK Co. v. PEARSON* (1902), 21 N. Z. L. R. 500.—N.Z.

Sect. 6.—Remedies and practice: Sub-sect. 2, D.

D. Evidence.

518. Inquiry as to grantor's indebtedness at date of grant—When ordered.]—Where a bill is filed by a creditor of a testator to set aside a voluntary settlement, if the evidence *prima facie* discloses enough to show it is injurious to the settlor's creditors, plff. is entitled to an inquiry as to the state of the settlor's circumstances at the date of the settlement.—*CRABBE v. MOXEY* (1853), 21 L. T. O. S. 99; 1 W. R. 226.

519. Of right to avoid—Creditor.]—*SANDERS v. —*, No. 485, *ante*.

Sheriff.]—*See* Nos. 436, 492, *ante*.

PART I. SECT. 6, SUB-SECT. 2.—D.

518 i. Inquiry as to grantor's indebtedness at date of grant—When ordered.]—In a suit to set aside a voluntary conveyance as void against creditors, it lies upon the parties interested in supporting the deed to show the existence of other property of the debtor available for creditors; & where the parties have omitted to give such evidence, the ct. will direct an inquiry as to the indebtedness of grantor at the date of the conveyance.—*BROWN v. DAVIDSON* (1862), 9 Gr. 439.—**CAN.**

519 i. Of right to avoid—Creditor.]—Where a bill of sale has been duly executed & filed, justices, on an interpleader summons to try the right of the holder to the goods comprised in it, ought to try to admit evidence if tendered, to show that the bill falls within 13 Eliz. c. 5, & is given to hinder, delay & defraud creditors.—*DUNLOP v. TUTTY* (1871), 2 V. R. (Law) 14.—**AUS.**

519 ii. ———.]—A creditor under Stat. Eliz., attacking another's judgment, cannot succeed merely by showing that the judgment was by confession, & in such case no consideration is presumed, but the burden is upon him to show that no debt was due.—*COMEAU v. WHITE* (1906), 3 N. S. R. 553; 1 E. L. R. 98.—**CAN.**

519 iii. ———.]—Where plff. was not a creditor at the time the deeds were made:—*Held*: he must prove that a debt due at the time remained unpaid; or that circumstances existed from which it would be inferred that the deeds were made with the intention of hindering subsequent creditors.—*HAYWOOD v. MCKAY* (1895), 23 N. S. R. (16 R. & G.) 152.—**CAN.**

520 i. Rebutting fraudulent intention—Right of defendant to give.]—When a mtge. over the whole of mtgor's property is given at a time when he is in insolvent circumstances to secure a pre-existing debt, & it is attempted to support it by a previous agreement, alleged to have been made when the money was advanced, the bare fact of the postponement of the execution throws upon the person supporting the transaction the onus of proving that the antecedent agreement was in fact made, & was made *bona fide*; but the ct. may find for itself in the surrounding circumstances a satisfactory explanation of the postponement.—*THOMSON v. MULDO IRRIGATION CO.* (1894), 15 N. S. W. Eq. 55.—**AUS.**

520 ii. ———.]—Plff., son-in-law, lived with J., & they had made arrangements with the express object of putting J.'s property out of reach of certain creditors. Part of the evidence admitted for this purpose was a settlement of J.'s real estate prior to plff.'s

marriage with his daughter. In an action to try the title to certain goods alleged to have been purchased by plff. at a sheriff's sale of J.'s goods, it appeared that the purchase-money paid by plff. had been credited to him out of the sums payable by plff. to another estate, & in fact went in relief of the claims on J.:—*Held*: evidence of the settlement was admissible.—*COOK v. HENDRY* (1858), 7 C. P. 354.—**CAN.**

520 iii. ———.]—In a suit by a creditor to set aside a deed on the ground (*inter alia*) that it was made to deft. on a secret trust for grantor & to defeat creditors:—*Held*: grantor's statements after the conveyance that it was a real transaction were admissible evidence for deft., but were not entitled to much weight.—*WOOD v. IRWIN* (1869), 16 Gr. 398.—**CAN.**

520 iv. ———.]—*HILL v. THOMPSON* (1870), 17 Gr. 445.—**CAN.**

520 v. ———.]—*BARTON v. MERRITT* (1876), 24 Gr. 139.—**CAN.**

520 vi. ———.]—*JACK v. GREIG* (1879), 27 Gr. 6.—**CAN.**

520 vii. ———.]—In actions to set aside conveyances in fraud of creditors under 13 Eliz. c. 5, the inferences of law which the cts. are disposed to draw in favour of creditors may be rebutted by proof of the existence of a laudable motive not necessarily tending to defeat creditors, although sometimes having that effect.—*JACK v. KEARNEY* (1912), 11 E. L. R. 401; 41 N. B. R. 124.—**CAN.**

521 i. Examination of defendant—Refusal to answer criminating questions.]—The penal provisions of 13 Eliz. c. 5, afford no excuse for a refusal by deft. to answer questions put to him regarding a fraudulent transaction.—*DUNSFORD v. CARLISLE* (1884), 10 P. R. 449.—**CAN.**

n. What evidence admissible—Evidence of settlor.]—In a suit to set aside a voluntary settlement as fraudulent, the evidence of settlor of his intent in executing the settlement will be received if tendered, but not evidence of statements by him as to such extent.—*RICHMOND v. DICK* (1865), 2 W. W. & A.B. 143.—**AUS.**

o. Evidence under Mercantile Act, 1887—On principles of Statute of Elizabeth.]—Upon an application to set aside settlements as void under Mercantile Act, 1887, ss. 44, 45 & 46, a fraudulent intent must be proved in accordance with the principles governing the interpretation of 13 Eliz. c. 5.—*Re HOUROGAN, Ex p. KENNA*, [1903] S. R. Q. 117.—**AUS.**

p. Evidence of acts not pleaded.]—Where a party filed a bill to set aside a deed on the ground of

520. Rebutting fraudulent intention—Right of defendant to give.]—Upon an interpleader summons plff. put in & proved an assignment by way of mtge. to him of the goods in question seized by the bailiff. Deft. then proved the deed fraudulent as against creditors, the county ct. judge held it fraudulent, & declined to hear plff.'s evidence tendered in reply to negative the fraud:—*Held*: upon appeal, the county ct. was wrong in rejecting the evidence tendered by plff. in reply to negative the fraud, & a new trial was directed.—*SHAW v. BECK* (1853), 8 Exch. 392; 1 Saund. & M. 67; 20 L. T. O. S. 211; 17 J. P. 72; 155 E. R. 1401.

Annotations:—Reid. *Vernon v. St. James, Westminster Vestry* (1880), 49 L. J. Ch. 130. **Mentd.** *Penn v. Jack* (1866), L. R. 2 Eq. 314.

521. Examination of defendant—Refusal to

fraud:—*Held*: evidence of particular acts of fraud, although not charged in the bill, was admissible.—*WRIGHT v. HENDERSON* (1845), 1 O. S. 656.—**CAN.**

q. Where not admissible.]—Evidence is not admissible to cut down to a mtge. an instrument absolute in form which had been executed for the purpose of securing a debt due to a grantee, but the main object of which was to protect the property from the results of an anticipated action for breach of contract.—*MUNDELL v. TINKIS* (1884), 6 O. R. 625.—**CAN.**

r. Evidence as to grantor's solvency at date of grant.]—Where the issue was whether a conveyance from A. to deft. was fraudulent, a declaration made by A. as to the state of his affairs, is not admissible in evidence unless made at or about the time when the deed was given.—*DOE d. HUTCHINSON v. FRASER* (1857), 3 All. 417.—**CAN.**

s. ———.]—In order to establish fraud in the transfer, declarations & admissions by B., both before & after the transfer, as to the general state of his business & the value of the property transferred, are admissible in evidence on the part of deft.—*LAWTON v. TARRATT* (1858), 4 All. 1.—**CAN.**

t. ———.]—*ROUSTEAD v. SHAW* (1879) 27 Gr. 280.—**CAN.**

u. ——— Onus on grantee in voluntary conveyance.]—The onus is upon grantee in a voluntary conveyance when it is attacked by creditors to show the existence of other property available for creditors.—*OSBORNE v. CAREY* (1888), 5 Man. L. R. 237.—**CAN.**

v. ———.]—*DUNDEE MORTGAGE CO. v. PETERSON* (1889), 6 Man. L. R. 66.—**CAN.**

w. ———.]—When a voluntary conveyance has the effect of defeating creditors it is not necessary to adduce evidence of fraud; the burden lies on the person executing the deed to show cause why it should not be set aside.—*CUNNINGHAM v. CURTIS* (1897), 5 B. C. R. 472.—**CAN.**

x. ———.]—*RAICHLIN v. KATZ* (1910), 16 W. L. R. 1; 19 Man. L. R. 402.—**CAN.**

y. ———.]—*DAUCET v. SIDE SODE* (1916), 49 N. S. R. 485.—**CAN.**

z. ——— Knowledge of transferee.]—A transferee's knowledge of insolvent's condition may be implied, if knowledge is shown of circumstances from which ordinary men of business would determine that debtor was unable to meet his liabilities.—*HART v. ALLEN* (1902), 40 N. S. R. 352.—**CAN.**

—.]—*PARROTT & BYERS*

answer criminating questions.]—MICHAEL v. GAY, No. 385, *ante*.

See, generally, EVIDENCE, Vol. XXII., pp. 399 *et seq*.

See, also, No. 515, *ante*.

E. Costs.

522. On setting aside voluntary settlement—Trustees.]—On setting aside a voluntary settlement, made by a trader while insolvent, in favour of his wife & an infant child, the *ct.*, as to the costs of the trustees & infant:—*Held*: the utmost it could do was to make the decree without costs.—ELSEY v. COX (1858), 26 Beav. 95; 53 E. R. 832. *Annotation*:—*Expld.* Ideal Bedding Co. v. Holland, [1907] 2 Ch. 157.

523. ———.]—PONSFORD v. WIDNELL, [1869] W. N. 81.

Annotation:—*Distd.* Crossley v. Elworthy (1871), 24 L. T. 607.

524. ———.]—CROSSLEY v. ELWORTHY, No. 274, *ante*.

525. ———.]—The trustees of a settlement who are *defts.* to an action successfully brought against them to set aside the settlement are entitled, if they have acted properly in the discharge of their duties as trustees & not put *pltf.* to unnecessary expense, to retain their costs of the action, as between *solr.* & *client*, out of the trust fund before handing it over under the judgment.

v. CARSON, [1924] 1 D. L. R. 361.—CAN.

h. ——— Proof of insolvency on attacking party.]—Where it is alleged that the transaction offended against Assignments Act (c. 145) R. S., the fact of insolvency must in all cases be proved by the attacking party, but what has to be shown is not a state of insolvency, in the strict legal or commercial acceptance of the terms, but debtor's inability to pay his way, & meet his creditors.—FAWCETT v. FAULKNER (1903), 40 N. S. R. 398.—CAN.

k. Transactions between near relatives—Corroboration.]—Where a wife claimed as against her husband's creditors certain chattels as a gift from him while they were living together:—*Held*: *onus* of proof of right to the goods was on her, & there being no writing or witnesses, her own evidence, although corroborated by her husband, was not sufficient to satisfy the *onus*.—THOMPSON v. DOYLE, 16 C. L. T. Occ. N. 286.—CAN.

l. ———.]—RICE v. RICE (1899), 31 O. R. 59; 27 A. R. 121.—CAN.

m. ———.]—BURNS & Co. v. MATEJKA (1912), 19 W. L. R. 863; 1 W. W. R. 431; 1 D. L. R. 837.—CAN.

n. ———.]—In transaction between near relatives under suspicious circumstances in an action to set aside, not merely is the burden on *defts.*, but the judge should not consider that burden satisfied unless the evidence of the parties themselves is corroborated by some other evidence.—KILLIPS v. PORTER (1916), 33 W. L. R. 380; 9 W. W. R. 949.—CAN.

o. ———.]—Where a security is given by one in insolvent circumstances to a relative, & the transaction is attacked as in fraud of creditors, if the judge is impressed with the veracity of grantee as to the reality of the consideration & the *bona fides* of the transaction, it is competent for him to accept & act upon it without

corroboration; the question of the necessity of corroboration is strictly one of fact.—BANQUE D'HOCHELAGA v. JEANNOTTE, [1923] 1 W. W. R. 28; 16 Sask. L. R. 523.—CAN.

p. ——— Proof of bona fides.]—In a transfer between near relatives having the effect of defeating creditors, if the circumstances are suspicious, the *onus* is shifted to the transferee of establishing the *bona fides* of the transaction.—IMPERIAL BANK OF CANADA v. McLELLAN, [1919] 3 W. W. R. 607.—CAN.

q. ———.]—v. CANADY, [1920] 1 W. W. R. 274; 13 Sask. L. R. 130.—CAN.

r. LTD. v. SUMNER, [1924] 3 D. L. R. 381.—CAN.

s. ———.]—ADVANCE RUMELY THRESHER Co. v. HOLOBOFF, [1924] 3 D. L. R. 335; 2 W. W. R. 680.—CAN.

t. Evidence of ownership — Onus on attacking party.]—Where grain was seized in execution & claimed by the wife of execution debtor, who were at the time of seizure living on the farm where the grain was, & the farm had been transferred by execution debtor to his wife:—*Held*: the *onus* was on the execution creditor to establish that the grain belonged to debtor.—LEIPPI v. FREY, [1921] 2 W. W. R. 326.—CAN.

prove that property in question is the property of the judgment-debtor. The *onus* is upon him.—SHEKH ADAM ISUFBAI v. JAMNADAS RANCHORDAS (1891), 1 L. R. 17 Boon. 94.—IND.

b. Burden of proof—Shifting of.]—If the person upholding the transaction establishes that the agreement was *bona fide* & that the price was actually paid, the *onus* shifts to the person attacking the validity of the transaction & he must prove that there was an intent to defraud & that to this intent the purchaser or other person upholding the transaction was

An action having been brought by a settlor's trustee in *bkpcy.* against the trustees of the settlement of the settlor's own property to set aside limitations cutting down his life interest in the event of his *bkpcy.*, the beneficiaries taking under the limitations over were subsequently added by *pltf.* as *defts.* at the suggestion of *defts.* the trustees, & at the trial appeared to defend separately from their co-*defts.* the trustees. The action being successful, the trustees were allowed to retain their costs as between *solr.* & *client* out of income in their hands, but the beneficiaries, having chosen to defend, although they had been unnecessarily, but not improperly, made parties, were not allowed any costs.—MERRY v. POWNALL, [1898] 1 Ch. 306; 67 L. J. Ch. 162; 78 L. T. 140; 46 W. R. 487; 42 Sol. Jo. 213.

Annotation:—*Refd.* Ideal Bedding Co. v. Holland, [1907] 2 Ch. 157.

526. ——— Cestuis que trust.]—ELSEY v. COX, No. 522, *ante*.

527. ———.]—CROSSLEY v. ELWORTHY, No. 274, *ante*.

528. ———.] MERRY v. POWNALL, No. 525, *ante*.

529. Settlor.]—PONSFORD v. WIDNELL, [1869] W. N. 81.

Annotation:—*Distd.* Crossley v. Elworthy (1871), 24 L. T. 607.

530. ——— Assignee in bankruptcy.]—CROSSLEY v. ELWORTHY, No. 274, *ante*.

a party.—WAGNER v. HARTOWS, [1922] 3 W. W. R. 1050; [1923] 1 D. L. R. 186.—CAN.

c. ———.]—In a suit by a creditor's trustee to set aside a voluntary settlement, the burden of proving solvency on the part of the settlor at the time of its execution lies on those claiming under the settlement. The burden of proving intent to defeat or a necessary effect of defeating creditors under Stat. Eliz. lies on the party attacking the settlement.—*Re* MUNRO'S ESTATE (1876), 2 N. Z. Jur. N. S. 183.—N.Z.

PART I. SECT. 6, SUB-SECT. 2.—E.

522 i. On setting aside voluntary settlement—Trustees.]—A post-nuptial settlement was executed by a person insolvent, but the trustee was ignorant of the fact of his indebtedness. On a bill filed impeaching the settlement as fraudulent against creditors:—*Held*: set aside with costs as against the settlor; but the trustee to receive his costs out of any residue of the fund, after payment in full of the claims of the creditors, with costs.—MERCHANTS BANK OF CANADA v. MACDONALD (1872), 19 Gr. 476.—CAN.

522 ii. ———.]—A bill filed impeaching a deed as void under Stat. Eliz. was set aside with costs against the party beneficially interested; but without costs, as against the trustees, as the ground upon which it was set aside was not necessarily & probably was not known to them.—DEAVITT v. SCANLON (1873), 20 Gr. 352.—CAN.

d. ——— Voluntary action by bank.]—Where the action of a bank in taking & acting upon a chattel mtge. had been beneficial to the creditors generally:—*Held*: the bank should have some compensation for their loss & labour in preserving the property & converting it into money, & might be allowed as such compensation their costs, between party & party, out of the estate.—MUNRO v. STANDARD BANK

Sect. 6.—Remedies and practice: Sub-sect. 2, E. Sect. 7. Part II. Sects. 1 & 2.]

531. Of suit—Priority.] — ADAMES v. HALLETT, No. 495, ante.

SECT. 7.—STATUTORY PENALTIES.

See, now, Law of Property Act, 1925 (c. 20), s. 172, which replaces 13 Eliz. c. 5, but makes no provision for penalties.

532. Who may recover—Assignees of insolvent debtor.]—(1) The assignees of an insolvent debtor are "parties grieved" within the meaning of 13 Eliz. c. 5 against fraudulent conveyances & may recover the penalty thereby given from the insolvent & others, parties to such conveyance. (2) On a fraudulent alienation of lands, the offending parties forfeit, by 13 Eliz. c. 5, s. 3, a year's value of the estate but not the consideration money named in the conveyance.—*BUTCHER v. HARRISON* (1832), 4 B. & Ad. 129; 1 Nev. & M. K. B. 677; 2 L. J. K. B. 189; 110 E. R. 404.

533. Indictment.]—For any offence within 13

Eliz. c. 5, s. 3, the offender may be proceeded against by indictment. In such an indictment it is not necessary to set out the specific facts which constitute the fraud.—*R. v. SMITH* (1852), 6 Cox, C. C. 31.

534. Amount of penalty—Assignment of chattels—To avoid heriot—Value of best beast conveyed.]—*CRESWELL & COKE'S CASE* (1577), 2 Leon. 8; 3 Dyer, 351 b; 74 E. R. 313.

Annotation:—Reid. Child v. Sands (1693), 1 Salk. 31.

535. — Alienation of land—One year's value—Whether consideration as well.]—*BUTCHER v. HARRISON*, No. 532, ante.

536. — Amount of covinous bond—Covinous judgment included.]—*MEUX v. HOWELL*, No. 30, ante.

537. Whether composition allowed.]—This was an action brought on 13 Eliz. c. 5, for setting up a fraudulent judgment, wherein pltf. on trial obtained a verdict for the penalty of £45. This action is brought by the party injured. Deft. is convicted by the verdict, & after conviction leave is never given in any case to compound (*per cur.*).—*BRITTON v. PEIRCE* (1751), Barnes, 462; 94 E. R. 1005.

OF CANADA (1913), 5 O. W. N. 508; 16 D. L. R. 293; 30 O. L. R. 12.—CAN.

g. — Assignee in bankruptcy—Defrauding creditors.]—*ATKINSON v. CAMMERLEY* (1910), 17 O. W. R. 926; 2 O. W. N. 446; 22 O. L. R. 527.—CAN.

531 i. — Of suit—Priority.]—Where a conveyance is set aside as void against creditors, a sale ordered, & costs up to the hearing given against debts, these costs should be paid by debts, immediately, where it is manifest the property is not sufficient to pay the creditors in full.—*GILL v. TYRRELL* (1865), 11 Gr. 474.—CAN.

531 ii. — — — — —.]—Costs incurred in a creditors' action, in preserving for creditors property which had been fraudulently transferred, are a first lien upon the fund recovered, & are allowed as between solr. & client.—*Re JUDGMENTS ACTS, HOOD, ALDRIDGE & CO. v. TYSON* (1902), 9 B. C. R. 233.—CAN.

f. — Disclaimer by grantee.]—Where a creditor filed a bill to set aside a deed as fraudulent against creditors, & grantee by his answer disclaimed & alleged that the deed was executed without his knowledge or consent, & that when he became aware of it he had repudiated it: *Held*: having been properly made a deft., he was not entitled to his costs.—*SHUTTLEWORTH v. ROBERTS* (1865), 11 Gr. 237.—CAN.

g. — Creditors benefiting under suit—Contribution to costs.]—Where a creditor filed a bill impeaching conveyances made by debtor as fraudulent against creditors, & the relief prayed was granted:—*Held*: the difference between party & party, & solr. & client costs to be paid *pro rata* by such of the creditors as might avail themselves of the benefit of the suit for the purpose of obtaining payment of their demands.—*PEGG v. EASTMAN* (1867), 13 Gr. 137.—CAN.

h. — — — — —.]—*SON v. ST. LOUIS* 13 P. R. 318.

k. — Judgment creditor of under \$200—Value of property.]—The costs of a suit by a judgment creditor, to whom less than \$200 is due, to obtain payment of his own debt alone out of property alleged to have been conveyed away to defeat pltf.'s claim, are taxable according to the lower scale, no matter what the value of the property may be.—*FORREST v. LAYCOCK* (1871), 18 Gr. 611.—CAN.

—.]—Where, if pltf. had been successful all the executions have been satisfied out of the property covered by the impeached conveyance, & Creditors' Relief Act would have applied to the case, & the amount of the subject matter involved exceeded \$200:—*Held*: costs were taxable on the high et. scale.—*DOMINION BANK v. HEFFERNAN* (1886), 11 P. R. 504.—CAN.

m. — — — — —.]—*McKAY v. MAGEE* (1889), 13 P. R. 106, 146.—CAN.

n. — Simple contract creditors of under \$200.]—Where in an action by simple contract creditors, whose claim was less than \$200, suing on behalf of all creditors to obtain judgment & equitable execution against the lands of debtor conveyed in alleged fraud of creditors, it appeared that the land was worth more than \$200, & that the claims of execution creditors exceeded \$600 in the aggregate:—*Held*: costs should be taxed on the higher scale.—*MORPHY v. FAWKES* (1897), 18 P. R. 24.—CAN.

o. Failure to set aside—Suspicion against bona fides.]—Where a bill was filed by creditors impeaching a conveyance as fraudulent, but the facts proved failed to establish more than a case of suspicion against the bona fides of the transaction; & the same relief having been sought in a bill by other creditors who were also the personal representatives of debtor, which relief was refused, the ct. in dismissing the present bill did so with costs, notwithstanding the reasons for doubting

the bona fides of the transaction.—*SCOTT v. HUNTER* (1868), 14 Gr. 376.—CAN.

p. Favoured creditor — Duty to give information to other creditors.]—Where a bona fide transaction takes place between a failing debtor & a favoured creditor, it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion, & afford to other creditors reasonable satisfaction, as to the moral character of the transaction; & if this duty is neglected, the favoured creditor may have to bear his own costs of afterwards establishing the transaction, if impeached by the other creditors whom it disappointed.—*HEALEY v. DANIELS* (1868), 14 Gr. 633.—CAN.

PART I. SECT. 7.

q. Who are liable—Whether grantee.]—The grantee of a deed made to defeat creditors is not liable to penalties under 13 Eliz. c. 5, although he have notice of grantor's intention to defeat creditors, if the conveyance is taken, bona fide, for a good consideration, & is intended absolutely to pass the estate.—*LYNCH v. COPINGER* (1866), 14 W. R. 863.—IR.

r. Who may recover — Execution creditor.]—In order to sue for a moiety of the penalty pltf. must have been a creditor at the time of the fraudulent transaction & must have continued to be such up to & at the time of the commencement of the action. Where pltf.'s debt has been recovered as the result of an execution he cannot maintain an action under the statute.—*CONNORS v. EGGLI*, [1923] 3 W. W. R. 1373.—CAN.

s. Joinder of action — For recovery of penalty.]—An action by the party aggrieved to recover the moiety of the penalty imposed by 13 Eliz. c. 5, may be joined with an action to set aside a fraudulent transfer under that Act.—*MILLAR v. McTAGGART* (1891), 20 O. R. 617.—CAN.

Part II.—Conveyances Impeachable by Subsequent Purchasers under Statute.

NOTE.—See Stat. 27 Eliz. c. 4, & Voluntary Conveyances Act, 1893 (c. 21), repealed & replaced by Law of Property Act, 1925 (c. 20), ss. 173, 207.

SECT. 1.—PROPERTY WITHIN THE STATUTE.

See, now, Law of Property Act, 1925 (c. 20), s. 173.

538. Equitable estate in land.]—BARTON v. VANHEYTHUYSEN, STONE v. VANHEYTHUYSEN, No. 14, ante.

539. Leaseholds.]—(1) If the father makes a lease by fraud & covin of his land to defraud others, to whom he shall demise or sell it (& all fraudulent leases shall be so intended), & before the father sells or demises it he dies, & the son knowing or not knowing of the lease sells the land on good consideration, the vendee shall avoid the lease by the 27 Eliz. c. 4.

(2) If the father assigns his term fraudulently to his son, having at the time nothing in the inheritance of the land, yet when the father sells the land (upon the inheritance descending upon him), with a covenant to be clear of all leases, etc., his vendee shall avoid the term by the said Act.

(3) Where a man secretly makes a jointure to his wife by fraud & covin to defraud a purchaser to whom he intended to sell the land, the purchaser shall avoid it.—BURRELL'S CASE (1607), 6 Co. Rep. 72 a; 77 E. R. 364.

Annotations:—As to (1) *Consd.* Doe d. Newman v. Rusham (1852), 17 Q. B. 723. *Refd.* Doe d. Richards v. Lewis, Richards v. Lewis (1852), 11 C. B. 1035; Lewis v. Rees (1856), 3 K. & J. 132. As to (2) *Refd.* Doe d. Newman v. Rusham (1852), 17 Q. B. 723. As to (3) *Consd.* Doe d. Richards v. Lewis, Richards v. Lewis (1852), 11 C. B. 1035. *Generally, Mentd.* Winchcombe v. Winchester (Bp.) & Pullerton (1616), Hob. 165; Warburton v. Loveland (1832), 6 Blf. N. S. 1.

540. Rentcharges.]—27 Eliz. c. 4, doth not only aid purchasers of the lands, but those who, for a valuable consideration, have any charge out of the land or upon the land (*per Cur.*).—GARTH v. ERSFIELD (1616), J. Bridg. 22; 123 E. R. 1171.

Annotations:—*Consd.* Barton v. Vanheythuyssen, Stone v. Vanheythuyssen (1853), 11 Hare, 126. *Refd.* Beavan v. Oxford (1856), 6 De G. M. & G. 507.

541. Not pure personalty.]—Voluntary settlements of personal property, made by persons who are not indebted at the time, are good against a subsequent purchaser for valuable consideration.

PART II. SECT. 1.

541 i. Not pure personalty.]—MOORE v. MOORE (1880), 13 N. S. R. (1 R. & G.) 525.—CAN.

PART II. SECT. 2.

a. Conveyance for good consideration—Though incomplete.]—A sale of property for consideration, intended to be operative between the parties, is not void *ab initio*, even though the transaction is brought about by fraud. Subsequent failure of consideration, in consequence of purchaser refusing to perform his part of the promise, will only make the sale voidable.—GOVIND-

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PILLAI v. RAMAHAMI PILLAI (1908), I. L. R. 32 Mad. 72. IND.

fictitious execution.]—A., being indebted, a voluntary conveyance of real estate to B. to prevent its being taken in execution, leaving ample property to satisfy creditors. A creditor obtained judgment after this against A., but before any execution against lands, B. sold to debt. for valuable consideration, but with notice of the nature of the first conveyance. After this sale an execution was taken out, & this lot was sold, apparently to satisfy the judgment. It appeared, however, that the judgment was in

—JONES v. CROUCHER (1822), 1 Sim. & St. 315; 57 E. R. 128.

Annotation:—*Refd.* Meek v. Kettlewell (1842), 1 Hare, 464.

542. —.]—BILL v. CURETON, No. 445, ante.

543. —.]—Personal property is not within 27 Eliz. c. 4 (WIGRAM, V.-C.).—MEEK v. KETTLEWELL (1842), 1 Hare, 464; 11 L. J. Ch. 293; 6 Jur. 550; 66 E. R. 1114; *on appeal* (1843), 1 Ph. 342, L. C.

Annotations:—*Mentd.* Kekewich v. Manning (1851), 1 De G. M. & G. 176; Price v. Price (1851), 14 Beav. 598; Bridge v. Bridge (1852), 16 Beav. 315; Voyle v. Hughes (1854), 2 Sm. & G. 18; Cramer v. Moore (1855), 25 L. T. O. S. 31; *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365; *De Houghton v. Money* (1865), L. R. 1 Eq. 154; Penfold v. Mould (1867), L. R. 4 Eq. 562; Richardson v. Richardson (1867), L. R. 3 Eq. 686; Baddeloy v. Baddeloy (1878), 38 L. T. 906; Harding v. Harding (1886), 17 Q. B. D. 442; *Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51; *Re Johnson, Moore v. Johnson*, [1891] 3 Ch. 48; *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; *Re Mudge*, [1914] 1 Ch. 115; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

Copyholds.]—See COPYHOLDS, Vol. XIII., pp. 52, 53, Nos. 617–622.

SECT. 2.—DISPOSITIONS WITHIN THE STATUTE.

See, now, Law of Property Act, 1925 (c. 20), s. 173.

544. Conveyance for good consideration—Though concealed.]—A conveyance shall not be fraudulent, if it be made upon good consideration, though it was concealed, & secretly made.—COLVILLE v. PARKER (1607), Cro. Jac. 158; 70 E. R. 138.

545. —.]—(1) A conveyance made upon good consideration, though made secretly & kept concealed, is not fraudulent.

(2) A lease for years made by husband to trustees for the use of his wife, with a condition indorsed on the back of it, to be void on a jointure, is good, if executed in pursuance of a promise, of such jointure made previous to & in consideration of their intermarriage.

(3) Where leases are made with a proviso "that if the lessor pay 10s. that then the lease shall be void," such lease shall be void as to the purchaser, because it is apparent that the sum to be paid is

fact satisfied by the heirs of A. out of his estate & that the sale under this execution was intended for their benefit, & the purchaser at sheriff's sale was acting on their account, & had paid nothing:—*Held:* this sale could not defeat the conveyance made by A. to B., & by B. to debt.—DOE d. DAILY v. VANKOUGHNET (1836), 5 O. S. 246.—CAN.

b. Two conveyances by same grantor—Deed after previous sale.]—Where A., being seized in fee of land, sold a portion of it to B., but gave him no deed, & B. went into possession, & A. afterwards sold all the land to C., directing that a deed should be made

Sect. 2.—Dispositions within the statute. Sect. 3: Sub-sect. 1, A. & B. (a).]

not of the value of the land, but only limited as a power of revocation; but if a man mortgage his land for £1,000, proviso "that if the mtgor. pay the £1,000, that then the lease shall be void," this is not a fraudulent lease, but shall be good against the purchaser, if the money be not paid thereupon (*per* CUR.).—**GRIFFIN v. STANHOPE** (1817), Cro. Jac. 454; 79 E. R. 389.

Annotations:—*Generally, Mentd.* Bainbridge v. Gardiner (1865), O. Bridg. 402; *Machell v. Clarke* (1702), 2 Ld. Raym. 778.

546. — Though incomplete—Agreement [to settle.]—**BINGHAM v. HUSSEY** (1660), 1 Rep. Ch. 192; 21 E. R. 547.

See 27 Eliz. c. 4, s. 4.

547. Grant to Crown.]—A conveyance to the Crown of purpose & intent to deceive a purchaser is void as to such purchaser by 27 Eliz. c. 4.—**MAGDALEN COLLEGE, CAMBRIDGE (MASTER & FELLOWS) CASE** (1615), 11 Co. Rep. 66 b; 77 E. R. 1235; *sub nom.* **WARREN v. SMITH, MAGDALEN COLLEGE CASE**, 1 Roll. Rep. 151.

Annotations:—*Mentd.* Colt & Glover v. Coventry & Lichfield (Bp.) (1612), Hob. 140; *R. v. Hampden* (1637), 3 State Tr. 826; *Lyn v. Wyn* (1665), O'Bridg. 122; *Thomas v. Sorrell* (1673), Freem. K. B. 85; *Elways v. Cottesford* (1675), 3 Keb. 457; *Woodward v. Fox* (1691), 2 Vent. 267; *R. v. London (Bp.) & Lancaster* (1693), 1 Show. 441; *R. v. London (Bp.) & Birch* (1694), 1 Show. 493; *Thornby v. Fleetwood* (1720), 1 Stra. 318; *A.-G. v. Allgood* (1743), Park. 1; *A.-G. v. Downing* (1767), Wilm. 1; *A.-G. v. Walker* (1849), 3 Exch. 242; *Abergavenny v. Braco* (1872), L. R. 7 Exch. 145; *Moore v. Clench* (1875), 1 Ch. D. 447; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Perry v. Eames, Salaman v. Eames, Mercer's Co. v. Eames*, [1891] 1 Ch. 658.

548. Limitation without consideration.]—(1) In a conveyance of lands a limitation without consideration is void as against a subsequent purchaser for good consideration, being fraudulent under 27 Eliz. c. 4.

(2) The concurrence of a necessary party, in the conveyance containing such limitation, does not amount to a consideration where the limitation is shown by circumstances apparent on the face of the conveyance, & of other conveyances forming part of the transaction, not to have been made for the benefit, or at the desire, of such party, & the concurrence of such party does not appear to have been a part of the contract at the time. Therefore, where H., tenant for life of copyhold, & B. remainderman in tail, with remainder to H. in fee, intending to join in an absolute sale of the property to L., suffered a recovery to the use of H. for life, remainder to B. for life, remainder to the right heirs of the survivor; & then joined in surrendering to L., a purchaser for valuable consideration, in fee:—*Held*: the contingent remainder was void against L., though, had it been good, it would not have passed to L. by the

surrender, especially as, with respect to a moiety, the object of the conveyance appeared to be to effect a sale of the whole interest, in pursuance of an earlier marriage settlement; but the recovery was not totally void, & therefore the entail was barred, & L. took the use resulting to B. in fee.—**DOE d. BAVERSTOCK v. ROLFE** (1838), 8 Ad. & El. 650; 3 Nev. & P. K. B. 648; 1 Will. Woll. & H. 466; 7 L. J. Q. B. 251; 112 E. R. 985.

Annotations:—*As to* (1) *Consd.* Tarleton v. Liddell (1851), 17 Q. B. 390. *As to* (2) *Reid.* Scott v. Scott (1854), 23 L. T. O. S. 27. *Generally, Mentd.* Davenport v. Bishopp (1843), 2 Y. & C. Ch. Cas. 451; *Ford v. Stuart* (1852), 15 Beav. 493.

549. Not confined to voluntary conveyances.]—**PERRY-HERRICK v. ATTWOOD**, No. 561, *post*.

550. Purchase by way of advancement.]—**DREW v. MARTIN**, No. 90, *ante*.

551. Two conveyances by same grantor.]—**GODFREY v. POOLE**, No. 219, *ante*.

552. Resettlement after marriage—After entail barred—Heir joining in resettlement.]—**TARLETON v. LIDDELL**, No. 169, *ante*.

Gifts to charities.]—*See* CHARITIES, Vol. VIII., p. 282, Nos. 558, 559.

SECT. 3.—FRAUDULENT INTENT AND EVIDENCE THEREOF.

SUB-SECT. 1.—ACTUAL FRAUD.

A. In General.

553. General rule.]—(1) In debt against an heir on the bond of his ancestor, debt. pleaded *riens per descent* the day of the writ purchased, upon which issue was joined:—*Held*: pltf. might give in evidence a fraudulent conveyance to defraud him of his action.

(2) A purchaser shall avoid a fraudulent conveyance made with intent to deceive purchasers against 27 Eliz. c. 4, although before his purchase he had notice of such conveyance.—**GOOCH'S CASE** (1590), 5 Co. Rep. 60 a; 77 E. R. 146.

Annotations:—*As to* (1) *Reid.* Richardson v. Horton (1843) 7 Beav. 112. *As to* (2) *Consd.* Roe d. Hamerton v. Mitton (1767), 2 Wils. 356. *Generally, Mentd.* Winchcombe v. Winchester (Bp.) & Pulleston (1616), Hob. 165.

554. Fraud a question of fact.]—Fraud shall never be intended, except it be apparent & found, & that conveyance which at the time of the making was good, shall never by matter *ex post facto* be adjudged to be fraudulently made, for before *primo* Eliz. at the common law, a conveyance made for natural affection without valuable consideration is not to be avoided; none shall avoid it, but such as come in upon valuable

to B. of his portion when he paid it in full. C. sold all to D. except B.'s portion, which D. subsequently bought at sheriff's sale, where it was sold for B.'s debt, & C. then made a deed of B.'s portion to a stranger for a nominal consideration:—*Held*: such deed was fraudulent as well against D. as against creditors.—**DOE d. WILCOX v. THORNE** (1836), 4 O. S. 315.—CAN.

e. — Presumption of reconveyance.]—In ejectment, it appeared that A. in 1829, conveyed to his son N., who devised to pltf. Debt. proved that in 1823 A. had made a deed to another son, I., which was produced

with the seals torn off, & had been found among A.'s papers after his death. A few years after this deed was given, I. had removed from that part of the country, leaving A. in possession. I. died in 1830, never having made any claim; & A., in 1838, & his son N., in 1841, both died in possession. In 1847, I.'s son brought ejectment against N.'s widow, this pltf. being then an infant, but the suit was compromised:—*Held*: the mere cancelling of the deed by I., or with his consent, would not divest him of the estate, but if I. gave up & cancelled the deed intending to surrender the estate, & his father

afterwards entered & conveyed to N., & possession was held consistently with these facts till 1847, the jury might presume a re-conveyance by I., in pursuance of his intention.—**FRASER v. FRALICK & FRASER** (1861), 21 U. C. R. 343.—CAN.

PART II. SECT. 3, SUB-SECT. 1.—A.

554 l. Fraud a question of fact.]—Under Land Titles Act, s. 136, fraud is an element necessary to be found in each transaction before an action will lie for the recovery of land transferred under the Act.—**COVENTRY v. ANNABLE**

considerations.—ANON. (1616), 1 Brownl. 45 ; 123 E. R. 655.

555. —.] — GORGE'S (LADY) CASE (1635), cited in Cro. Car. at p. 550 ; 79 E. R. 1074.

Annotations:—*Reid*. Crisp v. Pratt (1640), Cro. Car. 549. *Mentd.* Grey v. Grey (1677), 2 Swan. App. 594.

556. —.]—J. voluntarily gave to his sisters, in 1848, a mtge. for a term of two hundred years, to secure an antecedent debt. The sisters allowed him to retain the title deeds, that he might give security on the estate for another debt for which he was then being sued by L. Shortly afterwards, J. agreed, in writing, to give L. a mtge. on the estate for the debt, & the deeds, in pursuance of this agreement, were deposited with G. & B., the London agents of J.'s solr., & who shortly afterwards became his solrs., to be held by them for the purpose of giving effect to the security. J., in 1851, made a mtge. in fee to C., who had no notice of the prior incumbrances, & G. & B. handed over to C. the title deeds. In 1855, the sisters made a sub-mtge. of the term by assignment:—*Held*: the mtge. of 1848 was void under 27 Eliz. c. 4, as against C., who therefore took the legal fee discharged of the term.

The question depends upon the *bona fides* of the transaction, to be judged of on all the circumstances of the case. It is a question to be decided by us as a jury would decide (*per Cur.*).—*LLOYD v. ATTWOOD*, *ATTWOOD v. LLOYD* (1859), 3 De G. & J. 614 ; 29 L. J. Ch. 97 ; 33 L. T. O. S. 209 ; 5 Jur. N. S. 1322 ; 41 E. R. 1405, L. JJ.

Annotations:—*Reid*. Freeman v. Pope (1870), 5 Ch. App. 538 ; *Re* Johnson, Golden v. Gillam (1881), 20 Ch. D. 389. *Mentd.* *Re* Beetham, *Ex p.* Broderick (1886), 18 Q. B. D. 380.

557. False recital of consideration.] — If colourable payment of money by a purchaser of land is resisted in a conveyance when none was actually paid, the estate is invalid as against one who purchases *bonâ fide* for valuable consideration.—*BALLERD v. SITWELL* (1636), Clay. 32.

558. Interest reserved to settlor in case of alienation.]—A., being tenant for life of certain premises, with a power of limiting a jointure to his wife, a settlement was executed on his marriage,

by which he demised the lands, of which he was tenant for life, to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin-money during the coverture, & he limited a jointure to her after his death ; the same parties on the same day executed another instrument, by which A. covenanted not to sell or incumber the lands comprised in the term, & it was declared, that, if he should at any time sell or incumber them, or attempt so to do, the trustees of the term should receive the rents & profits, & apply them, as they might think fit, for the maintenance & support of A. or his wife or children or issue:—*Held*: the covenant & this proviso were fraudulent & void as against a subsequent incumbrancer of A.'s life estate.—*PHIPPS v. ENNIS-MORE (LORD)* (1829), 4 Russ. 131 ; 38 E. R. 754, L. C.

Annotation:—*Distd.* Knight v. Browne (1861), 30 L. J. Ch. 619.

559. Avoidance of liability — Term assigned to poor person.]—Assignment by the assignee of an equitable term to a person in poor circumstances:—*Held*: valid, although it was made in order to avoid payment of a sum of money chargeable on the lessee under the original agreement, which agreement the assignee had adopted in all its parts.

The motive which induces the assignee of a lease to assign over his interest, has no bearing upon the question whether the assignment is fraudulent or not, provided the assignment is real, & intended to operate as it appears to operate.—*FAGG v. DOBIE* (1838), 3 Y. & C. Ex. 96 ; 2 Jur. 681 ; 160 E. R. 629.

Annotation:—*Mentd.* *Re* Smith, *Ex p.* Hepburn (1890), 25 Q. B. D. 536.

B. Badges of Fraud.

(a) Grantor Remaining in Possession.

560. Purchase in name of daughter — Father exercising rights of ownership.]—(*GORGE'S (LADY) CASE* (1635), cited in Cro. Car. at p. 550 ; 79 E. R. 1074.

Annotations:—*Reid*. Crisp v. Pratt (1640), Cro. Car. 549. *Mentd.* Grey v. Grey (1677), 2 Swan. App. 5

(1911), 19 W. L. R. 400 ; 1 W. W. R. 148 ; 4 Sask. L. R. 75.—*CAN.*

d. — Necessity for proof of.]—Where a lease was impeached for alleged fraud & undervalue:—*Held*: in the circumstances, valid. Concealment & misrepresentation, relied on in such a case, must be proved fraudulent, & the contract shown to be based upon it, & the very fraud alleged in the bill proved.—*DONOGAL (MARQUIS) v. GREY* (1849), 13 L. Eq. R. 12.—*IR.*

e. — Burden of proof.]—Where a voluntary conveyance of lands is impeached by a subsequent purchaser for value, the onus of proving that such conveyance was made *bonâ fide* & without fraudulent intent, so as to bring it under Voluntary Conveyances Act, 1893, s. 2, lies on the party seeking to uphold such voluntary conveyance.—*NATIONAL BANK, LTD. v. BEHAN*, [1913] 1 L. R. 512.—*IR.*

f. — —.]—10 Chas. 1, s. 2, c. 3 (Ir.), corresponding to 27 Eliz. c. 4, remains in operation to prevent fraud of the character described in the statute ; but a presumption of fraudulent intent has been got rid of by Voluntary Conveyances Act, 1893, which has cast the onus of showing that a deed has been executed *mala*

on the person alleging it.—*MOORE v. KELLY & MOORE*, [1918] 1 L. R. 169.—*IR.*

g. Avoidance of liability — Conveyance to protect against creditors — Subsequent mortgage.]—Voluntary Conveyances Act, 1868, gives effect as against subsequent purchasers to prior voluntary conveyances executed in good faith, & to them only ; & a voluntary conveyance to a wife for the purpose of protecting property from creditors:—*Held*: not to be good against a subsequent mtge. to a creditor.—*RICHARDSON v. ARMITAGE* (1871), 18 Gr. 512.—*CAN.*

h. — — Subsequent power of attorney to grantor.]—If real estate is purchased by a husband in the name of his wife, who becomes the registered owner, for the illegal purpose of defeating creditors, both spouses being aware of the illegal purpose, & the wife thereafter grants a power of attorney to the husband giving him a wide general power to sell & absolutely dispose of the property, but not embracing a power to transfer to himself, any attempt by him to acquire the title by such a use of his authority is a fraud on the power.—*ELFORD v. ELFORD*, [1922] 3 W. W. R. 339 ; 69 D. L. R. 284 ; 64 S. C. R. 125.—*CAN.*

k. — Mining licence allowed to lapse — To defeat mortgage.]—K., was the holder of a prospecting licence over certain gold mining areas under which he was entitled, at any time prior to the expiration of the licence, on payment of the statutory fees, to the exclusive right to a lease of the areas for the term of 21 years. K., having mtged. his rights to plff. as security for the repayment of a loan, fraudulently, & for the purpose of defeating the mtge., allowed his licence to expire, & his right to a lease to become forfeited, when the areas were taken up by D., another deft., with money supplied by K., & transferred to K.'s son:—*Held*: the transfer was fraudulent & without consideration, & the mtge. to plff. attached to the new title.—*GRIFFIN v. KENT* (1894), 31 N. S. R. (19 R. & G.) 528.—*CAN.*

PART II. SECT. 3, SUB-SECT. 1.—B. (a).

1. Purchase in name of son — Father exercising rights of ownership — Subsequent sale by son.]—Deft. agreed in 1862 to exchange land with J. & W. He deeded certain lands to them, but instead of taking a deed from them to himself, he had the deed made out in favour of his infant son, R. This

Sect. 3.—Fraudulent intent and evidence thereof:
Sub-sect. 1, B. (a) & (b); sub-sect. 2, A. & B. (a).]

561. Mortgage to secure existing debt—Mortgagor retaining deeds—With intent that he may raise money.]—A. voluntarily gave to his sisters a mtge. to secure an antecedent debt. The sisters allowed him to retain the title-deeds, that he might be enabled to give a first mtge. to secure another debt, for which he was being sued by B. A. deposited the deeds with B. to secure that debt & afterwards, without B.'s concurrence, got possession of them & mortgaged the estate to plffs. for a considerably larger sum, & delivered the title-deeds to them, they having no notice of the mtge. to the sisters:—*Semble*: the mtge. to the sisters was void as against the plffs. under 27 Eliz. c. 4.

I much incline to the view, though I am not wholly free from doubt upon the point, that this mtge. is void as against plffs. by virtue of 27 Eliz. c. 4. It has been urged against this view that it was not a voluntary conveyance; but though we are most familiar with the application of the Act to voluntary conveyances, it is not necessary that a conveyance should be voluntary to come within it. There is not a word in the Statute about a conveyance being voluntary; the Statute speaks only of conveyances made for the purpose of deceiving persons who shall purchase the property, & of conveyances by the secret intent of the conveying parties to be to their own proper use. If the intention of the parties to the transaction here in question was that the [sisters] should have this security, but that nevertheless A. should keep the title-deeds, that he might be enabled thereby to deal with the estate in favour of third parties, I am strongly disposed to think that the security comes within the Statute; it certainly comes within its principle (LORD CRANWORTH, C.).—*PERRY-HERRICK v. ATTWOOD* (1857), 2 De G. & J. 21; 27 L. J. Ch. 121; 30 L. T. O. S. 267; 4 Jur. N. S. 101; 6 W. R. 204; 41 E. R. 895, L. C.

Annotations:—*Reid*. Lloyd v. Attwood (1859), 3 De G. & J. 614; Freeman v. Pope (1870), 23 L. T. 208; Hunter v. Walters, Curling v. Walters, Darnell v. Hunter (1870), L. R. 11 Eq. 292. *Mentd.* Cory v. Eyre (1863), 1 De G. J. & Sm. 149; Jones v. Rhind, Rhind v. Jones (1869), 17 W. R. 1091; Briggs v. Jones (1870), L. R. 10 Eq. 92; Shropshire Union Rys. & Canal Co. v. R. (1875), L. R. 7 H. L. 496; Fox v. Hawks, Hawks v. Fox (1879), 13 Ch. D. 822; Clarke v. Palmer (1882), 21 Ch. D. 124; Northern Counties of England Fire Insee. v. Whipp (1884), 26 Ch. D. 482; Manners v. Mew (1885), 29 Ch. D. 725; National Provincial Bank of England v. Jackson (1886), 33 Ch. D. 1; *Re Ingham*, Jones v. Ingham, [1893] 1 Ch. 352; Brocklesby v. Temperance Bldg. Soc., [1895] A. C. 173; Brown v. Stedman (1896), 44 W. R. 458; Lloyds

deed was recorded on the day of its execution, though the grantee, R., was not present at the execution, & there was no evidence that it was ever delivered to him personally. Deft. went into possession at once, & continued in possession until action brought. R. shortly after coming of age in 1875, executed a deed of the land to plff., who, after making demand of possession, brought an action of ejectment against deft.:—*Held*: the deed to R. conveyed title to him, & a non-suit ordered on the ground that R. was out of possession when he deeded the land, deft. holding adversely, could not be sustained.—*GAMMON v. JODREY* (1877), 11 N. S. R. (2 R. & C.) 314.—**CAN.**

PART II. SECT. 3, SUB-SECT. 1.—
B. (b).

m. Conveyance secretly made—Trust

for benefit of children—Purchaser at execution sale.]—The owner of lands, subject to several mtges., conveyed to his brother, but without his knowledge; & the person by whose advice the deed was executed stated in evidence that the deed, though absolute in form, was made upon trust for securing the incumbrances affecting the property & for the benefit of grantor's children; grantor at the time being greatly involved, & having no other property except book debts & household furniture. A sale of grantor's interest was subsequently effected by the sheriff upon an execution, & the purchaser filed a bill impeaching the conveyance upon trust as a fraud upon creditors:—*Held*: in the circumstances, a decree in his favour.—*BEAMISH v. POMEROY* (1858), 6 Gr. 586.—**CAN.**

n. Failure to register.]—The omission to register a deed is not necessarily

Bank v. Bullock, [1896] 2 Ch. 192; *Re Castell & Brown*, Roper v. Castell & Brown, [1893] 1 Ch. 315; West v. Williams, [1898] 1 Ch. 488; Rimmer v. Webster, [1902] 2 Ch. 163; Powell v. Browne (1907), 97 L. T. 854; Truman v. Attenborough (1910), 103 L. T. 218; Fry v. Smellie, [1912] 3 K. B. 282; Lloyds Bank v. Swiss Bankverein, Union of London & Smiths Bank v. Swiss Bankverein (1912), 107 L. T. 309; London Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777.

(b) Secrecy of the Grant.

562. Jointure for wife—Voluntarily & secretly created—With intent to defraud intending purchaser.]—BURREL'S CASE, No. 539, *ante*.

563. Conveyance secretly made—For valuable consideration—Not fraudulent.]—COLVILLE v. PARKER, No. 544, *ante*.

564. ———.]—GRIFFIN v. STANHOPE, No. 545, *ante*.

565. Deed retained by grantor.]—DOE d. GARNONS v. KNIGHT, No. 375, *ante*.

566. ———.]—A mtge. executed in 1871 contained a recital that the mtgor. was indebted to the mtgee. in the sum of £1,500 for moneys advanced by her to him, & that he had agreed to secure the payment of the same by the mtge. The money had been advanced in 1864, & the evidence showed that there was at that time no agreement for a mtge., & that there had been no subsequent pressure by the lender. The mtge. deed was retained in the possession of the mtgor., & there was nothing to show that the mtgee. knew of its execution until Feb. 1874:—*Held*: the mtge. was void under 27 Eliz. c. 4, as against a mtgee. for value whose mtge. was executed in Feb. 1872, the recital of the agreement not operating as an estoppel against him.—*CRACKNALL v. JANSON* (1879), 11 Ch. D. 1; 40 L. T. 640; 27 W. R. 851, C. A.

Annotation:—*Mentd.* Wigan v. English & Scottish Law Life Assoc. Assocn., [1909] 1 Ch. 291.

SUB-SECT. 2.—PRESUMPTION OF FRAUD BEFORE VOLUNTARY CONVEYANCES ACT, 1893, WHEN CONVEYANCE VOLUNTARY.

A. In General.

NOTE.—In view of the provisions of the Voluntary Conveyances Act, 1893 (c. 21), the following cases are set out in the form in which they appear below.

567. Voluntary conveyance followed by sale for value—Intention to defeat subsequent sale pre-

or by itself, indicative of fraud, but with other matters it may be a badge of fraud.—*DOE d. PEACOCK v. KING* (1854), 2 Legge, 829.—**AUS.**

PART II. SECT. 3, SUB-SECT. 2.—A.

567 i. Voluntary conveyance followed by sale for value—Intention to defeat subsequent sale presumed.]—Property of plff.'s husband having been offered for sale under mtge., she agreed orally with mtgee.'s solrs. to purchase it, but, not having the means to make the cash payment required, she saw one of the defts., who agreed to lend her for a year the necessary money, & to take a deed of the property as security, & he gave to the solrs. a written offer to purchase on the terms arranged by plff., which offer was by the solrs. orally accepted. The property was in fact conveyed to the other deft., who was the daughter of her

sumed.]—DOE d. NEWMAN v. RUSHAM (1852), 17 Q. B. 723.

568. Voluntary conveyance — Whether conclusive.]—ROBERTS (LORD) v. LEA (1632), Toth. 44; LEACH v. DENE (1640), 1 Ch. App. 461, n.; FITZ-JAMES v. MOYS (1663), 1 Sid. 133; REEVE'S CASE (1684), 2 Vent. 363; WHITE v. HUSSEY (1690), Prec. Ch. 13; TONKINS v. ENNIS (1727), 1 Eq. Cas. Abr. 334; OXLEY v. LEE (1736), 1 Atk. 625; WHITE v. SANSOM (1746), 3 Atk. 410; UNDERWOOD v. HITHCOX (1749), 1 Ves. Sen. 279; SENHOUSE v. EARLE (1755), Amb. 285; DOE d. OTLEY v. MANNING (1807), 9 East, 59; CORMICK v. TRAPAUD (1818), 6 Dow. 60; DOE d. BAVERSTOCK v. ROLFE (1838), 8 Ad. & El. 650; TARLETON v. LIDDELL (1851), 17 Q. B. 390; DE HOUGHTON v. MONEY (1866), 2 Ch. App. 164; *Re BARKER'S ESTATE*, JONES v. BYGOTT, BYGOTT v. HELLARD (1875), 44 L. J. Ch. 487.

569. — — — Prima facie evidence.]—DOUGLASSE v. WAAD (1668), 1 Cas. in Ch. 99; HOLFORD v. HOLFORD (1672), 1 Cas. in Ch. 216; LAVENDER v. BLACKSTONE (1675), 2 Lev. 146.

570. — — — Bonâ fide conveyance.]—GARTH v. MOIS (1663), 1 Keb. 486; BANBURY'S (LORD) CASE (1676), Freem. Ch. 8; DOE d. WATSON v. ROUTLEDGE (1777), 2 Cowp. 705; DOE d. RICHARDS v. LEWIS, RICHARDS v. LEWIS (1852), 11 C. B. 1035.

571. — — — Not reserving power of revocation.]—MOUNTFORD v. KEENE (1871), 24 L. T. 925.

See, now, Law of Property Act, 1925 (c. 20), s. 173 (2).

B. Consideration.

(a) In General.

572. Necessity for valuable consideration.]—In purchases the question is not whether the consideration be adequate, but whether it is valuable; for if it be such a consideration as will make deft. a purchaser within 27 Eliz. c. 4, & bring him within the protection of that Act, he ought not to be impeached in equity (*per Cur.*).—BASSETT v. NOSWORTHY (1673), Cas. temp. Finch, 102; 23 E. R. 55.

*Annotations:—***Refd.** Bullock v. Sadler (1776), Amb. 763; Copls v. Middleton (1817), 2 Madd. 410. **Mentd.** Dudley & Ward v. Dudley (1705), Prec. Ch. 241; Jerrard v. Saunders (1794), 2 Ves. 454; Phillips v. Phillips (1862), 4 De G. F. & J. 208; Stratton v. Murphy (1867), 15 W. R. 1125; Manners v. Mew (1885), 29 Ch. D. 725; Emmerson v. Ind Coope (1886), 33 Ch. D. 323.

co-deft.:—**Held:** the conveyance to the daughter was the result of a fraudulent conspiracy between her father & herself to deprive pltf. of her bargain; therefore the daughter stood in no better position than her father; & he was an agent for pltf. whose agency might be proved by oral evidence.—McMILLAN v. BARTON (1890), 19 A. R. 602; 20 S. C. R. 404.—CAN.

o. Voluntary conveyance—Proof of consideration.]—*Semble:* R. S. O. 1877, c. 109, s. 2, is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary, even though the transaction took place prior to that enactment.—SANDERS v. MALSBURG (1882), 1 O. R. 178.—CAN.

p. — — — In fraud of creditors—Purchaser at execution sale.]—Pltf. can not be allowed to set up a deed of gift against proceedings in execution under which deft. acquired his title as pur-

chaser, when the gift was made by a donor in pecuniary difficulties, & included all his property.—HORMUJI v. COWASJI (1888), 1 L. R. 13 Bom. 297.—IND.

PART II. SECT. 3, SUB-SECT. 2.—B. (a).

q. Necessity for valuable consideration—Assignment of lease—Onerous covenants.]—The mere existence of a covenant, on the part of an assignee of a leasehold interest, to indemnify the lease against the rents & covenants of the lease, is not, *per se*, such a valuable consideration for the assignment as to take the case out of the operation of *Covinous & Fraudulent Conveyances (Irish) Act, 1634 (c. 3)*.—GARDINER v. GARDINER (1861), 12 I. C. L. R. 55.—IR.

lease is held at a full or substantial rent, & contains onerous covenants on the part of the lessee, an assignment

573. — — —]—GOODRIGHT d. HUMPHREYS v. MOSES, No. 612, *post*.

574. — — —]—(1) A conveyance of the property of the youngest of four coparceners, when the church is full, upon the presentation of the eldest, expressed to be made "in consideration of 20s. & of faithful service done to the grantor, as also for divers good & valuable causes & considerations him thereunto moving," is not necessarily fraudulent as against a subsequent purchaser for value.

(2) *Semble:* the sum of 20s., & the service performed were, in themselves a sufficient valuable consideration for a right which could not come to be exercised for more than half a century.

(3) This deed purports to be a grant in consideration of 20s. & of faithful service performed, & of divers other good & valuable causes & considerations; & in such a case the party is entitled to show, as matter of fact, the existence of other considerations besides those which are expressed in the deed. If there were no consideration for it, if the 20s. was not paid, & no services were rendered, & there were no other consideration of a valuable nature, the deed would be fraudulent; but the jury having found that the deed was not fraudulent, we cannot, as matter of law, say that it is fraudulent (BAYLEY, J.).

(4) The distinction between good & valuable consideration is this, that a good consideration means good as between the parties; but a valuable consideration makes the conveyance good against a subsequent purchaser.—GULLY v. EXETER (BP.) (1830), 10 B. & C. 584; 8 L. J. O. S. K. B. 281; 109 E. R. 568; *sub nom.* EXETER (BP.) v. GULLY, 5 Man. & Ry. K. B. 457.

*Annotation:—*Generally, **Mentd.** Newton v. Boodle (1848), 6 C. B. 529.

See, generally, CONTRACT, Vol. XII., pp. 173 et

575. — — — Several deeds relating to one transaction—Consideration of one supports all.]—In 1815, real estate stood settled on the husband for life, remainder to his wife for life, remainder to the heirs of the body of his wife, remainder to the right heirs of the husband. The husband & wife barred the estate tail, & by a deed of June 30, 1817, it was settled to such uses as the husband alone should appoint. He, by a deed of July 1, 1817, appointed to such uses as he & his wife should jointly appoint, & in default, to himself for life, remainder to his wife for life, remainder

free from actual fraud to an assignee, who subjects himself to the performance of the covenants, is not voluntary.—*Re GREER* (1877), 11 I. R. Eq. 502.

s. — — — — —.]—There is no abstract & inflexible rule that every assignment of leasehold premises subject to a rent must necessarily be an assurance for good consideration under *Covinous & Fraudulent Conveyances (Irish) Act, 1634 (c. 3)*, so as to prevail against a subsequent purchase for value.—LEE v. MATHEWS (1880), 6 L. R. Ir. 530.—IR.

t. — — — — — Covenant for further assurance only.]—In 1846, A. mtgd. to B. the lands of X., & in 1854 assigned them to his son, in consideration of natural love & affection. They were held under a renewable lease, & the son covenanted to perform the lessee's duties. A. merely covenanted for further assurance. In 1856 the assignment was registered. In 1860 A.

intent and evidence thereof:
2, B. (a) & (b).]

to his son in fee: & on July 2, 1817, they appointed the estate by way of mtge. for a term, with a proviso for cesser of the term upon repayment. Between 1817 & 1826, various other mtges. were made under the power, the equity of redemption being reserved in terms consistent with the uses of the deed of July 1, 1817. In 1832, the husband & wife, under the power, mortgaged the estate in fee, the equity of redemption being limited to the husband & wife, their heirs or assigns, or to such other persons as they should direct:—*Held*: the deeds of June 30, & July 1 & 2, 1817, constituted one transaction; &, consequently, the deed of July 1, 1817 was not a voluntary deed, as between the son claiming under the limitations of that deed, & a purchaser from the husband.—*WHITBREAD v. SMITH* (1854), 3 De G. M. & G. 727; 2 Eq. Rep. 377; 23 L. J. Ch. 611; 23 L. T. O. S. 2; 18 Jur. 475; 2 W. R. 177; 43 E. R. 286, L. C. & L. JJ.

Annotations:—*Mentd.* *Sharshaw v. Gibbs* (1854), Kay, 333; *Heather v. O'Neill* (1858), 2 De G. & J. 399.

576. Adequacy of consideration immaterial — If consideration valuable.]—*BASSETT v. NOSWORTHY*, No. 572, *ante*.

577. — — — Advancement of issue.]—*JONES v. MARSH*, No. 627, *post*.

578. — — —]—Purchase for a valuable consideration *bond fide* paid:—*Held*: a good defence, though the consideration was much less than the real value.—*BULLOCK v. SADLER* (1776), Amb. 764; 27 E. R. 491, L. C.

Annotation:—*Reid.* *Townend v. Toker* (1866), 1 Ch. App. 446.

579. — — —]—*OWEN v. OWEN* (1861), 3 H. & C. 88; 33 L. J. Ex. 237; 11 L. T. 137; 10 Jur. N. S. 881; 159 E. R. 459.

See, generally, CONTRACT, Vol. XII., pp. 201

580. Effect of "good" & "valuable" consideration distinguished.]—*GULLY v. EXETER* (Bp.), No. 574, *ante*.

See, also, CONTRACT, Vol. XII., pp. 172, 173, 201.

581. Who is within the consideration — Trustee for party paying price.]—*BOULTON v. WISEMAN*, No. 801, *post*.

582. — — — Children of grantor — Under terms of settlement—Consideration moving from stranger.]

mtged. lands which, with X., had been included in the mtge. of 1846. Proceedings for the sale of A.'s lands having been instituted, a supplemental petition for the sale of X. was presented on foot of the mtge. of 1846. The order was made, but a direction was given that A.'s lands should be sold first. The proceeds of the sale sufficed to pay off the mtge. of 1846 & the prior incumbrances; but left no sufficient residue for the mtge. of 1860:—*Held*: the assignment was not to be deemed to have exonerated X. from the mtge. of 1846, notwithstanding the covenant for further assurance; the assignment was to be deemed a voluntary conveyance, & therefore no indemnity could prove effectual against a purchaser for value.—*Re RORKE'S ESTATE* (1863), 15 L. Ch. R. 316.—IR.

576 i. Adequacy of consideration immaterial—If consideration

A. entered into an agreement whereby he conveyed part of his land to his son L. on account of natural love, the son to give his father one-half of the produce, if demanded:—*Held*: a valuable consideration.—*LEECH v. LEECH* (1865), 11 Gr. 572.—CAN.

577 i. — — — Advancement of issue.]—The wife of A. claimed an annuity on his estates under a voluntary deed, or a right to dower. She concurred in a sale of some of his estates to a stranger, & joined in a covenant to levy a fine, & was induced to do so by other estates of her husband being settled by articles under which plff., her grandson, claimed: the articles recited other considerations, but there was no proof of any; no fine was ever levied in pursuance of the covenant, but the purchaser was never disturbed:—*Held*: the articles were

—A. mortgaged his own estate for £5,000 for the benefit of B., & B., pursuant to an agreement to that effect with A., conveyed his estate, not only as an indemnity to A., but also to uses for the benefit of his own (B.'s) children & their issue:

—*Held*: there was a sufficient valuable consideration as between A. & B. to support the limitations to B.'s children, as against subsequent purchasers for valuable consideration from B.—*FORD v. STUART* (1852), 15 Beav. 493; 21 L. J. Ch. 514; 51 E. R. 629.

Annotations:—*Mentd.* *Kelson v. Kelson* (1853), 10 Haro, 385; *Clarke v. Wright* (1861), 7 Jur. N. S. 1032.

Marriage consideration.]—*See* Sect. 3, sub-sect. 2, B. (c) iii., *post*.

(b) Valuable Consideration.

583. Advancement of learning — & love of grantee.]—An annuity granted by W. to D. in consideration that the public good is advanced by the encouragement of learning, & in consideration likewise of the love he bore him is not a legal consideration, nor does it amount to a valuable one in the eye of the law.—*STILES v. A.-G.* (1740), 2 Atk. 152; 26 E. R. 496, L. C.

Annotations:—*Consd.* *Townend v. Toker* (1866), 1 Ch. App. 446. *Reid.* *Blount v. Doughty* (1747), 3 Atk. 481; *Gilham v. Locke* (1804), 9 Ves. 612. *Mentd.* *Jameson v. Skipwith* (1779), 1 Bro. C. C. 34.

584. Surrender of right — Surrender of jointure by wife on resettlement.]—*Feme covert* joins in an alienation of her jointure & had another made the same day without precedent articles or agreement, not fraudulent *quoad* purchasers.—*SCOT v. BELL* (1672), 2 Lev. 70; 3 Keb. 82; 83 E. R. 454.

Annotations:—*Reid.* *Blount v. Doughty* (1747), 3 Atk. 481; *Roe d. Hamerton v. Mitton* (1767), 2 Wils. 356; *Butterfield v. Heath* (1852), 15 Beav. 408.

585. — — — Inferior security accepted.]—On a settlement in contemplation of marriage of J. H. his mother having an annuity secured upon the whole of the lands comprised in the settlement consented to part with her security upon the whole of the lands & to take instead thereof a security upon part of the lands:—*Held*: there was a good & valuable consideration to support a limitation in the settlement in favour of T. H., a younger brother of J. H.—*ROE d. HAMERTON v. MITTON* (1767), 2 Wils. 356; 95 E. R. 856.

Annotations:—*Consd.* *Brown v. Carter* (1801), 5 Ves. 862; *Tarleton v. Liddell* (1851), 17 Q. B. 390. *Reid.* *Jones v. Boulter* (1786), 1 Cox. Eq. Cas. 288; *Myddleton v. Kenyon* (1794), 2 Ves. 391; *Doe d. Otley v. Manning* (1807), 9 East, 59; *Ford v. Stuart* (1852), 15 Beav. 493; *A.-G. for Ireland v. Rathdonnell*, [1896] W. N. 141.

586. Wife parting with interest.]

for sufficient consideration against a subsequent purchaser for value.—*FITZMAURICE v. SADLER* (1846), 9 L. Eq. R. 595.—IR.

a. Inadequacy of consideration.]—*Semble*: inadequacy of price when it is less than half the value is a strong evidence of fraud, where the property is the whole property of the vendor.—*BUTLER v. MILLER* (1867), 15 W. R. 779.—IR.

PART II. SECT. 3, SUB-SECT. 2.—
B. (b).

b. Surrender of right — Release of dower.]—The release by a woman married since 1837, of her dower rights, is not a valuable consideration for a settlement of lands on her, so as to defeat a subsequent sale by the settlor, to a purchaser for value.—*CONOLI v.*

(1) *Semble*: the mutual concurrence of a husband & wife in the levying of a fine of lands in which they were jointly interested, & in the declaration of the uses for the benefit of their issue, constitutes a valuable consideration to support the deed declaring such uses.

(2) *Semble*: the heir-at-law of the author of a voluntary deed cannot avoid the deed under 27 Eliz. c. 4, by a conveyance for value.—PARKER v. CARTER (1845), 4 Hare, 400; 67 E. R. 704.

Annotations:—As to (1) *Consd.* Crofts v. Middleton (1856), 25 L. J. Ch. 513. As to (2) *Reid.* Doe d. Newman v. Rusham (1852), 17 Q. B. 723; Doe d. Richards v. Lewis, Richards v. Lewis (1852), 11 C. B. 1035. *Generally*, *Mentd.* Wilkinson v. Fowkes (1851), 9 Hare, 193.

587. —.]—A. & his wife, joint tenants in fee, in 1818 mortgaged their estate to B. the proviso for redemption being, that on payment of the mortgage money B. should re-convey to A. & his wife, their heirs or assigns or unto such other person or persons, & for such intents & purposes & in such manner & form as A. & his wife or the survivor of them, or the heirs or assigns of such survivor should appoint. In pursuance of a covenant in the mortgage deed, a fine was levied by A. & his wife. In 1823 the mortgage money was repaid & in 1827, by a deed reciting these circumstances B. by the direction of A. & wife conveyed, & A. & wife appointed to a trustee the property to be held to the use of the wife for life, then of A. for life, & afterwards of S., a daughter, & her children, etc. After the death of the wife, A. in 1854 conveyed the estate to his son for a valuable consideration. The son after A.'s death instituted a suit to set aside the settlement of 1827 as voluntary & void against himself, a purchaser for value. A decree was made in pltf.'s favour. On appeal:—*Held*: a power was created by the proviso in the deed of 1818, which enabled A. & his wife effectually to convey their interests, as they did by the settlement of 1827, without levying a fine; & the wife's parting with her interest for the purpose of the settlement was sufficient to prevent the settlement being voluntary on A.'s part and accordingly pltf.'s bill should be dismissed with costs.—ATKINSON v. SMITH (1858), 3 De G. & J. 186; 28 L. J. Ch. 2; 32 L. T. O. S. 140; 4 Jur. N. S. 1160; 7 W. R. 42; 44 E. R. 1240, L. C.

— Mutual surrenders by husband & wife—*Post-nuptial settlement.*]—See No. 182, *ante*, Nos. 630–632, *post*.

See, generally, CONTRACT, Vol. XII., pp. 182 *et seq.*

588. *Blood relationship.*]—In conveyance, blood is no consideration within 27 Eliz. c. 4.—PARRY v. CARWARDEN (1778), Dick. 544; 21 E. R. 381.

Annotations:—*Reid.* Pulvertoft v. Pulvertoft (1811), 18 Ver. 84; Buckle v. Mitchell (1812), 18 Ver. 100.

589. *Release of adverse claim.*]—The release of an adverse claim to a litigated estate is a good & valuable consideration in a deed to avoid a former voluntary grant by virtue of 27 Eliz. c. 4, although the re-lessee was not party to the original suit, but came in by consent, & entered into an

order of reference, & although he would not have been bound by the judgment in the original suit: & in pleading such a release it is not necessary to show what was the value or nature of the claim released. A grant of an advowson, except the next presentation, made during a vacancy, is good.

A., seized in fee of an advowson, except the next presentation, which B. had under the same title, in consideration of natural love & affection conveyed the advowson in fee to his son; upon a vacancy happening, C., claiming title to the advowson, contested the next presentation against B. in a *quare impedit*. A., B., & C. entered into a compromise, upon the terms that C. should release his claims to A. & B. according to their respective interests, & that A. should convey to C. the then next following presentation, which he did:—*Held*: the grant of that presentation was a conveyance for a valuable consideration, & was paramount to the grant made to the son of A.—HILL v. EXETER (Bp.) (1809), 2 Taunt. 60; 127 E. R. 1001.

Annotations:—*Reid.* Gully v. Exeter (Bp.) (1830), 10 B. & C. 584; Doe d. Richards v. Lewis, Richards v. Lewis (1852), 11 C. B. 1035; *Re* Lulham, Brinton v. Lulham (1884), 53 L. J. Ch. 928.

See, generally, CONTRACT, Vol. XII., pp. 182 *et seq.*

590. *Services rendered.*]—GULLY v. EXETER (Bp.), No. 574, *ante*.

See, generally, CONTRACT, Vol. XII., pp. 213 *et seq.*

591. *Concurrence of necessary party.*]—DOE d. BAVERSTOCK v. ROLFE, No. 548, *ante*.

592. *Existing debt — Employers defrauded by clerk.*]—Where one person robs another, the amount taken by the thief constitutes such a debt between the parties as to form a good consideration for the assignment of the felon's property previous to conviction.

A clerk confessed to having robbed his employers, & without any inducement being held out by them, he wrote to the manager of an assurance office in which he had effected two policies of assurance expressing his wish to transfer the policies to his late employers. A few days afterwards the employers gave notice of the assignment to the office. In the meantime the felon handed over the policies to a third party, to whom he was indebted, & executed a formal assignment of them by way of mtge. The assignee gave notice to the co. subsequently to the notice of the employers:—*Held*: there was a valid assignment in equity to the employers, & they were entitled to the policies in priority to the subsequent assignee.—CHOWNE v. BAYLIS (1802), 31 Beav. 351; 31 L. J. Ch. 757; 6 L. T. 739; 26 J. P. 579; 8 Jur. N. S. 1028; 11 W. R. 5; 54 E. R. 1174.

Annotation:—*Mentd.* Glegg v. Rees (1871), 25 L. T. 261.

See, generally, CONTRACT, Vol. XII., pp. 211 *et*

593. *Security executed by fraudulent solicitor*—

HORIGAN (1882), 8 V. L. R. 239.—AUS.

e. — — —.]—A deed by the heir-at-law to his mother of certain lands in lieu of dower is not to be considered as voluntary & fraudulent against subsequent purchasers for

value, although the consideration expressed in such deed be money, & no money in fact be proved to have been paid.—PATULO v. BOYINGTON (1854), 4 C. P. 125.—CAN.

d. — — —.]—Chattel mtge. to

wife, in consideration of right to dower in certain real estate being barred by her, upheld.—MORRIS v. MARTIN (1890), 19 O. R. 564.—CAN.

e. *Liability undertaken by grantee — Maintenance of children.*]—

Sect. 3.—Fraudulent intent and evidence thereof:
Sub-sect. 2, B. (b) & (c) i.]

Security not disclosed to client.]—B., a solr., having mtged. an estate to the trustee of his settlement, fraudulently deposited with a creditor the title-deeds which were in his possession as solr. for the mtgees., suppressing the fact of the original mtge. In 1871 he mortgaged certain other lands to H. & T. in fee. He died insolvent in 1872, & shortly after his death a deed of Nov. 1860, was found in his safe, by which he had demised to the original mtgee. for the term of four hundred years some of the lands comprised in the mtge. of 1871 by way of further security for the amount due on the original mtge. No consideration was stated in this deed, & the conclusion was that it had never been communicated to the original mtgee., or been out of B.'s possession:—*Held*: the deed of Nov. 1860, was fraudulent & void, under 27 Eliz. c. 4, as against H. & T.—*Re BARKER'S ESTATE, JONES v. BYGOTT, BYGOTT v. HELLARD* (1875), 44 L. J. Ch. 487; 23 W. R. 944.

Annotations:—*Consd. Wigan v. English & Scottish Law Life Assco. Asscn.*, [1909] 1 Ch. 291. *Reid. Glegg v. Bromley*, [1912] 3 K. B. 474.

594. Liability undertaken by grantee—Covenant to indemnify in respect of mortgage.]—(1) A lady, who was entitled in fee to an estate subject to mtges., proposed to her nephew that she should come & live with him, & that he should remove into a larger house for the purpose, she contributing a yearly sum towards the housekeeping. The nephew agreed to this provided she would settle the estate, limiting it to him after her death. She agreed to this, & a settlement was accordingly executed by which the nephew covenanted to indemnify her from all liability in respect of the mtges., except the payment of the interest during her life. He removed to a larger house, at considerable expense, & they lived together for some time. The aunt afterwards ceased to live with the nephew, & agreed to sell the estate to a purchaser, who filed a bill against the aunt & nephew for specific performance:—*Held*: the settlement was not voluntary, the covenant of indemnity & the expenses incurred by the nephew on the faith of the settlement being severally sufficient to support it as made for value.

(2) *Seemle*: had the settlement been voluntary, & so void against a purchaser, the nephew would have been a proper party to the suit, but could not have established any claim to the purchase-money.—*TOWNEND v. TOKER* (1866), 1 Ch. App. 446; 35 L. J. Ch. 608; 14 L. T. 531; 12 Jur. N. S. 477; 14 W. R. 806, L. J.

Annotations:—*As to* (1) *Consd. Rosher v. Williams* (1875), L. R. 20 Eq. 210; *Crossman v. R.* (1886), 18 Q. B. D. 256.

595. — Covenant to pay off mortgage.]—*MOUNTFORD v. KEENE*, No. 602, [

596. — Covenant valueless—No penalty for breach.]—A deed conveying the whole of the real estate of the grantor, & otherwise voluntary, contained a covenant by the grantee under certain specified circumstances to build a house on part of the estate conveyed within a limited period, but there was no shifting clause

or provision for defeasance in case of non-performance of the covenant:—*Held*: the covenant raised no consideration affecting the voluntary nature of the contract, & specific performance decreed of a contract (subsequent to the settlement) made by the settlor for sale of part of the estate.

The deed of conveyance contains a covenant so vague that I do not think anything could have been recovered upon it. The covenant can be of no pecuniary advantage to the grantor, because if he has conveyed away the fee simple of his property it can be of no consequence to him whether the house is built upon it or not (*MALINS, V.-C.*).—*ROSHER v. WILLIAMS* (1875), L. R. 20 Eq. 210; 44 L. J. Ch. 419; 32 L. T. 387; 23 W. R. 561.

Annotation:—*Reid. Crossman v. R.* (1886), 18 Q. B. D. 256.

597. — Assignment of leaseholds.]—(1) A widower on his second marriage, made a settlement, in which he assigned some leasehold property to trustees, one of whom was his son by a former marriage, upon trust for himself for life, & after his death for his said son. He afterwards contracted to sell the leasehold property to pltf.:—*Held*: the settlement of the leasehold property on the son was not a voluntary conveyance under 27 Eliz. c. 4, on the ground that the assignment of leasehold property to which liability is attached is, in itself, a conveyance for valuable consideration.

(2) *Qu.*: whether the settlement was also for valuable consideration as regarded the son, on the ground that the consideration of the second marriage extended to him.—*PRICE v. JENKINS* (1877), 5 Ch. D. 619; 46 L. J. Ch. 805; 37 L. T. 51, C. A.

Annotations:—*As to* (1) *Folld. Re Doble, Ex p. Doble* (1878), 26 W. R. 407. *Consd. Re Ridler, Ridler v. Ridler* (1882), 22 Ch. D. 74; *Re Lulham, Brinton v. Lulham* (1884), 53 L. J. Ch. 928. *Folld. Harris v. Tubb* (1889), 42 Ch. D. 79. *Reid. Horrocks v. Rigby* (1878), 9 Ch. D. 180; *Trowell v. Shenton* (1878), 8 Ch. D. 318; *Re Pumfrey, Ex p. Hillman* (1879), 10 Ch. D. 622; *Re Marsh & Granville* (1883), 24 Ch. D. 11; *Shurmer v. Sedgwick, Crossfield v. Shurmer* (1883), 24 Ch. D. 597; *Crossman v. R.* (1886), 18 Q. B. D. 256; *Green v. Paterson* (1886), 32 Ch. D. 95; *Synge v. Synge*, [1894] 1 Q. B. 466. *As to* (2) *Reid. Gale v. Gale* (1877), 6 Ch. D. 144; *Re Cameron & Wells* (1887), 37 Ch. D. 32; *De Mestre v. West* (1891), 64 L. T. 375; *A.-G. v. Jacobs Smith*, [1895] 2 Q. B. 341. *Generally, Mentd. Re Briggs & Spicer*, [1891] 2 Ch. 127; *Liles v. Terry*, [1895] 2 Q. B. 679; *Bellerby v. Rowland & Marwood's S.S. Co.*, [1902] 2 Ch. 14.

598. — —.]—A *bond fide* settlement of leasehold property is not a voluntary settlement, since the obligation is cast upon the assignee of the lease of paying the rent & performing the covenants.—*Re DOBLE, Ex p. DOBLE* (1878), 38 L. T. 183; 26 W. R. 107.

Annotations:—*Reid. Re Pumfrey, Ex p. Hillman* (1879), 10 Ch. D. 622; *Re Ridler, Ridler v. Ridler* (1882), 31 W. R. 93; *Re Lulham, Brinton v. Lulham* (1884), 53 L. J. Ch. 928.

599. — —.]—A husband, shortly before leaving for a long absence in India, executed a deed by which he assigned a leasehold house in his own occupation to his wife to her separate use, without naming any trustees. During his absence, she handed the deeds to an agent to raise £200 for her; he returned the assignment to her, being advised that it was inoperative. The agent made

The wives of defts. were sisters, & on the death of N.'s wife, deft. P. from motives of humanity & relationship, took over & afterwards maintained the infant children of N. with

consent as the latter was, through habitual & excessive drinking, unable to take care of them. Subsequently N. conveyed to P. a property, being all he had in the world, in trust for the

maintenance of the children, & P. continued to support & maintain them. One year later, N. gave an agreement of sale of the property to pltf. for a valuable consideration:—*Held*: at the

use of the remaining deeds to obtain an advance of £1,200 on a mtge. of the house, forging the name of the husband to the mortgage deed, to an authority to receive the mortgage money, & to the cheque by which the balance of it was paid:—*Held*: by reason of the reservation of rent, the assignment was not a voluntary settlement.—*FOX v. HAWKS, HAWKS v. FOX* (1879), 13 Ch. D. 822; 49 L. J. Ch. 579; 42 L. T. 622; 28 W. R. 656.

Annotation:—*Mentd. Re Broton's Estate, Broton v. Woollven* (1881), 17 Ch. D. 416.

600. ———.]—An assignment of leaseholds in consideration of natural love & affection is not voluntary.

Leaseholds, on which there was a vendor's lien, were assigned by the purchaser to his son in consideration of natural love & affection. The son had no notice of the vendor's lien:—*Held*: there was sufficient consideration in the assignment to make the son a purchaser for value instead of a volunteer, & the vendor's lien did not hold against the son as assignee of the leaseholds.—*HARRIS v. TUBB* (1889), 42 Ch. D. 79; 58 L. J. Ch. 431; 60 L. T. 699; 38 W. R. 75.

601. Conveyance of freeholds by same deed.]—It does not follow that if there is in the same deed a conveyance of freeholds as well as an assignment of leaseholds, the decision in *Price v. Jenkins*, No. 597, ante, establishes that the liability to the covenants in the leaseholds is sufficient to support the concurrent conveyance of freeholds as being a conveyance for valuable consideration (*BOWEN, L.J.*).—*Re MARSH & GRANVILLE (EARL)* (1883), 24 Ch. D. 11; 53 L. J. Ch. 81; 48 L. T. 947; *sub nom. MARSH v. GRANVILLE (LORD)*, 31 W. R. 845, C. A.

Annotations:—*Reid. Re Lulham, Brinton v. Lulham* (1884), 53 L. J. Ch. 928. *Mentd. Farnham Brewery v. Hunt* (1893), 68 L. T. 440; *Re Williams & Parry's Contract* (1895), 72 L. T. 869.

602. — Sub-demise of leaseholds at nominal rent.]—A married woman, having become entitled under a will to freehold & leasehold property for her sole & separate use, joined her husband in making a settlement, whereby the husband & wife conveyed the freeholds, & the husband alone demised the leaseholds, subject to the annual payment of 1s., if demanded, to trustees, upon trust for the wife for her separate use for life, remainder to the husband for life, remainder for the children (if any), with ultimate remainder to the wife absolutely. Two years afterwards the husband & wife (there being no children of the marriage) made a mtge. of the property:—*Held*: the conveyance by the husband, though binding on the estate by the curtesy which he would have had in his wife's freeholds if there had been issue, in the absence of any conveyance by her, was not sufficient to raise a consideration moving from the husband, & the settlement was voluntary & void under 27 Eliz. c. 4, as against the mtgee.—*SHURMUR v. SEDGWICK, CROSSFIELD v. SHURMUR* (1883), 24 Ch. D. 597; 53 L. J. Ch. 87; 49 L. T. 156; 31 W. R. 884.

See, generally, CONTRACT, Vol. XII., pp. 187 et seq.

603. Separation deed—Consideration illusory.]—In a separation deed there was a covenant by the trustees that the husband should be at liberty

to reimburse himself any expenses which he might be put to, out of an annuity secured by the deed to the wife:—*Held*: this was a voluntary instrument, & void as against subsequent mtgees.

There is no covenant against the debts of the wife, the only provision in this respect being that the husband should be at liberty to reimburse himself out of the annuity secured by the same deed. That gives him nothing which he had not got before; it is a mere right to keep back so much out of the voluntary gift which he thereby made (*PAGE WOOD, V.-C.*).—*COWX v. FOSTER* (1860), 1 John. & H. 30; 29 L. J. Ch. 888; 6 Jur. N. S. 1051; 70 E. R. 649; *sub nom. COX v. FORSTER*, 2 L. T. 797.

Annotations:—*Mentd. Ferrier v. Jay* (1870), L. R. 10 Eq. 550; *Maunsell v. Maunsell* (1871), 24 L. T. 698; *Re Teape's Trust* (1873), L. R. 16 Eq. 442; *Busk v. Aldam* (1874), L. R. 19 Eq. 16; *Thornton v. Thornton* (1875), L. R. 20 Eq. 599; *Scotney v. Lomer* (1885), 29 Ch. D. 535; *Re Denton, Bannerman v. Toosey* (1890), 63 L. T. 105; *Re Paget, Re Mellor, Mellor v. Mellor*, [1898] 1 Ch. 290; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563; *Re Redgate, Marsh v. Redgate*, [1903] 1 Ch. 356; *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510; *Re Mackenzie Bain v. Mackenzie*, [1916] 1 Ch. 125.

See, generally, HUSBAND & WIFE.

(c) The Marriage Consideration.

i. Ante-Nuptial Settlements.

604. Settlement of wife's property.]—*DOYLY v. PERSALL*, No. 610, *post*.

605. Surrender of copyholds to son—Subsequent marriage.]—A. surrendered the reversion in fee of copyhold lands to his son, to lessen the fine he must have paid in case it had come to him by descent. [Afterwards, upon] the son's treaty of marriage the father told the wife's friends that this copyhold was so settled, in consideration of which, & of some leasehold lands, a marriage was had, & £2,000 portion paid:—*Held*: this surrender of the copyhold was not voluntary or fraudulent.—*KIRK v. CLARK* (1708), Prec. Ch. 275; 2 Eq. Cas. Abr. 479; 24 E. R. 133.

Annotation:—*Reid. Brown v. Carter* (1801), 5 Ves. 802.

606. Settlement with gift over on alienation.]—By a marriage settlement a rentcharge out of the husband's property was to become payable to his wife if he mortgaged it or became bkpt. He mortgaged it first & afterwards became bkpt.:—*Held*: a valid rentcharge having arisen upon the mtge., it was not avoided by a subsequent bkpey.—*BROOKE v. PEARSON* (1859), 27 Beav. 181; 34 L. T. O. S. 20; 5 Jur. N. S. 781; 7 W. R. 638; 54 E. R. 70.

Annotations:—*Folld. Knight v. Browne* (1861), 30 L. J. Ch. 649. *Apld. Re Detmold, Detmold v. Detmold* (1889), 40 Ch. D. 585. *Reid. Mackintosh v. Pogose*, [1895] 1 Ch. 505.

607. ———.]—In a marriage settlement, property was settled for the benefit of the husband for life, or until bkpey. or intended alienation, & thereupon over:—*Held*: the gift over arose upon an attempted alienation, notwithstanding the property settled was that of the husband himself.—*KNIGHT v. BROWNE* (1861), 30 L. J. Ch. 649; 4 L. T. 206; 7 Jur. N. S. 894; 9 W. R. 515.

Annotations:—*Apld. Re Detmold, Detmold v. Detmold* (1889), 40 Ch. D. 585. *Reid. Re Pearson, Ex p. Stephens* (1876), 3 Ch. D. 807; *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

608. — By operation of law.]—A marriage

time of the conveyance to P. he had a good cause of action against N. on the implied contract to pay for the

support & maintenance of the children; & as a pre-existing debt may be a valuable consideration, the deed

was not voluntary in its inception.—*EGGERTSON v. NICASTRO* (1911), 1 Man. L. R. 256.—CAN.

Sect. 3.—Fraudulent intent and evidence thereof:
Sub-sect. 2, B. (c) i. & ii.]

settlement of the settlor's own property was made on trust to pay the income to himself "during his life, or till he shall become bkpt., or shall assign, charge, or incumber, the income, or shall do or suffer something whereby the same, or some part thereof, would through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons"; &, from & after the determination of the trust in favour of the settlor, upon trust to pay the income to his wife during her life:—*Held*: the limitation over to the wife was valid in the event of an involuntary alienation by process of law of the income in favour of a judgment creditor of the husband.—*Re DETMOLD, DETMOLD v. DETMOLD* (1889), 40 Ch. D. 585; 58 L. J. Ch. 495; 61 L. T. 21; 37 W. R. 442.

Annotations:—*Consd. Re Spearman, Spearman v. Lowndes* (1900), 82 L. T. 302. *Appld. Re Johnson Johnson, Ex p. Matthews & Wilkinson*, [1904] 1 K. B. 134; *Re Perkins' Settlement, Trusts, Leicester, Warren v. Perkins* (1912), 56 Sol. Jo. 412. *Reid. Mackintosh v. Pogose*, [1895] 1 Ch. 505; *Re Tetley, Ex p. Jeffrey* (1896), 66 L. J. Q. B. 111; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

Parties claiming under the settlement as purchasers for good consideration.]—See Nos. 689, 690, post.

Compare Part I., Sect. 3, sub-sect. 3, B., ante.

ii. Post-Nuptial Settlements.

609. General rule.]—WOODIE'S CASE (prior to 1607), cited Cro. Jac. 158; 79 E. R. 138.

Annotation:—*Consd. Doe d. Otley v. Manning* (1807), 9 East, 59.

610. —.]—The wife having assigned her term in trust for herself before marriage, the husband, without joining the trustees, mortgaged the trust; the husband being dead, the mtgee. exhibited his bill to have the land conveyed to him, or that they should redeem; & the ct. dismissed pltf.'s bill; for since Queen Elizabeth's time, it has been the constant practice of this ct. to set aside & frustrate all incumbrances & acts of the husband upon the trust of the wife's term; & that he shall neither charge or grant it away. It is the common way of providing jointures, for a woman to convey a term in trust for her upon marriage, that it may be out of the power & reach of the husband. Neither shall he forfeit it by outlawry or felony, if for jointure, or in pursuance of articles, or being the wife's term it is assigned before in trust, or if on other good consideration it is assigned. But if it is an assignment after marriage by the husband, in trust for the wife, that is voluntary, & fraudulent against a pur-

chaser.—*DOYLY v. PERSALL* (1673), Freem. Ch. 138; 1 Cas. in Ch. 225; 22 E. R. 1113.

611. —.]—Mtgor. makes a settlement of the mortgaged premises after marriage, & after mortgages again, the second mtgee. having notice of the jointure; yet the jointure being voluntary is void as to him, being a purchaser.—*GARDINER v. PAINTER* (1726), Cas. temp. King, 65; 25 E. R. 225, L. C.

Annotation:—*Consd. Doe d. Otley v. Manning* (1807), 9 East, 59.

612. —.]—(1) Settlement by tenant in fee, for the maintenance of herself & children for her life, to raise portions for younger children, & the surplus to her heir-at-law, she having then many sons & daughters, is a voluntary settlement, & void against purchasers, under 27 Eliz. c. 4.

(2) A lessee at rack-rent is a purchaser for a valuable consideration.

(3) The deed of 1747 was only a voluntary conveyance within 27 Eliz. c. 4, being founded upon a good & not upon a valuable consideration (*DE GREY, C.J.*).—*GOODRIGHT d. HUMPHREYS v. MOSES* (1775), 2 Wm. Bl. 1019; 96 E. R. 599.

Annotations:—*As to* (1) *Folld. Currie v. Nind* (1836), 1 My. & Cr. 17; *Butterfield v. Heath* (1852), 15 Beav. 408; *Distd. Hewison v. Negus* (1853), 16 Beav. 594. *Consd. Re Foster & Lister* (1877), 6 Ch. D. 87. *As to* (2) *Reid. Doe d. Richards v. Lewis* (1852), 11 C. B. 1035. *As to* (3) *Consd. Doe d. Otley v. Manning* (1807), 9 East, 59. *Reid. Doe d. Baverstock v. Rolfe* (1838), 8 Ad. & El. 650.

613. —.]—A., after marriage, made a settlement of certain premises upon himself for life, remainder to his wife for life, remainder to their issue in tail; & three years afterwards mortgaged the premises to B. who was told there was such settlement:—*Held*: the settlement was a voluntary conveyance within 27 Eliz. c. 4.—*CHAPMAN d. STAVERTON v. EMERY* (1775), 1 Cowp. 278; 98 E. R. 1085.

Annotations:—*Consd. Doe d. Otley v. Manning* (1807), 9 East, 59; *Clarke v. Wright* (1861), 6 H. & N. 849; *Gale v. Gale* (1877), 6 Ch. D. 144. *Reid. Doe d. Richards v. Lewis* (1852), 11 C. B. 1035; *Kelson v. Kelson* (1853), 1 W. R. 143.

614. —.]—*DOE d. LEWIS v. HOPKINS* (1804), cited 9 East, at p. 70; 103 E. R. 500.

Annotation:—*Consd. Doe d. Otley v. Manning* (1807), 9 East, 59.

615. —.]—A post-nuptial settlement of a wife's estates, is voluntary under 27 Eliz. c. 4, as against subsequent purchasers for valuable consideration.—*CURRIE v. NIND* (1836), 1 My. & Cr. 17; 5 L. J. Ch. 169; 40 E. R. 283.

Annotations:—*Consd. Butterfield v. Heath* (1852), 15 Beav. 408. *Distd. Hewison v. Negus* (1853), 16 Beav. 594. *Consd. Re Foster & Lister* (1877), 6 Ch. D. 87. *Reid. Scott v. Scott* (1854), 23 L. T. O. S. 27; *Clarke v. Wright* (1861), 6 H. & N. 849.

PART II. SECT. 3, SUB-SECT. 2.—
B. (c) ii.

i. Settlement in pursuance of ante-nuptial agreement — Subsequent conveyance.—Priority of registration.]—The patent issued in 1839. The patentee conveyed to M. in the same year, & M. to pltf. in 1867, the conveyances not being registered. Deft. claimed through his wife, who was one of the co-heiresses of the patentee. He alleged that before his marriage, which took place in Nov. 1866, she agreed verbally to convey it to him after the marriage; & the deed under which he claimed was executed & registered in Oct. 1867:—*Held*: the conveyance to deft. was voluntary, & therefore could not prevail by reason of its

priority of registration.—*MCCARTHY v. ARBUCKLE* (1879), 29 C. P. 529.—*CAN.*

g. Post-nuptial settlement for valuable consideration.—Proof of consideration.]—In 1852 B. made a post-nuptial settlement of land, the expressed consideration of which was only love & affection. In Feb. 1855, being pressed by G. & Co., creditors, he wrote offering a legal mortgage of the whole of his property which offer G. & Co. accepted. G. & Co. instituted a suit to have the post-nuptial settlement declared voluntary & void as against them. Evidence was tendered that the father of B.'s wife, after the marriage of B., paid him moneys on condition & promise of their being

invested for B.'s wife & children, that the settlement was executed in consideration of & as equivalent for such moneys & that three of B.'s daughters had been married since the settlement:—*Held*: the settled property was included in the agreement, & the evidence of valuable consideration for the post-nuptial settlement was admissible, but not sufficient, & pltf. as purchasers within 27 Eliz. c. 4, were entitled to a sale.—*GLADSTONE v. BALL* (1862), 1 W. & W. 277.—*AUS.*

h. Ante-nuptial agreement void under Statute of Frauds.—Post-nuptial settlement void.]—An ante-nuptial agreement void under Stat. Frauds cannot form a valuable consideration for the conveyance of lands after the marriage.

—A., having executed a voluntary settlement of real estate in favour of his wife, his two sons B. & C., & his unborn children, afterwards contracted with D., for valuable consideration, to sell him the same property. D. filed his bill for specific performance against A. & his wife, & B. & C., & the representative of the surviving trustee of the settlement, in whom the legal estate was vested. The ct. decreed a specific performance of the contract against the parties defts., within the jurisdiction, but without prejudice to any interest in the estate which B., one of the parties out of the jurisdiction, might have or lay claim to.—*WILLATS v. BUSBY* (1842), 5 Beav. 193; 12 L. J. Ch. 105; 49 E. R. 551.

Annotations:—*Mentd.* *Postgate v. Barnes* (1863), 1 New Rep. 389; *Townend v. Toker* (1866), 35 L. J. Ch. 608.

617. —.]—(1) A voluntary conveyance by a married woman is within 27 Eliz. c. 4.

(2) Husband & wife executed a post-nuptial settlement of the wife's estate in favour of themselves & their children:—*Held*: it was void as against a subsequent purchaser from them for valuable consideration.

(3) A purchaser must take a title, though depending on the invalidity of a voluntary conveyance as against a purchaser for valuable consideration, with notice.—*BUTTERFIELD v. HEATH* (1852), 15 Beav. 408; 22 L. J. Ch. 270; 20 L. T. O. S. 242; 51 E. R. 595.

Annotations:—*As to* (2) *Distd.* *Hewison v. Negus* (1853), 16 Beav. 594. *N.F. Re Foster & Lester* (1877), 6 Ch. App. 87.

618. Settlement in pursuance of ante-nuptial agreement.]—*GRIFFIN v. STANHOPE*, No. 545, *ante*.

619. —.]—A settlement made after marriage but in pursuance of articles made precedent to marriage is not a voluntary settlement.—*BOVY'S CASE* (1672), 1 Vent. 193; 86 E. R. 131.

Annotations:—*Consd.* *Doe d. Otley v. Manning* (1807), 9 East, 59. *Refd.* *Russel v. Hammond* (1738), 1 Atk. 13; *Randall v. Morgan* (1805), 12 Ves. 67. *Mentd.* *Badeley v. Vigurs* (1854), 4 E. & B. 71.

620. —.]—*Re HOLLAND, GREGG v. HOLLAND*, No. 167, *ante*.

621. — Ante-nuptial agreement unenforceable.]—Settlement after marriage, held to be voluntary, proof of its having been made in pursuance of a parol promise before marriage, failing, & ct. of opinion, that even if such promise had been proved to have existed, it would not have supported a settlement made after marriage.—*SPURGEON v. COLLIER* (1758), 1 Eden, 55; 28 E. R. 605.

Annotations:—*Apld.* *Warden v. Jones* (1857), 2 De G. & J. 76. *Consd.* *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

—*Crow v. CAMPBELL* (1884), 10 V. L. R. 186.—AUS.

k. Voluntary settlement on wife—*Subsequent mortgage*.]—A. contracted in his own name to purchase certain land from B. Subsequently on A.'s direction B. conveyed the land to A.'s wife by a deed to which A. was not a party, & which recited that the land was purchased by a trustee for the wife out of moneys belonging to the wife's separate estate. The purchase money was in fact paid by A.:—*Held*: the transaction amounted to a voluntary settlement of the land by A. upon his wife within the meaning of 27 Eliz. c. 4, although A. was not a party to the conveyance & the interest of A.'s wife in the land was defeated pro

tanto by a subsequent mtge. of the land by A. for valuable consideration.—*HUBERT v. BROWN* (1895), 16 N. S. W. L. R. 11.—AUS.

l. Post-nuptial settlement with power of appointment to wife—*Secret appointment for children*.]—*Subsequent mortgage without notice*.]—*JOSHUA v. ALLIANCE BANK OF SIMLA* (1894), 1 [L. R. 22 Calc. 185.—IND.

m. Settlement of wife's freeholds—*Reconveyance of life interest to wife*.]—*Subsequent mortgage by husband & wife*.]—By a post-nuptial settlement, lands, of which the wife, before the marriage, had been seized in fee, were settled, subject to successive life estates for husband & wife, upon the

622. Settlement shown to parties before marriage.]—Showing a settlement to parties before marriage & their relying upon the credit of it will not make the issue of the marriage purchasers.—*HART v. MIDDLEHURST* (1746), 3 Atk. 371; 26 E. R. 1014, L. O.

Annotations:—*Refd.* *Payne v. Mortimer* (1859), 4 De G. & J. 447. *Mentd.* *Phillips v. James* (1865), 2 Drew. & Sm. 404; *Grier v. Grier* (1872), L. R. 5 H. L. 688.

623. Post-nuptial settlement not complying with ante-nuptial agreement—*Partial compliance*.]—A bond before marriage to settle a jointure, & afterwards a settlement was made which settled the estate on the wife & the issue of the marriage:—*Held*: this settlement was good as to the jointure, but fraudulent as to the children in respect of a purchaser.—*JASON v. JERVIS* (1681), 1 Vern. 284; 23 E. R. 472.

624. —.]—In Feb. 1818, M., by ante-nuptial settlement, directed that land, which he expected to purchase of C., should, if the marriage took effect, & C. be able to convey, be conveyed to the use of trustees of the marriage settlement; provided that if C. could not convey, no obligation should attach on M. to procure a conveyance from any other person; nor should M. be precluded from purchasing for his own benefit; C. being unable to make a title, M., in June, 1818, after his marriage, purchased the land of H., & then conveyed it to the trustees of his marriage settlement. In 1823, M. mortgaged the land to D., who conveyed it to plff.:—*Held*: the conveyance to the trustees was voluntary, & as against them plff. was entitled to the land.

On the transfer of a mtge. for £10,000 with an additional advance of £1,000, it was proved that the £10,000 were paid in banknotes by the transferee to the original mtgee. by the direction & in the presence of the mtgor., & the £1,000 by a cheque to the mtgor., as to which there was no proof that it was honoured:—*Held*: the payment of the £10,000 was a sufficient consideration as against one claiming under a voluntary settlement.—*DOE d. BARNES v. ROWE* (1838), 4 Bing N. C. 737; 1 Arn. 279; 6 Scott, 525; 132 E. R. 972.

Annotations:—*Mentd.* *Humberston v. Jones* (1847), 16 M. & W. 763; *Doe d. Crawley v. Gutteridge* (1848), 11 Q. B. 409.

625. —.]—In 1857 an infant engaged to be married wrote to his intended wife, promising that on coming of age he would give her seven specified houses. The marriage took place in 1859, after he came of age. In 1872 he executed a deed, not referring to any previous agreement, by which he conveyed the above & two other houses to trustees upon trust for his wife for life,

children of the marriage, reserving to the husband & wife power of revocation, & power to charge the lands with £1,000. The husband & wife executed a subsequent settlement, in conveying the lands in trust for the wife for her separate use during their joint lives, & subject thereto, & to an annuity for the survivor, in trust for the children of the marriage. Afterwards both husband & wife purported to mtge. the lands in fee. There were children of the marriage who, after the death of their parents, the mtgors., contended that the mtge. only affected the life estate limited to their mother by the second settlement:—*Held*: the settlements were deeds for value, so that the mtge. could not prevail against the estates in remainder of the children of

himself for life, & after her death upon trust or, upon such trusts as the wife should by deed or will appoint, & in default of appointment, in trust for her in fee. He subsequently agreed to sell three of the houses, & the purchaser sued for specific performance:—*Held*: the purchaser was entitled to specific performance, for as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter of 1857, & settled the property in a different way, there was no ratification in writing of the promise contained in that letter, & the settlement therefore was voluntary, & void as against a purchaser for value.—*TROWELL v. SHENTON* (1878), 8 Ch. D. 318; 47 L. J. Ch. 738; 38 L. T. 369; 26 W. R. 837, C. A.

Annotations:—*Consd.* *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Mentd.* *Re Croasdel & Cammell Laird & Co.* (1906), 75 L. J. K. B. 769.

626. Post-nuptial settlement for valuable consideration—Portion received at time of marriage.]—WOODIE'S CASE (prior to 1607), cited Cro. Jac. 158; 79 E. R. 138.

Annotation:—*Consd.* *Doc d. Otley v. Manning* (1807), 9 East, 59.

627. — Adequacy of consideration.]—A settlement made after marriage, for valuable consideration, for advancement of the issue, may be considered as a purchase, & defeat a subsequent purchaser; & the value paid is not to be too strictly examined; there being room for bounty.

The question is whether this be a voluntary conveyance or not. Here is plain proof that £100 was paid the receipt being indorsed upon the deed for a consideration of £100 *per annum*; yet in marriage settlements things are not to be considered so strictly there being room for bounty & every man ought to provide for his wife & family (*LORD TALBOT, C.*).—*JONES v. MARSH* (1734), *Cas. temp. Talb.* 64; 25 E. R. 664, L. C.

Annotations:—*Refd.* *Fitzer v. Fitzer* (1742), 2 Atk. 511; *Copls v. Middleton* (1817), 2 Madd. 410.

628. —.]—BROWN v. JONES, No. 178, *ante*.

629. Settlement by husband of wife's estate.]—WHITE v. SANSOM, No. 187, *ante*.

630. Contract between husband & wife—Mutual surrender of interests.]—A wife may, in many respects, enter into a contract for valuable consideration with her husband; so conversely, a husband may become a purchaser from his wife of property belonging to her.

A post-nuptial settlement of a wife's estate, whereby it is limited to the wife for her separate use for life, without power of anticipation, with remainder to the husband for life, with remainder

to the children, etc., is not void as against a subsequent purchaser from the husband & wife, as a voluntary settlement under 27 Eliz. c. 4. The modification, by the husband, of his life-estate in possession, & by the wife, of her inheritance, form a good & valuable consideration.—*HEWISON v. NEGUS* (1853), 16 Beav. 594; 1 Eq. Rep. 230; 22 L. J. Ch. 655; 21 L. T. O. S. 203; 17 Jur. 567; 1 W. R. 262; 51 E. R. 909, L. J.

Annotations:—*Folld.* *Teasdale v. Braithwaite* (1876), 4 Ch. D. 85; *Re Foster & Lister* (1877), 6 Ch. D. 87. *Refd.* *Butler v. Butler* (1885), 14 Q. B. D. 831.

631. —.]—By a post-nuptial settlement dated 1857, a wife's real estate was settled upon the wife for her life without impeachment of waste, but not to her separate use, & after her death to the use of such persons as she should by deed or will, notwithstanding coverture, appoint, & in default of such appointment to the use of all the children of the marriage in equal shares as tenants in common. The estate was mortgaged in 1872, & the mtgee. had a power of sale, & subsequently entered into a contract for sale:—

Held: the settlement was for valuable consideration as the positions of husband & wife with regard to the property were materially altered, he giving up his power of preventing alienation during the coverture & his estate by the curtesy, & she reducing her absolute dominium to an estate for life with general power of appointment. The children also were purchasers.—*Re FOSTER & LISTER* (1877), 6 Ch. D. 87; 46 L. J. Ch. 480; 36 L. T. 582; 25 W. R. 553.

Annotations:—*Consd.* *Welman v. Welman* (1880), 15 Ch. D. 570; *Schreiber v. Dinkel* (1884), 54 L. J. Ch. 241.

632. —.]—In an action for specific performance of an agreement to sell certain freehold property, a question arose as to whether a post-nuptial settlement was void under 27 Eliz. c. 4, as being a voluntary settlement. Previously to the settlement, the property had been settled on the wife for life with remainder to the husband in fee, & the wife was absolutely entitled to a one-seventh share of certain other property. The settlement contained a recital in the following words: "Whereas the said J. D. & E. D. are desirous that the hereinbefore-recited deed-poll should be altered, & that the property thereby settled should be resettled as hereinafter appearing, & also that the said one-seventh share of the said hereditaments at W., so as aforesaid vested in the said E. D., should be included in the new settlement intended to be hereby made," & the wife purported to revoke the deed-poll mentioned, & to join with the husband in resettling the property upon trusts, giving the husband a life interest in the whole after her decease, & subject thereto upon trust for third parties:—*Held*: there was clear evidence of a bargain between the parties, & as both husband & wife gave up something in order to make a resettlement, the settlement was

the marriage; also, the second settlement, operating as a revocation of the first, extinguished the general power to charge £1,000 thereby reserved.—*Re BELL'S ESTATE* (1882), 11 L. R. Ir. 512.—IR.

*n. Post-nuptial settlement in ... of dower—Wife executing—Subsequent sale for valuable consideration.]—*F. seized of the M. & D. estates, by a post-nuptial settlement executed in 1807, conveyed the D. estate to the use of himself in fee, free from his wife's dower, & conveyed the M. estate to the use of himself for life, remainder to

provide a jointure for his wife in lieu of dower, remainders over in strict settlement. The deed contained a covenant by F. that his wife would levy a fine to the uses of the deed. F.'s wife signed this deed, but died without having ever levied a fine, & without having ever been called on to do so:—*Held*: the deed of 1807 could be supported, as not merely voluntary, against subsequent purchasers for valuable consideration from F.—*BLAKE v. FRENCH* (1855), 5 L. Ch. R. 246; 8 Ir. Jur. 60.—IR.

e.

not executing—Subsec-

*mortgage without notice.]—*A person being entitled to the reversion in fee of certain lands, assigned by post-nuptial settlement the lands to trustees in trust for himself for life & subject thereto to the intent that his wife, not a party to the deed should, in lieu of dower, receive an annuity for her life. Settlor subsequently mtged. the lands, no mention being made of the settlement, & afterwards died:—*Held*: as against the mtgees. the settlement was a voluntary deed & void; & the alleged relinquishment of the wife's dower was not a valuable consideration for the settlement, as her dower still remained.

not voluntary within the statute.—**SCHREIBER v. DINKEL** (1886), 54 L. T. 911, C. A.

633. — — —.]—**GREEN v. PATERSON**, No. 182, *ante*.

See, also. No. 586, *ante*.

634. Settlement by wife of property devised to her—With desire that she would settle it.]—Real estate was devised to a single woman with a declaration of a wish that if she should marry she would before marriage settle it to her separate use for life & to such uses as she should by will appoint. She married without a settlement, & afterwards, by an acknowledged deed expressed to be made for giving effect to testator's wish, the husband & wife conveyed the land to trustees during the life of the wife upon trust for her for her separate use without power of anticipation, & after her death to the use of her husband for life, with remainder to their children as therein mentioned. Subsequently the husband & wife mortgaged the property without notice of the settlement:—*Held*: the settlement was for valuable consideration, & not void as against the mtgee. under 27 Eliz. c. 4.—**TEASDALE v. BRAITHWAITE** (1877), 5 Ch. D. 630; 46 L. J. Ch. 725; 36 L. T. 601; 25 W. R. 546, C. A.

Annotations:—**Consd.** **Welman v. Welman** (1880), 15 Ch. D. 570; **Shurmur v. Sedgwick**, **Crossfield v. Shurmur** (1883), 24 Ch. D. 597. **Refd.** **Schreiber v. Dinkel** (1884), 54 L. J. Ch. 241. **Refd.** **Re Foster & Lister** (1877), 6 Ch. D. 87.

635. Settlement of wife's freeholds & leaseholds—Her leaseholds by sub-demise—Subsequent mortgage by husband & wife.]—**SHURMUR v. SEDGWICK**, **CROSSFIELD v. SHURMUR**, No. 602, *ante*.

Compare Part I., Sect. 3, sub-sect. 3, C., *ante*.

iii. Who are within the Consideration.

636. Heirs of settlor—Though issue by second marriage.]—Settlement on marriage on husband & wife, remainder to his heirs male:—*Held*: not only a good conveyance as to the husband & wife, but as to the remainder to his heirs male, though this was not within the merit of the consideration, & he might marry another wife; & the reason was all was looked on as one entire agreement.—**VALENS v. WINGFIELD** (1653), cited 3 Keb. 82; 84 E. R. 607.

Annotation:—**Refd.** **Scot v. Bell** (1672), 3 Keb. 82.

—.]—**Scot v. BELL** (1672), 2 Lev. 70; 3 Keb. 82; 83 E. R. 454.

Annotations:—**Refd.** **Blount v. Doughty** (1747), 3 Atk. 481; **Roe d. Hamerton v. Mitton** (1767), 2 Wils. 356; **Butterfield v. Heath** (1852), 15 Beav. 408.

638. Collaterals.]—Where a settlement is made by the father, or other lineal ancestor, in consideration of the marriage of his son, in such case all the remainders limited to his children & their posterity are within the consideration of that settlement; but when it is made by a brother or any other collateral ancestor on his inter-marriage, there, after the limitations to his own issue, all the remainders limited to his collateral kindred are voluntary, & not within the consideration of the marriage settlement (**LORD HARDWICKE**, C.).—**REEVES v. REEVES** (1724), as reported in 9 Mod. Rep. 128; 88 E. R. 358.

—*Re CONLAN'S ESTATE* (1892), 29 L. R. Ir. 199.—**IR.**

PART II. SECT. 3, SUB-SECT. 2.— B. (c). iii.

638 i. Collaterals.]—The considera-

of marriage will not operate to support limitations to collaterals in a marriage settlement, which, therefore, as against subsequent purchasers for value are voluntary & void.—**STACKPOOLE v. STACKPOOLE** (1843), 2 Con.

639. — — — **Though illegitimate.]—****HEAP v. TONGE**, No. 666, *post*.

640. — — —.]—Trusts in a marriage settlement in favour of the children of a future marriage & of collaterals are purely voluntary.—**WOOLASTON v. TRIBE** (1869), L. R. 9 Eq. 44; 21 L. T. 449; *sub nom.* **WOOLASTON v. TRIBE**, 18 W. R. 83.

Annotations:—**Consd.** **Paul v. Paul** (1880), 15 Ch. D. 580. **Refd.** **Welman v. Welman** (1880), 15 Ch. D. 570; **Tucker v. Bennett** (1887), 38 Ch. D. 1. **Mentd.** **Phillips v. Mullings** (1871), 7 Ch. App. 244; **James v. Couchman** (1885), 29 Ch. D. 212.

641. — — — **Settlement by father on son's marriage—Remainder to other sons.]—****ST. SAVIOUR'S, SOUTHWARK CASE**, No. 792, *post*.

642. — — —.]—Covenant in consideration of the marriage of his first son, to settle to him in tail, remainder to the second son, the consideration extends to the second son, & is not voluntary, nor void *quoad* purchasers.—**WHITE v. STRINGER (TENHAM'S (LORD) CASE)** (1671), 2 Lev. 105; 3 Keb. 322; 84 E. R. 744; *sub nom.* **TEYNHAM (LORD) v. MULLINS**, 1 Mod. Rep. 119.

Annotation:—**Refd.** **Russel v. Hammond** (1738), 1 Atk. 13.

643. — — —.]—**REEVES v. REEVES**, No. 638, *ante*.

644. Brothers of settlor.]—A., on the marriage of his son, settled several lands in this manner, viz. as to part, to the use of himself for life, & after to the use of his son for life, then to his first & other sons in tail, & for want of such issue, to the use of pltf., who was his brother, & his heirs; & as to the other part of the lands, to the use of the son for life, & after to the use of the wife for her jointure, then to the first & other sons in tail; & for want of such issue, to pltf. & his heirs; the son & wife died without issue in the lifetime of A. & after their deaths A. got the settlement, & cut it in pieces; but the counterpart was entire, & in the hands of A. & the bill was brought to discover it, & to have it preferred; & the counterpart being confessed in the answer, pltf. obtained an order at the Rolls to have it brought into ct.; & a motion was made to have that order discharged, for that the remainder to pltf. was merely voluntary, & therefore he ought not to have any aid from a ct. of equity; but the ct. would not discharge the order, but made the deed be brought into ct., there to remain, & thereby hinder A. from selling the estate from pltf.—**BROOKBANK v. BROOKBANK** (1691), 1 Eq. Cas. Abr. 168; 21 E. R. 963.

Annotations:—**Consd.** **Pulvertoft v. Pulvertoft** (1811), 18 Ves. 84. **Refd.** **Bill v. Cureton** (1835), 2 My. & K. 603.

645. — — — — **REEVES v. REEVES**, No. 638, *ante*.

646. — — —.]—**PULVERTOFT v. PULVERTOFT**, No. 749, *post*.

647. — — —.]—**JOHNSON v. LEGARD**, No. 744, *post*.

648. — — —.]—M. O., first tenant in tail under the will of his father, R. C. deceased (by which will estates in tail male in remainder were given to the devisor's other sons, F. O. & T. C.) before suffering a recovery, executed a settlement on his marriage, by which he limited an estate for

& Law. 489; 6 I. Eq. R. 18.—**IR.**

*p. Issue of second marriage—Limitation to daughters.]—***Re CULLIN'S ESTATE** (1864), 14 I. Ch. R. 506; 16 Ir. Jur. 117.—**IR.**

intent and evidence thereof:

life to himself, with remainders to the first & other sons of the marriage, in tail male, remainders to his brothers, F. C. & T. C. for life, with remainders to their first & other sons in tail male; & afterwards suffered a recovery, mortgaged the settled estate to R. P., & died without issue male. C. C., son of T. C. (F. C. having died without issue) entered upon the estate, suffered a recovery, & died, leaving M. C. applt., his eldest son. Bill of foreclosure by R. P. resisted by M. C. applt., the question being, whether O. C., applt.'s father, was entitled under the will of R. C. or only as a volunteer under the settlement, by M. C. the first tenant in tail:—*Held*: there was no substantial distinction between tenant in fee & tenant in tail, who had it in his power at any time to acquire the fee; the brothers & their sons took new estates under the settlement, which were voluntary, & void as against the subsequent mtgee. for valuable consideration.—*CORMICK v. TRAPAUD* (1818), 6 Dow, 60; 3 E. R. 1399.

Annotation:—*Appld.* *De Mestro v. West*, [1891] A. C. 264.

649. — Nephew—Remainderman in default of issue.]—(1) A., seised in fee, on his marriage covenanted to settle the premises on himself & his wife, & on the issue of the marriage, remainder to his nephew in fee:—*Held*: the remainder in fee was voluntary, & not supported by the consideration of that marriage or of the marriage portion.

(2) A. the father & B., the son on the marriage of B. articted to settle land on B. & his wife for their lives, remainder to their issue, remainder to the nephew in fee:—*Held*: if A. had the sole interest, the limitation to the nephew was voluntary; *secus* if the father & son had each some interest.—*OSGOOD v. STRODE* (1724), 2 P. Wms. 245; 10 Mod. Rep. 533; 24 E. R. 716, L. C.

Annotations:—*As to* (1) *Refd.* *Hale v. Lamb* (1764), 2 Eden, 292; *Jones v. Boulter* (1786), 1 Cox, Eq. Cas. 288 c; *Price v. Jenkins* (1876), 4 Ch. D. 483. *As to* (2) *Refd.* *Stephens v. Trueman* (1747), 1 Ves. Sen. 73; *Roe d. Hamerton v. Milton* (1767), 2 Wils. 356. *Generally, Refd.* *Itell v. Beane* (1749), 1 Ves. Sen. 215; *Estwick v. Caillaud* (1793), 5 Term Rep. 420; *Clarke v. Wright* (1861), 6 H. & N. 849.

650. — Settlement by wife—Remainder to her brothers & sisters.]—*COTTERELL v. HOMER*, No. 741, *post*.

651. Issue of second marriage.]—Consideration of a former marriage extended to the second.—*JENKINS v. KEYMIS* (1661), 1 Lev. 150; Hard. 395; 83 E. R. 343.

Annotations:—*Expld.* *Osgood v. Stroud* (1724), 10 Mod. Rep. 533. *Consd.* *Price v. Jenkins* (1876), 4 Ch. D. 483. *Refd.* *Norfolk's Case* (1681), 3 Cas. in Ch. 14; *Evelyn v. Evelyn* (1731), 2 P. Wms. 659; *Goring v. Nash* (1744), 3 Atk. 186; *Jones v. Boulter* (1786), 1 Cox, Eq. Cas. 288; *Doe d. Otley v. Manning* (1807), 9 East, 59; *Sutton v. Chetwynd* (1817), 3 Mer. 249; *Doe d. Nowell v. Roake* (1825), 2 Bing. 497; *Clarke v. Wright* (1861), 6 H. & N. 849.

652. —.]—A consideration paid on one marriage extends to the issue on another marriage.

653 i. Issue of former marriage—Settlement by widow.]—Where a widow who contemplated second marriage, settled certain of her property on herself for life, & after her death on two of her children by a former marriage, in consideration of her intended marriage:—*Held*: the trusts in favour of the children of the former marriage were not within the marriage considerations, & the children were mere

volunteers; the provisions made in their favour were not made for valuable consideration, & as to real estate could be avoided by 27 Eliz. c. 4, by a subsequent conveyance to a purchaser.—*NATIONAL TRUSTEES EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. v. R.* (1893), 19 V. L. R. 132.—*AUS.*

q. Issue of marriage.]—Where, by a post-nuptial deed, a sum of money

—*JENKINS v. KEYMEYS* (1668), 1 Rep. Ch. 275; 1 Cas. in Ch. 103; 1 Lev. 237; 21 E. R. 571, L. C.

Annotations:—*Expld.* *Osgood v. Stroud* (1724), 10 Mod. Rep. 533. *Refd.* *Evelyn v. Evelyn* (1731), 2 P. Wms. 659; *Goring v. Nash* (1744), 3 Atk. 186; *Sutton v. Chetwynd* (1817), 3 Mer. 249.

653. — Limitations interposed between limitations to sons & daughters of first marriage.]—Limitations in a marriage settlement in favour of the issue of a second marriage by the settlor:—*Held*: good against a purchaser for a valuable consideration; such limitations being interposed between the limitations to the sons of the first marriage & the daughters of such.—*CLAYTON v. WILTON (EARL)* (1813), 3 Madd. 302, n.; 6 M. & S. 67, n.; 56 E. R. 516.

Annotations:—*Consd.* *Clarke v. Wright* (1861), 6 H. & N. 849; *Price v. Jenkins* (1876), 4 Ch. D. 483. *Expld.* *De Mestro v. West*, [1891] A. C. 264. *Refd.* *Gale v. Gale* (1877), 6 Ch. D. 144; *Mackie v. Herbertson* (1884), 9 App. Cas. 303; *A.-G. v. Jacobs-Smith*, [1895] 2 Q. B. 341; *Meredyth v. Meredyth*, [1895] P. 92.

654. —.]—A., having the fee simple of an estate, on his marriage settled it to the use of self for life, remainder to trustees for one hundred years to secure wife's jointure; remainder to other trustees for five hundred years, for raising portions; remainder to the use of first & other sons of the marriage in tail male; remainder to first & other sons in tail male of any other marriage; remainder to the use of divers persons for life, etc.; with ultimate remainder to A., his heirs & assigns for ever. A., having no issue, executed a mtge. of part of the estate to B., & created a term of five hundred years for securing the money lent; A. died without ever having had any lawful issue; & B. filed his bill to have the limitations, subsequent to those for the benefit of A.'s issue, declared voluntary as against him. The ct. made a decree in favour of the security.—*GRAY v. LEGARD* (1831), 9 L. J. O. S. Ch. 80.

655. —.]—*WOLLASTON v. TRIBE*, No. 640, *ante*.

656. Issue of former marriage—Settlement by widow.]—A widow who had two children by a former husband, & these two children, each of them a child, & being entitled after the death of her mother, to certain freehold, copyhold, & leasehold estates, by articles before her second marriage, to which her husband was a party, & with his consent, covenanted that trustees should stand seised of the freehold, copyhold, & leasehold estates, if no issue of the marriage, in moieties; one to pltf., her grandson, his heirs & assigns, the other to her granddaughter in fee; provided, if there should be any child or children of the marriage, such child or children, to have an equal share of the said estates with the grandson & grand-daughter. The husband & wife afterwards mortgaged the estates to persons who had notice of the articles. Declared that the articles are no voluntary agreement, but a binding one, & it was not fraudulent & void against subsequent purchasers or creditors.—*NEWSTEAD v. SEARLE* (1737),

which had been charged on land, & was the property of the wife, was settled in trust for the husband for life, with remainder to his wife & their issue; & the husband, after the death of his wife, joined by the issue, mtged. the entire charge to A. & B., who, at the time, were solrs. for him & his issue, & who had notice of the settlement:—*Held*: mtge. deed was set aside as far as it affected the issue; it being

West temp. Hard. 287; 1 Atk. 265; 25 E. R. 942, L. C.

Annotations:—*Appld.* Doe d. Bothell v. Martyr (1805), 1 Bos. & P. N. R. 332; Wright v. Dickenson (1861), 4 L. T. 21. *Consd.* Price v. Jenkins (1876), 4 Ch. D. 483. *Appld.* Gale v. Gale (1877), 6 Ch. D. 144. *Consd.* Re Cameron & Wells (1887), 37 Ch. D. 32. *Expld.* De Mestre v. West, [1891] A. C. 264; A.-G. v. Jacobs-Smith, [1895] 2 Q. B. 341. *Refd.* Goring v. Nash (1744), 3 Atk. 186; Blount v. Doughty (1747), 3 Atk. 481; Doe d. Watson v. Routledge (1777), 2 Cowp. 705; Kinchant v. Kinchant (1784), 1 Bro. C. C. 369; Jones v. Boulter (1786), 1 Cox, Eq. Cas. 288; Doe d. Otley v. Manning (1807), 9 East, 59; Smith v. Cherrill (1867), L. R. 4 Eq. 390; Mackie v. Herbertson (1884), 9 App. Cas. 303; Tucker v. Bennett (1887), 38 Ch. D. 1. *Mentd.* Holliday v. Overton (1852), 15 Beav. 480.

657. ———.]—The performance of a covenant by a widow on her second marriage to convey property for the benefit of her children by a former marriage, if made in pursuance of an agreement between her & her intended husband, will be enforced at the suit of those children, & is an exception to the general rule that the performance of a covenant cannot be enforced by volunteers.—GALE v. GALE (1877), 6 Ch. D. 144; 46 L. J. Ch. 809; 36 L. T. 690; 25 W. R. 772.

Annotations:—*Refd.* Gandy v. Gandy (1885), 30 Ch. D. 57; Re Cameron & Wells (1887), 37 Ch. D. 32; Tucker v. Bennett (1887), 38 Ch. D. 1; A.-G. v. Jacobs-Smith, [1895] 2 Q. B. 341; Meredyth v. Meredyth, [1895] P. 92.

658. Settlement by widower.]—PRICE JENKINS, No. 597, *ante*.

659. ———.]—The principle of *Newstead v. Searle*, No. 656, *ante*, whereby limitations contained in the marriage settlement of a widow in favour of her children by a former marriage are not treated as voluntary, will not be extended to the like limitations in the marriage settlement of a widower. By the settlement made on the second marriage of a widower, land belonging to him was conveyed in trust for his children by his first wife absolutely, & personalty belonging to the second wife was settled on trusts for her benefit. The husband afterwards mortgaged the land:—*Held*: the settlement of the land was voluntary, & therefore void as against the mtgee. under 27 Eliz. (c. 4.).—*Re* CAMERON & WELLS (1887), 37 Ch. D. 32; 57 L. J. Ch. 69; 57 L. T. 645; 36 W. R. 5.

Annotations:—*Folld.* Carruthers v. Peake (1911), 55 Sol. Jo. 291. *Refd.* De Mestre v. West (1891), 64 L. T. 375; A.-G. v. Jacobs-Smith, [1895] 2 Q. B. 341. *Mentd.* A.-G. v. Chapman, [1891] 2 Q. B. 526.

660. Illegitimate child of settlor.]—A widow, the owner of property, having an illegitimate child, contemplated a second marriage, & by a marriage settlement, dated May 17, 1830, made between herself, her intended husband, & trustees, it recited that it had been agreed that the property should be released, & conveyed as therein mentioned, which was to the separate use of the wife for life, remainder to the use of the intended husband for life, remainder to the illegitimate child absolutely. The marriage took place, & the husband & wife afterwards mortgaged the property. After their death the illegitimate child brought this action of ejectment to recover the property from those claiming under the mtgee.:—*Held*: the limitation in favour of the illegitimate child, contained in the marriage settlement, was not void as against the subsequent mtgee. by

27 Eliz. c. 4, & therefore pltf. was entitled to recover.—CLARKE v. WRIGHT (1861), 6 H. & N. 849; 30 L. J. Ex. 113; 7 Jur. N. S. 1032; 9 W. R. 571; *sub nom.* WRIGHT v. DICKENSON, 4 L. T. 21, Ex. Ch.

Annotations:—*Consd.* Price v. Jenkins (1876), 4 Ch. D. 483. *Appld.* Tucker v. Bennett (1887), 38 Ch. D. 1. *Overd.* Doe v. West, [1891] A. C. 264. *Refd.* Smith v. Cherrill (1867), L. R. 4 Eq. 390; Gale v. Gale (1877), 6 Ch. D. 144; Re D'Angilan, Andrews v. Andrews (1880), 15 Ch. D. 228; Mackie v. Herbertson (1884), 9 App. Cas. 303; Re Cameron & Wells (1887), 37 Ch. D. 32; Godfrey v. Poole (1888), 13 App. Cas. 497; A.-G. v. Jacobs-Smith, [1895] 2 Q. B. 341.

661. Husband's illegitimate issue.]—A limitation in a marriage settlement in favour of the settlor's illegitimate child & his issue, not being within the marriage consideration, may be defeated by a subsequent conveyance by the settlor to a purchaser for value; unless such result would involve the defeat of other limitations within the marriage consideration. Special agreement between the parties thereto in favour of the limitation, acceptance by one of the parties of different interests in the settled property from those which the law would have given, omission to provide therein for all or some of the issue of the marriage, are insufficient to support such limitation against a purchaser for value.—DE MESTRE v. WEST, [1891] A. C. 264; 60 L. J. P. C. 66; 64 L. T. 375; 55 J. P. 613, P. C.

Annotation:—*Refd.* A.-G. v. Jacobs-Smith, [1895] 2 Q. B. 341.

662. Illegitimate collateral relation.]—HEAP v. TONGE, No. 666, *post*.

663. Strangers.]—SUTTON v. CHETWYND, No. 207, *ante*.

664. ——— Remainder to in default of issue.]—GRAY v. LEGARD, No. 654, *ante*.

Compare Part I., Sect. 3, sub-sect. 3, E., *ante*.

(d) Family Arrangements.

665. General rule.]—Deeds in the nature of family arrangements are exempt from the rules applicable to other deeds; the consideration for the former being partly value, & partly love & affection.—PERSSE v. PERSSE (1840), 7 Cl. & Fin. 279; West, 110; 4 Jur. 358; 7 E. R. 1073, H. L. **Annotation:**—*Refd.* Williams v. Williams (1865), 2 Drow. & Sm. 378.

666. Who are within the consideration—Legitimate & illegitimate children—Other than child whose rights disputed.]—(1) A deed conveying the property of an intestate, upon trusts, in pursuance of an agreement for the division of such property, made soon after the death of the intestate, between his sister & heiress-at-law, her husband, & her illegitimate son, & which agreement was founded on the supposition that the intestate had made a will disposing of his property in favour of the illegitimate son, which will had not been found:—*Held*: not to be voluntary within 27 Eliz. c. 4; but supported & enforced against the heiress-at-law & her husband, & also against subsequent purchasers from them for valuable consideration with notice of the trust deed.

(2) Under the agreement & trust deed other children of the sister & heiress-at-law, both

fraudulent as against them.—ASHE v. LOWE (1833), Hayes & Jo. 287.—IR.

r. ———.]—A woman, possessed of certain lands, in contemplation of her marriage assigned them by deed to a trustee, to hold for her life

& after her decease for the use of the children of the marriage. A child was born of the marriage. Before her death the mother sold the property of the *cestui que trust* to pltf., who endeavoured to sell:—*Held*: the trust deed was not

voluntary & void against pltf. purchaser; & the mother had no authority to sell, so as to deprive the *cestui que trust* of his right in remainder after her life estate.—JERRITT v. SCOTT (1890), 7 Nfld. L. R. 431.—NFLD.

Sect. 3.—Fraudulent intent and evidence thereof:
Sub-sect. 2, B. (d), (e) & (f).]

legitimate & illegitimate, besides the child in whose favour it was suggested that a will might have been made, took interests in the property of the intestate:—*Held*: the deed was not voluntary as to such other parties, but they were within the consideration of the family contract.

(3) The cases in which collaterals are not within the consideration of a marriage settlement, proceed upon the ground that the wife cannot be considered to stipulate on the part of the relations of the husband; but limitations in favour of collaterals are supported, if there be any party to the settlement who purchases on their behalf.—*HEAP v. TONGE* (1851), 9 Harc. 90; 20 L. J. Ch. 661; 68 E. R. 427.

Annotations:—As to (1) *Reid*. Salt v. Standish (1863), 2 New Rep. 573. As to (3) *Consd.* Clarke v. Wright (1861), 6 H. & N. 849. *Reid*. Ford v. Stuart (1852), 15 Beav. 493.
 , generally, FAMILY ARRANGEMENTS.

(e) Consideration ex post facto.

667. General rule.]—(1) Lease was made by bond in trust to the use of his daughter if marriage be had with A., if not to raise £2,000 for her if she married with consent of J. S. if J. S. were living at the time of the marriage.

This lease for maintenance of his daughter is a voluntary conveyance; but if it were for raising a portion for such person as she shall marry, after marriage this is a conveyance for valuable consideration (*per* OUR).

(2) A fraudulent conveyance may become a good one; as if the feoffee conveys it over for value before the feoffor conveys it, the feoffee of the feoffee shall hold it against the feoffee of the feoffor (*per* OUR).—*PRODGER v. LANGHAM* (1663), 1 Keb. 486; 1 Sid. 133; 83 E. R. 1068.

Annotations:—As to (1) *Consd.* Brown v. Carter (1801), 5 Ves. 862; Doe d. Otley v. Manning (1807), 9 East, 59; Clarke v. Willott (1872), L. R. 7 Exch. 313. *Reid*. Halifax Joint Stock Banking Co. v. Gledhill, [1891] 1 Ch. 31. As to (2) *Apprvd.* George v. Milbanke (1803), 9 Ves. 190. *Expld.* Halifax Joint Stock Banking Co. v. Gledhill, [1891] 1 Ch. 31. *Reid*. Part v. Eliason (1800), 1 East, 92; Doe d. Newman v. Rusham (1852), 17 Q. B. 723; Payne v. Mortimer (1859), 1 Giff. 118; Re Williams & Parry's Contract (1895), 72 L. T. 869; Harrods v. Stanton, [1923] 1 K. B. 516.

668. —.]—Fraudulent conveyance purged by a good one.

If a conveyance be made by fraud, & afterwards the land is conveyed over upon valuable consideration, *bond fide*, the fraud is purged (*HOLT, C.J.*).—*PORTER v. CLINTON* (1693), Comb. 222; 90 E. R. 441.

669. —.]—A voluntary bond assigned for value is entitled, in the administration of assets, to stand on the same footing as a bond originally given for value.—*PAYNE v. MORTIMER* (1859), 4 De G. & J. 447; 28 L. J. Ch. 716; 33 L. T. O. S. 293; 5 Jur. N. S. 749; 7 W. R. 646; 45 E. R. 173, L. JJ.

Annotations:—*Consd.* Halifax Joint Stock Banking Co. v. Gledhill, [1891] 1 Ch. 31; Re Williams & Parry's Contract (1895), 72 L. T. 869.

670. —.]—Deft. having executed a voluntary conveyance, agreed to sell the property com-

prised in it to pltf., who paid a deposit. Pltf. refused to accept the title, & sued for the deposit:—*Held*: deft. could not make a good title, first, because the voluntary conveyance might have since been confirmed by a consideration, & its invalidity therefore depended on a doubtful state of facts; &, secondly, because deft. could not compel pltf. to concur in defeating the previous conveyance, & making a good title to himself; & pltf. was therefore entitled to recover the deposit.—*CLARKE v. WILLOTT* (1872), L. R. 7 Exch. 313; 41 L. J. Ex. 197; 21 W. R. 73.

Annotations:—*Consd.* Re Briggs & Spicer, [1891] 2 Ch. 127. *Reid*. Noyes v. Paterson (1893), 8 R. 323.

671. —.]—Purchasers from the trustees of a voluntary settlement of freehold lands objected to the title on the ground that under Bkpcy. Act, 1883 (c. 52), s. 47, the settlement would be void as against the trustee in bkpcy. of the settlor, if he should become bkpt. within two years of the date of the settlement, & would be void if he should become bkpt. within ten years of such date, unless the "parties claiming under the settlement" could show that the settlor was at the time of making the settlement able to pay all his debts without the aid of the settled property:—*Held*: although a good title might possibly be made through the concurrence of the settlor, by his conveying to the purchasers & their paying the purchase-money by his direction to the trustees, yet such a title could not be forced upon unwilling purchasers; (1) because the ct. would not assist a settlor to get rid of his own settlement; & (2) because there was no means of ascertaining conclusively that the settlement was not in reality in the first instance, or had not subsequently become, a settlement for value.—*Re BRIGGS & SPICER*, [1891] 2 Ch. 127; 60 L. J. Ch. 514; 64 L. T. 187; 55 J. P. 278; 39 W. R. 377; 7 T. L. R. 274.

Annotations:—As to (2) *Reid*. Mogridge v. Clapp, [1892] 3 Ch. 382; Re Vansittart, Ex p. Brown, [1893] 2 Q. B. 377; Re Carter & Kenderdine's Contract, [1897] 1 Ch. 776; Re Handman & Wilcox's Contract, [1902] 1 Ch. 599. Generally, *Mentd.* Re Hart, Ex p. Green, [1912] 2 K. B. 257.

672. —.]—The conditions of sale of a freehold estate provided that the title should commence with a conveyance on sale dated 1892 deducing the title by recitals from 1844; that it appeared from such recitals that on payment off of a mtge. in 1868 no reconveyance was executed, & that in that year the estate, which was in fact of freehold tenure, was assured to the vendor at the sale in 1892 by a form of assurance applicable only to copyholds, & that the purchaser should raise no objections in respect of these matters or require the legal estate, if outstanding to be got in, but should be satisfied with the recitals. By the deed of 1892, which recited that by a voluntary settlement of 1868 the settlor covenanted to surrender the estate, which was subject to a mtge. by £700, to the use of trustees of the settlement upon trust for sale, to pay off the mtge. & thereupon to cause the estate to be conveyed or surrendered so as to vest in the trustees freed from the mtge., the estate was conveyed by the trustees to the predecessor in title of the present vendor. The mtge. was paid off, but no reconveyance was executed. The estate was purchased by the auctioneer at the present sale, who refused to

PART II. SECT. 3, SUB-SECT. 2.—
B. (e).

667 i. General rule.]—A settlement voluntary in its inception may have an *ex post facto* consideration supplied,

& become indefeasible by any subsequent sale by settlor, by settlee expending money in erecting buildings on the land with the knowledge of settlor, even though the settlement contem-

plated no such expenditure.—*GOODBODY v. MILLER* (1893), 19 V. L. R. 581.—*AUS.*

667 ii. —.]—*FORSYTH v. LINTON* (1893), 14 N. S. W. L. R. 233.—*AUS.*

complete. Upon summons by the vendor under the Vendor & Purchaser Act, 1874 (c. 78):—*Held*: the purchaser was told he would not get the legal estate; although he might claim the legal estate by reason of the covenant to surrender & the declaration of trust for sale, he could not call upon the original settlor to pass the legal estate; but value had attached to the voluntary settlement by virtue of the subsequent sale in 1892 for valuable consideration; & the equitable title of the purchaser would be a sufficient answer to any claim in ejectment by the heir or devisee of the original settlor, & the purchaser therefore got a good title according to the conditions.—*Re WILLIAMS & PARRY'S CONTRACT* (1895), 72 L. T. 869; 13 R. 574.

673. Marriage of grantee.]—*PRODGER v. LANGHAM*, No. 667, *ante*.

674. —.]—*KIRK v. CLARK*, No. 605, *ante*.

675. Mortgage without consideration—Assignment by mortgagee for consideration.]—Upon an assignment of a mtge. made by K. in 1859, & after by divers mean assignments vested in N., exor. of S., it was objected that it did not appear that any money was paid upon the original mtge., & therefore it was fraudulent; & it being fraudulent in the creation, though S. paid a valuable consideration, yet this would not purge the fraud, & make it good against debt., who was a purchaser *bond fide*, & for a valuable consideration.

The first mtge. was good between the parties, & being so, when the first mtgee. assigns for a valuable consideration, this is all one, as if the first mtge. had been upon a valuable consideration, for now the second mtgee. stands in his place, & therefore is within the proviso of 27 Eliz. c. 4. No mtge. *bond fide*, & upon good consideration, shall be impeached by force of this Act; but it shall stand in such force, as before the Act made; & if this proviso does not extend to the case, to what case shall it extend? (*HOLT, C.J.*).—*NEWPORT'S CASE* (1694), Skin. 423; *Holt, K. B.* 477; 90 E. R. 188; *sub nom. SMARTLE v. WILLIAMS*, 3 Lev. 387.

Annotations:—*Mentd. Birch v. Wright* (1786), 1 Term Rep. 378; *Tinkler v. Walpole* (1811), 14 East, 226.

673 i. Marriage of grantee.]—Where a voluntary settlement has been made, & a person interested under the settlement has married, if the existence of the settlement has been an inducement to the marriage, the interest of such person cannot be defeated by a subsequent sale for value by settlor, though the inducement to marriage was not with the privity or knowledge of settlor.—*CHAPMAN v. ROBERTSON* (1887), 13 V. L. R. 682.—*AUS.*

673 ii. —.]—A conveyance of land voluntary in its inception may have a valuable consideration supplied *ex post facto*, as, by a person marrying the voluntary donee on the faith of the conveyance, or of a promise by donor that he would do nothing to defeat the conveyance; & when such *ex post facto* consideration is supplied, a subsequent *bond fide* sale by donor to a purchaser for value will have no effect.—*O'CONNELL v. O'CONNELL* (1894), 20 V. L. R. 253.—*AUS.*

673 iii. —.]—*GREENWOOD v. LUTMAN*, [1915] 1 I. R. 266.—*IR.*

s. — *Prior mortgage.]*—A father, before his second marriage in 1832, executed three bonds with warrants of attorney to confess judgments,

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to trustees, as provisions for his three daughters of his first marriage. In 1843 the father mtged. the lands in settlement, & in 1844 granted an annuity out of them. In 1853, on the marriages of two of the daughters, the judgments were settled for valuable consideration:—*Held*: the judgments were voluntary; although they became judgments for value, on the execution of the daughters' marriage settlements, they did not become valid by relation against the mtgee. & annuitant.—*O'DONOVAN v. ROGERS* (1858), 7 I. Ch. R. 496; 10 Ir. Jur. 291.—*IR.*

t. Subsequent failure of consideration.]—The failure by matter *ex post facto* of what was at the date of a conveyance of land sufficient to constitute a consideration for it of value, will not operate retrospectively so as to render the conveyance liable to be defeated under *Covinous & Fraudulent Conveyances* (Irish) Act, 1634 (c. 3), by a subsequent conveyance for value of the same land by the same grantor for other uses.—*PAGET v. PAGET* (1882), 9 L. R. Ir. 128.—*IR.*

PART II. SECT. 3, SUB-SECT. 2.—**B. (f).**

a. Nominal consideration c

(f) Consideration not Expressed.

676. General rule.]—Where a settlement is expressed to be made in consideration of natural love & affection, & no other consideration is expressed in the deed, evidence is admissible to prove that valuable consideration was given for the settlement, but such evidence must be most conclusive in order to induce the ct. to uphold the settlement as against a subsequent mtgee. for value, even though the latter had notice of the settlement.—*LEVY v. CREIGHTON* (1874), 31 L. T. 1; 22 W. R. 605, L. JJ.

677. Services rendered—Admissibility of evidence.]—*GULLY v. EXETER* (Bp.), No. 574, *ante*.

678. Nominal consideration expressed—Evidence allunde of real consideration.]—The statement in a deed of settlement, executed after marriage, was that it was made in consideration of 5s., & divers other good & valuable considerations:—*Held*: this statement did not, as against strangers to the settlement, amount to evidence that it was not voluntary; & a debt. claiming against it as a purchaser for valuable consideration, & insisting that the settlement was fraudulent & void under 27 Eliz. c. 4, the ct. directed an inquiry whether the settlement was founded on any & what valuable consideration.—*KELSON v. KELSON* (1853), 10 Hare, 385; 22 L. J. Ch. 745; 20 L. T. O. S. 257; 17 Jur. 120; 1 W. R. 143; 68 E. R. 976.

679. Post-nuptial settlement—Valuable consideration in fact given.]—The owner of a freehold estate, which was worth, beyond a mtge. to which it was subject, about £1,300, was persuaded by K., a relative of his wife, to make a post-nuptial settlement of it on his wife & children. As an inducement to do this, K. agreed to advance him £150 on his promissory note to meet the interest on the mtge., which was then in arrear. The settlement was accordingly prepared & executed, but no mention was made in it of the advance of £150:—*Held*: on a bill filed by a subsequent mtgee. to establish priority over the settlement, the advance of the £150 was a sufficient valuable consideration to support the settlement under 27 Eliz. c. 4.—*BAYSPOLE v. COLLINS* (1871),

— *Evidence of no consideration.]*—Deft., being owner of the equity of redemption in lands, conveyed them directly to his wife for a consideration of \$100, the receipt of which was acknowledged in the margin & body of the deed. Pltf. who claimed by conveyance from the wife brought this action to recover possession from deft., who contended that the deed to his wife had been made without consideration & was void. Pltf. purchased *bond fide* without notice of there having been no consideration:—*Held*: under 49 Vict. c. 20, s. 10 (O), the acknowledgment of the consideration in the deed authorised pltf. to deal on the footing of its having been paid upon execution, & deft. could not now dispute the consideration.—*JONES v. MCGRATH* (2) (1888), 16 O. R. 617.—*CAN.*

679 i. Post-nuptial settlement—Valuable consideration in fact given.]—*DON d. LAWRENCE v. STALKER* (1848), 6 U. C. R. 346.—*CAN.*

b. Quit claim without covenants—(Grantor without title.)—M. made a voluntary deed of certain land to L. At that time M. had no title to the land, it having been previously sold for taxes & conveyed by sheriff's deed to B. There were no recitals or

Sect. 3.—Fraudulent intent and evidence thereof:
Sub-sect. 2, B. (f), & C. Sect. 4: Sub-sects. 1
2, A. & B

6 Ch. App. 228; 40 L. J. Ch. 289; 25 L. T. 282;
 35 J. P. 517; 19 W. R. 363, L. C.

Annotations:—*Reid*. *Rosher v. Williams* (1875), L. R. 20 Eq. 210; *Crossman v. R.* (1886), 18 Q. B. D. 256.

Sec, generally, DEEDS, Vol. XVII., pp. 334 et seq.

C. Gifts to Charities.

See CHARITIES, Vol. VIII., p. 282, Nos. 558, 559.

SECT. 4.—PURCHASERS WHO MAY IMPEACH.

SUB-SECT. 1.—IN GENERAL.

680. Purchasers for good consideration — Necessity for consideration.]—If a man makes a lease by fraud, & afterwards makes another lease *bonâ fide* [not for any fine, or rent reserved or any other valuable consideration], the second lessee shall not avoid the first lease.

A fraudulent conveyance is not made void against all, but only against those who afterwards come to the land upon good consideration (*ANDERSON, J.*).—*UPTON v. BASSET* (1595), Cro. Eliz. 443; 78 E. R. 685.

Annotations:—*Expld.* *Taylor v. Jones* (1743), 2 Atk. 600. *Reid*. *Twyne's Case* (1602), 3 Co. Rep. 80 b; *R. v. Nottingham* (1606), Lane, 42; *Roe d. Hamerton v. Mitton* (1767), 2 Wils. 356; *Copls v. Middleton* (1817), 2 Madd. 410. *Mentd.* *Barton v. Vanheythuysen*, *Stone v. Vanheythuysen* (1853), 11 Hare, 126.

681. ———.]—A. in 1683, makes a voluntary settlement of an estate, subject to some annuities, in trust for his grandson & his heirs, & afterwards in 1690, he makes another voluntary settlement of the same estate, to the use of his eldest son for life, & to his first, etc., sons in tail, with remainders over; & by will gives a considerable estate to his grandson. Although it was proved that A. always kept the settlement of 1683 in his custody, & never published it; & it was after his death found amongst waste papers; & the deed of 1690 was often mentioned by him; & he told the tenants, plff. was to be their landlord after his death; yet the son could not be relieved against the first settlement.—*CLAVERING v. CLAVERING* (1704), Prec. Ch. 235; 2 Vern. 473; 1 Eq. Cas. Abr. 24, pl. 6; 24 E. R. 114; *affd.* (1705), 7 Bro. Parl. Cas. 410, H. L.

Annotations:—*Consd.* *Chadwick v. Doleman* (1705), 2 Vern. 528; *Worrall v. Jacob* (1817), 3 Mer. 256; *Cecil v. Butcher* (1821), 2 Jac. & W. 565; *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671. *Reid*. *Clavell v. Littleton* (1710), Prec. Ch. 305; *Birch v. Blagrave* (1755), Amb. 264; *Roberts v. Williams* (1841), 11 L. J. Ch. 65; *Doe d. Richards v. Lewis*, *Richards v. Lewis* (1852), 11 C. B. 1035; *Re Jones*, *Farrington v. Forrester*, [1893] 2 Ch. 461.

682. ———.]—A conveyance in the form of a purchase deed, for valuable consideration,

covenants for title in the deed to L., & by it M. assigned & for ever quit claim to L. Subsequently B. sold & conveyed the land to M.:—*Held*: the deed from M. to L. did not operate by retoppel to vest the estate in the land subsequently acquired from B. in L., for there was no recital or covenants for title; it did not purport to grant any estate in the land, but merely to assign or release & quit claim to L., M.'s interest therein; & it never had any operation, for L. never paid anything for the land, never went into possession, never claimed to be owner of it or paid the taxes, & from the first

repudiated the gift.—*CASSELMAN v. CASSELMAN* (1885), 9 O. R. 442.—CAN.

PART II. SECT. 4, SUB-SECT. 1.

c. General rule.]—A deed made by one brother to another in consideration of natural love & affection is void as against a subsequent purchaser from grantor for a valuable consideration.—*Doe d. PHILLIPOTT v. BLANCHFIELD* (1845), 1 U. C. R. 350.—CAN.

d. Purchasers for good consideration — Removal from register of voluntary deed.]—As against a purchaser for

but in fact voluntary, not supported against a prior voluntary conveyance made by the same party.—*ROBERTS v. WILLIAMS* (1844), 4 Hare, 129; 67 E. R. 589.

Annotation:—*Mentd.* *Harmer v. Priestley* (1853), 16 Beav. 569.

683. ———.]—*DOE d. RICHARDS v. LEWIS, RICHARDS v. LEWIS*, No. 717, *post*.

684. ——— Consideration must be valuable.]—If a man for advancement of his issue male covenants to levy a fine to the use of himself for life, & afterwards to his eldest issue male upon the body of M. his wife, begotten, etc., & afterwards to defeat the covenant makes a fraudulent lease, & then levies the fine, the eldest son, though he was a purchaser *bonâ fide*, yet he was not a purchaser in vulgar & common intendment; also consideration of blood, natural affection, is a good consideration, but not such a good consideration which is intended by 27 Eliz. (c. 4), for a valuable consideration is only a good consideration within that Act.—*NEDHAM v. BEAUMONT* (1590), cited in 3 Co. Rep. at p. 83 b; 76 E. R. 823.

Annotation:—*Consd.* *Twyne's Case* (1602), 3 Co. Rep. 80 b.

685. ———.]—*ANON.* (1616), No. 554, *ante*.

686. ———.]—27 Eliz. c. 4, against fraudulent conveyances, enables a settlor to defeat a settlement which he has created on behalf of his family, but it only does so upon a subsequent conveyance to a purchaser for actual value. A mtgee. is a purchaser within the meaning of the statute.—*DOLPHIN v. AYLWARD* (1870), L. R. 4 H. L. 486; 23 L. T. 636; 19 W. R. 49, H. L.

Annotations:—*Reid*. *Re Walhampton Estate* (1884), 26 Ch. D. 391; *Godfrey v. Poole* (1888), 13 App. Cas. 497. *Mentd.* *Re Townley, Public Trustee v. Alder*, [1922] 1 Ch. 154.

687. ——— Adequacy of consideration—How far material.]—Though a purchaser for a valuable consideration may recover in ejectment against one who claims only under a voluntary settlement, of which such purchaser had notice, yet it seems that the inadequacy of consideration for such purchase is material, if it extend so far as to show that it was not made *bonâ fide*, but merely colourably, to get rid of the first settlement, & make another, which was also in truth a voluntary settlement.—*DOE d. PARRY v. JAMES* (1812), 16 East, 212; 104 E. R. 1069.

Annotations:—*Reid*. *Atkinson v. Smith* (1858), 4 Jur. N. S. 1160; *Townend v. Toker* (1866), 1 Ch. App. 446.

688. ——— Consideration not confined to money. —DOE d. WATSON v. ROUTLEDGE, No. 800, *post*.

689. ——— Marriage.]—Marriage a good consideration to make the feme a purchaser.—*DOUGLASSE v. WAAD* (1668), 1 Cas. in Ch. 99; 22 E. R. 713, L. C.

Annotations:—*Reid*. *Doe d. Richards v. Lewis, Richards v. Lewis* (1852), 11 C. B. 1035. *Mentd.* *I. R. Comrs. v. Gribble* (1913), 108 L. T. 887.

value, a voluntary deed, though registered, is void; & as this objection will avail purchaser in any proceeding adopted by or against him, the ct. will not interfere to remove the registration of the void deed as a cloud on the title.—*BUCHANAN v. CAMPBELL* (1867), 14 Gr. 163.—CAN.

e. ——— Voluntary settlement — Registration—Priority.]—By voluntary unregistered settlement, in 1853, F. conveyed lands to trustees for himself for life, then for J. for life, & then for the children of J. By voluntary registered grant in 1855, F. conveyed

690. ———.]—A. on the marriage of his son, covenants for himself & his exors., without naming his heirs, to settle lands of £150 a year on the son, & the issue of the marriage. He dies without having made any settlement. The son enters on the real estate as heir & settles part of it for a jointure for his second wife, who has no notice of the articles:—*Held*: although no particular lands were mentioned the covenant was a lien on all the lands of which A. was then seised, except those settled on the second wife who came in as a purchaser without notice.—*ROUNDELL v. BREARY* (1705), 2 De G. & J. 319, n.; 2 Vern. 482; 23 E. R. 909.

Annotations:—*Consd.* Deacon v. Smith (1746), 3 Atk. 323. *Expld.* Ravenshaw v. Hollier (1835), 4 L. J. Ch. 119. *Consd.* Wellesley v. Wellesley (1839), 4 My. & Cr. 561; *Mornington v. Keane* (1858), 2 De G. & J. 292. *Refd.* Montagu v. Sandwich (1886), 32 Ch. D. 525.

691. ———.]—*DOE d. WATSON v. ROUTLEDGE*, No. 800, *post*.

692. ——— **Liability undertaken—Covenant to pay off mortgage.**]—The absence of a power of revocation is a ground upon which a voluntary deed will be set aside at the suit of a subsequent purchaser for value, though there be no trace of fraud or undue influence, if it appear that the propriety of reserving the power of revocation was not impressed upon the grantor.

An old man made a voluntary conveyance of his property, & subsequently executed a deed reciting a contract with his daughter for the conveyance to her of his property, on her undertaking to pay a mtge. & witnessing that he conveyed the property to her. The deed contained a covenant by the daughter to pay off the mtge.:—*Semble*: the latter deed was not voluntary, the covenant to pay off the mtge. being sufficient to support it as made for value.—*MOUNTFORD v. KEENE* (1871), 24 L. T. 925; 19 W. R. 708.

Annotation:—*Consd.* Hall v. Hall (1873), 8 Ch. App. 430.

693. **Purchase must be bona fide.**]—*DOE d. WATSON v. ROUTLEDGE*, No. 800, *post*.

694. ——— **Adequacy of consideration.**]—*DOE d. PARRY v. JAMES*, No. 687, *ante*.

695. **Proof of consideration—Admissibility of evidence—Declarations of deceased grantor.**]—A party having, by a voluntary settlement after marriage, conveyed away his interest in an estate, afterwards executed a mtge. of the same estate. The mtgee. representing himself as a bona fide purchaser

for value, claimed to treat the prior settlement as void, under 27 Eliz. c. 4:—*Held*: declarations or admissions, implied or express, of the mtgor. made after he had parted with his interest by the settlement, were not admissible evidence on behalf of the mtgee. after the death of the mtgor. to show that money had actually been advanced upon the mtge.—*DOE d. SWEETLAND v. WEBBER* (1831), 1 Ad. & El. 733; 3 Nev. & M. K. B. 586; 3 L. J. K. B. 208; 110 E. R. 1387.

See, generally, EVIDENCE, Vol. XXII., pp. 53 *et seq.*

696. ——— **Partial proof of payment.**]—*DOE d. BARNES v. ROWE*, No. 624, *ante*.

SUB-SECT. 2.—WHO ARE PURCHASERS.

A. Lessees.

697. **General rule—Lease reserving rent.**]—A settlement made for a good consideration, as for the provision of children, will, if made with power of revocation in the seller, be void, by 27 Eliz. (c. 4), against a purchaser for a valuable consideration.

A lease on which rent is reserved is a revocation of a voluntary conveyance within 27 Eliz. (c. 4).—*CROSS v. FAUSTENDITCH* (1608), Cro. Jac. 180; 79 E. R. 157.

698. ———.]—*DOE d. LEWIS v. HOPKINS* (1804), cited 9 East, at p. 70; 103 E. R. 500.

Annotation:—*Refd.* Doe d. Otley v. Manning (1807), 9 East, 59.

699. **Lessee at rack-rent.**]—*GOODRIGHT d. YS v. MOSES*, No. 612, *ante*.

700. **Lease without consideration.**]—*UPTON v. BASSIET*, No. 680, *ante*.

B. Mortgagees.

701. **Mortgagee.**]—By a proviso in a marriage settlement the deed was to be void, if the marriage was not had in ten months. The heir sets up this settlement to defeat a mtge. made by his father, after his father had sworn that he was not married within the ten months. Voluntary settlement made by the father is fraudulent as to any mtge. made by himself. Otherwise as to a mtge. made by the

the same lands to J. in fee. J., in 1861, deposited this grant with the Bank of Ireland by way of equitable mtge., accompanied by a memorandum which was duly registered. The bank had no notice of the settlement of 1853:—*Held*: even assuming J. to have had notice of the settlement of 1853 at the time of the equitable mtge., the bank, as purchasers for value without notice, were entitled to rely on the registration of the deed of 1855, & had acquired priority over the unregistered settlement of 1853.—*Re M'DONAGH'S ESTATE* (1879), 3 L. R. Ir. 408.—IR.

694 i. **Purchase must be bona fide—Adequacy of consideration.**]—*TAYLOR v. WALLBRIDGE* (1879), 2 S. C. R. 616.—CAN.

i. ——— **Subsequent purchaser without notice.**]—L., the owner of certain valuable property, mtged. it for \$700, became of unsound mind & was confined in an asylum. During his confinement M., his second wife, pro-

cured S., the holder of the mtge., to sell under the power of sale, & the property was sold for \$900 to E., sister of M. Two years after E. sold the property to B. for \$5,000, & a mtge. for \$4,000 unpaid purchase money was taken to M. In an action by L., by his next friend, to set aside the sale or for an account:—*Held*: the property was sold at a great undervalue under the power of sale, but as B. was a purchaser for value without notice, the sale must stand, but an account of the proceeds was ordered against M.—*DUPRESNE v. DUPRESNE* (1885), 10 O. R.

PART II. SECT. 4, SUB-SECT. 2.—A.

g. Mining lease with royalties.]—Where a mining lease for 99 years contained provisions enabling lessor to demand a royalty upon the proceeds of the mines, or \$4,000 in lieu of such royalty, & lessor had not exercised such option:—*Held*: lessee was a

purchaser for value, & a prior voluntary conveyance was void as against him.—*CONLIN v. ELMER* (1869), 16 Gr. 541.

PART II. SECT. 4, SUB-SECT. 2.—B.

701 i. **Mortgagee.**]—Although a mtgee. has no right to complain of any subsequent dealing with the estate by mtgor., there is nothing to prevent him, if his claim is left unsatisfied, applying to the ct. to remove any subsequent fraudulent conveyance which interferes with the realisation of his claim.—*PARR v. MONTGOMERY* (1880), 27 Gr. 521.—CAN.

701 ii. ———.]—A mtge. made fraudulently, without consideration & for the purpose of defeating creditors, will be validated by a subsequent assignment for good consideration to a party who takes without notice.—*CONRAD v. CORKUM, WHITFORD v. CORKUM* (1902), 35 N. S. R. 288.—CAN.

701 iii. ———.]—A vendee of the Crown

Sect. 4.—Purchasers who may impeach: Sub-sect. 2, B. & C.]

son.—JONES v. PUREFOY (1682), 1 Vern. 45; 23 E. R. 209, L. C.

702. ———.]—The wife joins in a mtge., & levies a fine to bar her dower, & in consideration thereof, the husband agrees the wife shall have the equity of redemption in lieu of her dower, & afterwards he makes a second mtge. This agreement is fraudulent as against the second mtgee.; so far as to entitle the wife to the whole equity of redemption.—**DOLIN v. COLTMAN** (1684), 1 Vern. 204; 1 Eq. Cas. Abr. 148; 23 E. R. 478.

Annotation:—Consd. Dawson v. Bank of Whitehaven (1877), 6 Ch. D. 218.

703. ———.]—As against a purchaser, & a mtgee. is such, the law declares a voluntary settlement to be void (**LORD HARDWICKE, C.**).—**SENHOUSE v. EARLE** (1755), Amb. 285; 27 E. R. 102, L. C.

704. ———.]—**CHAPMAN d. STAVERTON v. EMERY**, No. 613, *ante*.

705. .]—**COWX v. FOSTER**, No. 603, *ante*.

706. .]—**DOLPHIN v. AYLWARD**, No. 686, *ante*.

707. .]—**CRACKNALL v. JANSON**, No. 566, *ante*.

708. .]—*Re* **CAMERON & WELLS**, No. 659, *ante*.

709. Equitable mortgagee—By deposit of deeds.]—B. after marriage having made a settlement on his wife, obtained from the trustees the title deeds of the property settled, & deposited them with a banker as a security for money advanced:—**Held**: the banker was not a purchaser within 27 Eliz. (c. 4), s. 2, & the trustees were entitled to recover the deeds.—**KERRISON v. DORRIEN** (1832), 9 Bing. 76; 2 Moo. & S. 114; 1 L. J. C. P. 166; 131 E. R. 543.

710. ———. Parol evidence of subsequent advances.]—Equitable mtge. established by means of written documents coupled with parol evidence against a prior voluntary settlement. Parol evidence of subsequent advances made on the security of a prior equitable mortgage by deposit of deeds & memorandum in writing not under seal.—**EDE v. KNOWLES** (1843), 2 Y. & C. Ch. Cas. 172; 63 E. R. 76.

———. Agreement to execute formal mortgage.]—An equitable mtge. by deposit of title-deeds, with an agreement in writing by the party making the deposit to execute a formal mtge. of the property to the mtgee. for the balance which might be due to him, constitutes the equitable mtgee. a purchaser for good consideration within 27 Eliz. c. 4, in respect of such balance; & it being a term of the agreement that the mtge. to be executed should contain a power of sale, the ct., on a bill to set aside a prior voluntary conveyance by the mtgor. as fraudulent & void, under 27

Eliz. c. 4, decreed that, on default of payment, the mortgaged property should be sold.—**LISTER v. TURNER** (1846), 5 Hare, 281; 15 L. J. Ch. 336; 7 L. T. O. S. 3; 10 Jur. 751; 67 E. R. 919.

C. Other Persons.

712. Chargee.]—**GARTH v. ERSFELD**, No. 540, *ante*.

713. Beneficiary under articles for settlement.]—**HOLFORD v. HOLFORD** (1672), 1 Cas. in Ch. 216; 22 E. R. 769.

Annotation:—Consd. Pulvertoft v. Pulvertoft (1811), 18 Ves. 84.

714. Devisee.]—Voluntary settlement without power of revocation shall bind the party, & shall not be defeated by a subsequent will.

If a man will improvidently bind himself up by a voluntary deed, he must lie down under his own folly, for if you would relieve in such a case, you must establish this proposition: that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd (**LORD NOTTINGHAM, C.**).—**VILLERS v. BEAUMONT** (1682), 1 Vern. 100; 1 Eq. Cas. Abr. 23; 23 E. R. 342, L. C.

Annotation:—Consd. Bill v. Cureton (1835), 2 My. & K. 503.

715. Party claiming in right of grantor.]—A voluntary surrender of copyhold lands, made by a man in his sickness, in favour of the nephew of his first wife, & out of respect to her memory, she being dead without issue, good against his second wife & her children by the second marriage, who claimed under a settlement of those lands made on such second marriage after recovery of that sickness.—**ALLEN v. ARME** (1685), 1 Vern. 365; 23 E. R. 525, L. C.

716. Partners.]—A. enters into partnership in fifths with three others for twenty-one years, in digging for mines in A.'s lands, A. to have two-fifths & in consideration of his ownership of the land to have a tenth out of the share of the other partners. A. dies & his widow sets up a voluntary settlement made after marriage, but before the partnership articles. Ct. inclined that the partners were as purchasers, & that the voluntary settlement should not stand against them.—**SHAW v. STANDISH (LADY)** (1694), 2 Vern. 326; 1 Eq. Cas. Abr. 353; 23 E. R. 811.

Annotations:—Refd. Goodright d. Humphreys v. Moses (1775), 2 Wm. Bl. 1019; Doe d. Otley v. Manning (1807), 9 East, 59.

717. Husband claiming in rights of wife.]—A., pending a treaty of marriage between her & B., without B.'s knowledge, made a settlement of certain leaseholds, to herself, for life, remainder to C., her son by a former marriage, remainder over to D.:—**Held**: this deed was not avoided by the marriage, under 27 Eliz. c. 4, the husband not taking as a purchaser.

One voluntary settlement cannot be set up against another voluntary settlement, the first must prevail (*per* CUR).—**DOE d. RICHARDS v. LEWIS, RICHARDS v. LEWIS** (1852), 11 C. B. 1035;

transferred his interest by way of mtge. to a person who took *bond fide*. After wards vendee made a second assignment for a nominal consideration of £200, but no money in fact passed, the consideration mentioned being intended to cover what assignee would have to pay the Govt. for balance due on the contract with vendee:—**Held**: as mtgee. the second deed was

voluntary.—**GARSDALE v. KING** (1831), 2 Gr. 673.—**CAN.**

h. Equitable mortgagee.]—A creditor holding an equitable mtge. is a purchaser within 27 Eliz. c. 4.—**GLADSTONE v. BALL** (1862), 1 W. & W. 277.—**AUS.**

k. ———.]—An equitable mtgee.

by deposit of title-deeds, unaccompanied by any memorandum in writing takes priority over a purchaser for value claiming under a subsequent registered deed, without notice of such deposit.—*Re* **BURKE'S ESTATE** (1881), 9 L. R. Ir. 24.—**IR.**

l. ———.]—**CONNOLLY v. MUNSTER BANK** (1887), 19 L. R. Ir. 119.—**IR.**

20 L. J. C. P. 177; 17 L. T. O. S. 126; 15 Jur. 512; 138 E. R. 786.

Annotation:—*Consd.* Doe d. Newman v. Rusham (1852), 17 Q. B. 723.

718. Judgment creditor.—A judgment creditor is not a purchaser within 27 Eliz. c. 4, & has therefore no title on that ground to set aside a prior voluntary settlement. Judgments Act, 1837 (c. 110), s. 13, does not confer on the judgment creditor any right against a person claiming under a voluntary settlement previously made by the judgment debtor.—*BEAVAN v. OXFORD (EARL)* (1856), 6 De G. M. & G. 507; 25 L. J. Ch. 299; 26 L. T. O. S. 277; 2 Jur. N. S. 121; 4 W. R. 275; 43 E. R. 1331, L. C. & L. JJ.

Annotations:—*Consd.* Kinderley v. Jervis (1856), 22 Beav. 1; Benham v. Keane (1861), 1 John. & H. 685. *Refd.* Scott v. Hastings (1858), 4 K. & J. 633; Eyre v. M'Dowell (1861), 9 H. L. Cas. 619; Gill v. Continental Gas Union Co. (1872), 41 L. J. Ex. 176; Dallow v. Garrold, *Ex p.* Adams (1884), 14 Q. B. D. 543. *Mentd.* Hirsch v. Coates (1856), 18 C. B. 757; Croft v. Lumley (1858), 6 H. L. Cas. 672; Nicholls v. Rosewarne (1859), 6 C. B. N. S. 480; Baker v. Tynte (1860), 2 E. & E. 897; Punchard v. Tomkins (1882), 31 W. R. 286; *Re* Bell, Carter v. Stadden (1886), 54 L. T. 370; Vacuum Oil Co. v. Ellis, [1914] 1 K. B. 693.

719. —.] — Judgments Act, 1837 (c. 110), s. 13, giving to a judgment creditor the same remedies in equity as if the debtor had power to charge the hereditaments, & had, by writing, agreed to charge the same with the judgment debt & interest, does not make the judgment creditor a purchaser, & a subsequent judgment creditor will not be affected by notice thereof, unless it is duly registered.—*BENHAM v. KEANE* (1861), 3 De G. F. & J. 318; 31 L. J. Ch. 129; 5 L. T. 439; 8 Jur. N. S. 604; 10 W. R. 67; 45 E. R. 901, L. JJ.

Annotations:—*Refd.* Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon, [1901] 2 Ch. 231. *Mentd.* Neve v. Flood (1864), 33 Beav. 666; Rolland v. Hart (1871), 6 Ch. App. 678; *Re* Wyatt, White v. Ellis, [1892] 1 Ch. 188.

720. Party agreeing to purchase—Purchase not completed.—The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud partakes of the nature of champerty, & will not be enforced in equity. A purchaser cannot, before completing his contract, enforce any equities attaching to the property against persons not parties to the contract. Therefore, where a purchaser filed a bill for specific performance, & added as defts. persons claiming under a previous agreement which the bill sought to impeach:—*Held*: a purchaser for value could not require a voluntary instrument affecting the estate to be delivered up to be cancelled.—*DE HOUGHTON v. MONEY* (1866), 2 Ch. App. 164; 15 L. T. 403; 15 W. R. 214, L. JJ.

Annotation:—*Mentd.* Townsend v. Toker (1866), 35 L. J. Ch. 608.

PART II. SECT. 4, SUB-SECT. 2.—C.

718 i. Judgment creditor.—A judgment creditor is not a purchaser for value within the meaning of 27 Eliz. c. 4.—*GOODWIN v. WILLIAMS* (1856), 5 Gr. 539.—*CAN.*

718 ii. —.] — *GILLESPIE v. VAN EGMOND* (1858), 6 Gr. 533.—*CAN.*

718 iii. —.] — *ANNAVUNADAVAN v. IYASAWMY PILLAI* (1870), 6 Mad. 65.—*IND.*

718 iv. —.] — *GANESH v. PURSHOTAM* (1908), 1. L. R. 33 Bom. 311.—*IND.*

718 v. —.] — A judgment creditor is not, as against the lands of the

conuzor, entitled to priority over a voluntary conveyance of anterior date, executed by the conuzor when not in embarrassed circumstances.—*EVANS v. EVANS* (1852), 2 L. Ch. R. 242; 5 Ir. Jur. 21.—*IR.*

720 i. Party agreeing to purchase—Purchase not completed.—A contract for the sale of land by a voluntary settlor with a *bond fide* purchaser which is *in fieri* only, & conditional on the vendor making a good title to the land, if prior in date to an out & out sale by the voluntary settlor, will take precedence over it.—*THOMPSON v. BOYD* (1888), 14 V. L. R. 594.—*AUS.*

m.

721. Trustee under inspectorship deed.—B., when solvent, by a voluntary post-nuptial settlement covenanted to assign certain leaseholds in trust for his wife for life, with remainder to the children of the marriage, with ultimate remainder to himself, & executed the assignment. Three days afterwards, & about a year from the date of the settlement, B. & his partner executed a deed of inspectorship containing a general provision for the conveyance of the whole of their joint & separate estate to trustees for the benefit of creditors. The trustees of the settlement, in compliance with the trusts thereof, having sold the leaseholds, a bill was filed to determine their rights & those of the trustees under the deed respectively to the proceeds of the sale:—*Held*: the trustees, under the deed, could not be considered purchasers for value within the meaning of 27 Eliz. c. 4, & consequently the settlement was valid; even assuming the trustees were purchasers, the fact of the property not being particularly referred to in the deed of inspectorship was in itself sufficient to exclude the right of those claiming under it.—*CADELL v. BEWLEY* (1867), 16 L. T. 141; 15 W. R. 703.

722. Surrender of lease.—In 1865, A. by a post-nuptial settlement, in consideration of natural love & affection, assigned a lease for a term expiring in 1905 to trustees, in trust for the benefit of his wife. In 1870, without disclosing the settlement, A. obtained a lease of the same premises for forty years, in consideration of a premium of £91, & the surrender of the former lease. The old lease, cancelled, & the new lease, were delivered by A. to his wife:—*Held*: in taking the new lease A. acted for the benefit of his wife, & as agent for her & the trustees of the settlement, & although there was no written declaration of trust of the new lease, such lease was "by operation of law" subject to the trusts of the settlement declared in respect of the old lease.

Qu.: whether the surrender of the old lease was a "conveyance" within sect. 1 of 27 Eliz. c. 7, which would prevail over the previous settlement, assuming such settlement to be a voluntary conveyance within the same statute.—*Re LULHAM, BRINTON v. LULHAM* (1885), 53 L. T. 9; 33 W. R. 788, C. A.; *affg.* (1884), 53 L. J. Ch. 928.

723. Purchaser from attorney—Attorney exceeding powers.—B. executed a voluntary settlement of land in favour of his wife & children, which contained a power of sale; subsequently, B. being about to leave England, executed a power of attorney to E., authorising him to sell all or any of his lands, but in general terms. E., as B.'s attorney, agreed to sell a portion of the land comprised in the settlement to deft.; & deft. contracted the next day, May 4, 1876, to sell the

SAVEREUX v. TOURANGEAU (1908), 16 O. L. R. 600; 11 O. W. R. *CAN.*

careat.
ALEXANDER v. GEMMAN (1911), 17 W. L. R. 184; 4 Sask. L. R. 111.—*CAN.*

o. Assignee of bankrupt.—A term of years was bequeathed to the wife of A., who while perfectly solvent, executed a deed purporting to convey all his interest therein to his wife for her sole benefit. A. then became a trader, & afterwards became bankrupt:—*Held*: the deed was not void as against the assignees of A., & as A., under 27 Eliz. c. 4, could have defeated the

Binding option.]

Sect. 4.—Purchasers who may impeach: Sub-sect. 2, C.; sub-sect. 3. Sect. 5.]

same piece of land to plffs. On the execution of this contract a deposit of £200 was paid, & the purchase was to be completed on Jan. 1, 1877. The title was objected to by plffs. on the ground that the power of attorney did not authorise the sale to deft., & an action was commenced in the Exchequer Div. in Aug. 1877, for the return of their deposit, & for damages for breach of the contract; deft. asserted that the contract was binding & the title good, & by his counter-claim asked for specific performance. An order had been obtained by consent in another action to administer the trusts of the settlement, confirming the proposed sale by E. to deft., & it had also been decided in the action that an order might be made directing a person to convey for B.

Deft. subsequently offered a conveyance direct from B. or from the trustees of the settlement, which was declined:—*Held*: the power of attorney did not authorise E. to sell to deft. any portion of the land comprised in the settlement; & that such a sale was not sufficient to call into operation 27 Eliz. c. 4; plffs. could not be affected by the order in the administration action, & the title being defective, plffs. were entitled to recover their deposit, with the costs of the action, the damages to be ascertained to be limited to the conveyancing costs; the trustees' suit, being a suit for the execution of the trusts of the settlement, there was no jurisdiction in it to make an order to confirm a sale in derogation of those trusts.—*GENERAL MEAT SUPPLY ASSOCN., LTD. v. BOUFFLER* (1879), 41 L. T. 719, C. A.

724. Purchaser from grantor without title — Grantor subsequently acquiring title by descent.]—*BURREL'S CASE*, No. 539, *ante*.

725. Purchaser from person other than original grantor.]—*DOE d. NEWMAN v. RUSHAM*, No. 783, *post*.

726. — Heir.]—*BURREL'S CASE*, No. 539, *ante*.

727. — —.]—*PARKER v. CARTER*, No. 586, *ante*.

728. — —.]—*DOE d. NEWMAN v. RUSHAM*, No. 783, *post*.

deed by a subsequent conveyance for value, the assignee, if permitted by the ct., could also defeat it.—*Re CROSS* (1870), 19 W. R. 153.—*IR*.

p. Purchaser from tenants in common to same uses.]—A conveyance by two tenants in common, setting the estate of each to the same uses in pursuance of a previous agreement between them to that effect, constitutes of itself a reciprocally valuable consideration for the grant of the estate of each, so as to take the conveyance out of 27 Eliz. c. 4, & renders the persons to whose use the entire estate is settled purchasers from both the settlors.—*MULLINS v. GILFOYLE* (1878), 39 L. T. —*IR*.

PART II. SECT. 4, SUB-SECT. 3.

733 i. Purchaser not estopped.]—A voluntary settlement of land under Transfer of Land Statute is void under 27 Eliz. c. 4, as against a subsequent purchaser, with notice, from settlor, notwithstanding that the volunteer holds a certificate of title as registered proprietor under the Act; & such subsequent purchaser may maintain a suit for specific performance against settlor & registered proprietor.—*COLL*.

CHIN v. WADE (1877), 3 V. L. R. 266.—*AUS*.

733 ii. —.]—A voluntary conveyance of land is fraudulent & void under 27 Eliz. c. 4, as against a subsequent purchaser for value even although such purchaser was trustee under the prior voluntary settlement, & had had notice thereof prior to his own purchase.—*PARTRIDGE v. PREDDY* (1903), 4 S. R. N. S. W. 36; 21 N. S. W. W. N. 11.—*AUS*.

733 iii. —.]—The locattee of lands of the Crown executed a bond for the conveyance of land to one of his sons for the purpose of procuring his marriage with a particular person, which never took place, & the son married another woman, having been allowed to retain possession of the bond. The father subsequently conveyed for value to another son, who had notice of the existence of the bond, & he having obtained the Crown patent for the land refused to recognise the right of his brother under the bond. A bill was filed to compel the specific performance:—*Held*: as against a purchaser for value the bond was voluntary & could not be enforced.—*OSBORNE v. OSBORNE* (1856), 5 Gr. 619.—*CAN*.

729. — —.]—Purchaser for value from the heir not entitled, under 27 Eliz. c. 4 to set aside voluntary conveyance by ancestor.—*LEWIS v. REES* (1856), 3 K. & J. 132; 26 L. J. Ch. 101; 28 L. T. O. S. 229; 3 Jur. N. S. 12; 5 W. R. 96; 69 E. R. 1052.

Annotation:—*Mentd.* *Cooper v. Kynock* (1872), 7 Ch. App. 398.

730. — Devisee.]—*DOE d. NEWMAN v. RUSHAM*, No. 783, *post*.

731. — Representative.]—Voluntary provision in trust for natural children, good against the father's representative. The estate having been sold by him for a valuable consideration, plffs. were decreed to have satisfaction out of his assets, as there were words in the deed amounting to a covenant. An account being directed, a deduction was made in respect of their maintenance.—*WILLIAMSON v. CODRINGTON* (1750), 1 Ves. Sen. 511; Belt's Sup. 215; 27 E. R. 1174, L. C.

Annotations:—*Reid.* *Fletcher v. Fletcher* (1844), 4 Hare, 67; *Patch v. Shore* (1862), 11 W. R. 142. *Mentd.* *Re Cavendish Browne's Settltmt. Trusts*, *Horner v. Rawle* (1916), 61 Sol. Jo. 27.

See, also, Nos. 680, 682, 717, *ante*.

732. Purchaser from intermediate purchaser—Intermediate purchase obtained by fraud—Ultimate purchase without notice.]—The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud he, the purchaser, was ignorant.—*DOE v. MARTYR* (1805), 1 Bos. & P. N. R. 332; 127 E. R. 492.

Annotation:—*Reid.* *Doe d. Otley v. Manning* (1807), 9 East, 59.

SUB-SECT. 3.—EFFECT OF NOTICE OF PRIOR GRANT.

733. Purchaser not estopped.]—*GOOCH'S CASE*, No. 553, *ante*.

734. —.]—A. voluntarily agrees to give certain houses to his niece, & the heirs of her body, after the death of himself & his wife, in case they

733 iv. —.]—A., without any fraudulent intent, made a voluntary conveyance of land to plff., his infant son; fourteen years afterwards deft. obtained judgment against A. under which the land was sold by the sheriff, & purchased by deft. with notice of the prior conveyance:—*Held*: deft. was a purchaser for valuable consideration, as if he had purchased from A., & the deed from A. to plff. was fraudulent & void, under 27 Eliz. c. 4.—*DOE d. KERR v. McCULLY* (1857), 3 All. 508.—*CAN*.

733 v. —.]—*HAMLIN v. NEWTON*, [1920] 1 W. W. R. 657.—*CAN*.

733 vi. —.]—*PETNERPERMAL CHETTY v. MUNIANDY SERVAI* (1908), 1 L. R. 35 Cal. 551; 12 C. W. N. 562; L. R. 35 Ind. App. 98.—*IND*.

733 vii. —.]—A voluntary conveyance which has been followed by one for value made by successive owners of the same estate, creates no exception to the general rule that notice will not preclude a subsequent purchaser for value from relying upon the statutes against voluntary or fraudulent conveyances as against a party claiming under a prior voluntary deed.—*BLAKE*

should leave no issue; but no conveyance was executed by A. though he lived above twenty years afterwards. In the meantime, A. becomes indebted by mtge., judgment, etc., & by his will devises all his estate, both real & personal, to his wife. This agreement is not good against a purchaser for valuable consideration, although he had notice by being a subscribing witness to it.—**POWELL v. PLEYDELL** (1702), 1 Bro. Parl. Cas. 124; 1 E. R. 460, H. L.

735. —.]—**GARDINER v. PAINTER**, No. 611, ante.

736. —.]—A purchaser for valuable consideration shall hold, or take place, against a prior voluntary settlement, though he had express notice thereof at the time of his purchase, such voluntary settlement by 27 Eliz. c. 4, being made void against a purchaser with or without notice.—**TONKINS v. ENNIS** (1727), 1 Eq. Cas. Abr. 334; 21 E. R. 1084.

Annotation:—**Consd.** **Doe d. Otley v. Manning** (1807), 9 East, 59.

737. —.]—A. by settlement after marriage, not being indebted, conveys to trustees to family uses, reserving a power to sell, but covenanting that the purchase-money should be paid to the trustees to be laid out to the same uses. He sells to B. who has notice of the covenant, but pays his money to A. who dies insolvent. B.'s representatives shall not be obliged to repay the money: the settlement being voluntary & fraudulent, as against a purchaser.—**EVELYN v. TEMPLAR** (1787), 2 Bro. C. C. 148; 29 E. R. 85, L. C.

Annotations:—**Consd.** **Doe d. Bothell v. Martyr** (1805), 1 Bos. & P. N. R. 332. **Expld.** **Pulvertoft v. Pulvertoft** (1811), 18 Ves. 84. **Consd.** **Buckle v. Mitchell** (1812), 18 Ves. 100; *Re* **Walhampton Estate** (1884), 28 Ch. D. 391. **Refd.** **Doe d. Otley v. Manning** (1807), 9 East, 59.

738. —.]—A voluntary settlement of lands made in consideration of natural love & affection is void as against a subsequent purchaser for a valuable consideration; though with notice of the prior settlement before all the purchase money was paid or the deeds executed; & though the settlor had other property at the time of such prior settlement, & did not appear to be then indebted, & there was no fraud in fact in the transaction; for the law, which is in all cases the judge of fraud & covin arising out of facts & intents, infers fraud in this case, upon the construction of 27 Eliz. c. 4.—**DOE d. OTLEY v. MANNING** (1807), 9 East, 59; 103 E. R. 495.

Annotations:—**Consd.** **Trowell v. Shenton** (1878), 8 Ch. D.

v. HYLAND (1838), 2 Dr. & Wal. 397.—**IR.**

q. Proof of notice.—A purchaser at auction is not put upon inquiry of a claim made by vendor's wife at the time of sale, if there be no other circumstances known to him than the mere fact of her claim, & her relationship to vendor.—**NICHOLS v. NICHOLS** (1845), Res. & Eq. Jud. 55.—**AUS.**

r. —.]—A bill setting forth that one of the defts. procured a conveyance from plff. by fraud, & afterwards mtged. the property to another deft., is not demurrable for want of a charge that the latter had notice of the fraud at or before he received his mtge.—**KITCHEN v. KITCHEN** (1869), 16 Gr. 232.—**CAN.**

s. —.]—W., after completing a contract to buy certain premises, told M. that he had done so. M. was afterwards informed by vendor that the treaty with W. was off. M. did not

make any further inquiry, & bought & took an assignment of the premises himself:—**Held**: he had notice of W.'s contract.—**WALDRON v. JACOB & MILLIE** (1870), 5 L. R. Eq. 131.—**IR.**

t. —.]—Whenever a party having knowledge of such facts as would lead an honest man to make further inquiry, & does not make, but avoids making such inquiry, he must be taken to have notice of those facts, which if he had used ordinary diligence he would readily have ascertained.—**MCKAY v. COADY** (1875), 6 Nfld. L. R. 109.—**NFLD.**

a. Effect of registration—Priorities.—**CHOMLEY v. FIREBRACE** (1875), 6 V. L. R. 57.—**AUS.**

b. —.]—O., requiring money, mtged. land to B., in 1854, for £50, to enable B. to obtain it for him, which mtge. was registered in the same year. B. having done nothing, O., in 1858, got him to assign the mtge. to S.,

318. Refd. **Gully v. Exeter** (1828), 5 Bing. 171; **Doe d. Tunstall v. Bottrill** (1833), 5 B. & Ad. 131; **Doe d. Newman v. Rusham** (1852), 17 Q. B. 723; **Clarke v. Wright** (1861), 6 H. & N. 849; **Hadley v. Caswell** (1866), 15 L. T. 516; **Godfrey v. Poole** (1888), 13 App. Cas. 497. **Mentd.** **Mullins v. Gilfoyle** (1879), 39 L. T. 511; **Caldwell v. McLaren** (1884), 9 App. Cas. 392.

739. —.]—**PULVERTOFT v. PULVERTOFT**, No. 749, post.

740. —.]—Voluntarily settlement, though free from actual fraud, & meritorious, as a provision for relations, void against a subsequent purchaser for valuable consideration, with notice, whether by conveyance, or articles.—**BUCKLE v. MITCHELL** (1812), 18 Ves. 100; 34 E. R. 255.

Annotations:—**Consd.** **Rosher v. Williams** (1875), L. R. 20 Eq. 210. **Refd.** **Doe d. Bavorstock v. Rolfe** (1838), 8 Ad. & El. 650; **Butterfield v. Heath** (1852), 15 Beav. 408. **Mentd.** **Lister v. Turner** (1846), 5 Hare, 281.

741. —.]—Marriage settlement of wife's fee simple estate upon herself for life, then to her children, & in default of children, to husband for life, then to be divided amongst the brothers & sisters of the wife, etc. There were no children of the marriage. Husband & wife sold the fee simple of the estate to a purchaser having notice of the settlement, & they levied a fine in pursuance of the husband's covenant:—**Held**: the limitations to the brothers & sisters of the settlor were void as against the purchaser for valuable consideration, & the circumstance of the settled estate being the property of the wife, did not prevent the operation of 27 Eliz. c. 4, the wife having, by joining in the fine in pursuance of the husband's contract, become as much a contracting party from the first as the husband. His contract could not be separated from the conveyance.—**CORRIEUELL v. HOMER** (1813), 13 Sim. 506; 7 Jur. 514; 60 E. R. 196.

Annotations:—**Refd.** **Scott v. Scott** (1854), 23 L. T. O. S. 27; **Clarke v. Wright** (1861), 6 H. & N. 819.

742. —.]—**BUTTERFIELD v. HEATH**, No. 617, ante.

5.—POSITION OF GRANTOR CONTRACTING TO SELL.

743. Not entitled to specific performance.—A ct. of equity will not assist a vendor in defeating a prior voluntary settlement made by himself.

who paid B. £25 but neglected to the assignment until 1864. In the meantime O. conveyed for value to M., to whom B. for a nominal consideration conveyed his interest:—**Held**: the mtge. to B. being voluntary, was void under 27 Eliz. c. 4 as against the conveyance for value to M., & the fact of its being first registered could not affect its validity in this respect.—**MILLER v. MCGILL** (1865), 24 U. C. R. 597.—**CAN.**

(1874), 21 Gr. 222.—**CAN.**

d. —.]—To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking & registering his conveyance fraudulent, is indispensable.—**NEW BRUNSWICK RY. CO. v. KELLY** (1896), 26 S. C. R. 341; 33 N. B. R. 310.—**CAN.**

Sect. 5.—Position of grantor contracting to sell.
Sect. 6: Sub-sects. 1 & 2.]

Purchaser objecting to title on the ground of a voluntary settlement made by the vendor; a bill for specific performance by the vendor was dismissed.—**SMITH v. GARLAND** (1817), 2 Mer. 123; 35 E. R. 887.

Annotations:—**Consd.** Peter v. Nicolls (1871), L. R. 11 Eq. 391. **Refd.** Clarke v. Willott (1872), L. R. 7 Exch. 313; *Re Briggs & Spicer*, [1891] 2 Ch. 127; *Noyes v. Paterson* (1893), 8 R. 323.

744. —.]—(1) The author of a voluntary settlement cannot file a bill for the specific performance of a contract afterwards entered into by him to sell the settled estate.

(2) *Qu.*: whether his creditors after his death can maintain such a bill.

(3) The ct. was of opinion that limitations in a marriage settlement to the brothers of the settlor & their issue were voluntary.—**JOHNSON v. LEGARD** (1822), Turn. & R. 281; 37 E. R. 1107, L. C.; *previous proceedings* (1817), 6 M. & S. 60; (1818), 3 Madd. 283.

Annotations:—*As to* (1) **Expld.** *Re Briggs & Spicer*, [1891] 2 Ch. 127. **Refd.** Gray v. Legard (1831), 9 L. J. O. S. Ch. 80; Clarke v. Willott (1872), L. R. 7 Exch. 313. *As to* (2) **Refd.** Kingsford v. Ball (1852), 2 Giff. App. 1. *As to* (3) **Expld.** Sutton v. Chetwynd (1817), 3 Mer. 249. **Consd.** Clarke v. Wright (1861), 6 H. & N. 849; Smith v. Cherrill (1867), L. R. 4 Eq. 390. **Refd.** Doe d. Baverstock v. Rolfe (1838), 8 Ad. & El. 650; Davenport v. Bishopp (1843), 2 Y. & O. Ch. Cas. 451; Ford v. Stuart (1852), 15 Beav. 493; Holliday v. Overton (1852), 19 L. T. O. S. 211; Wade v. Hopkinson (1855), 19 Beav. 613; Bentley v. Mackay (1862), 31 Beav. 143; Hepworth v. Hill (1862), 30 Beav. 476; Price v. Jenkins (1876), 4 Ch. D. 483; Mullins v. Gilfoyle (1879), 39 L. T. 511; Mackie v. Herbertson (1884), 9 App. Cas. 303; A.-G. v. Jacobs Smith, [1895] 2 Q. B. 341. **Generally, Mentd.** Lyon v. Mercer (1823), 1 Sim. & St. 356; Olliver v. King (1856), 27 L. T. O. S. 29.

745. —.]—**CLARKE v. WILLOTT**, No. 670, *ante*.

Effect of Bankruptcy Act, 1883 (c. 52), s. 47.]
 —See **BANKRUPTCY**, Vol. V., pp. 842 *et seq.*, 846 *et seq.*, 848 *et seq.*

746. — **Unless purchaser willing to complete on good title being shown.]**—On bill by a vendor for specific performance, deft., purchaser, set up a voluntary settlement as an objection to the title, but said he was willing to complete the purchase on having a good title. He had been let into possession as purchaser, & paid part of his purchase-money, & had paid off a mtge. & got a conveyance of the legal estate & possession of the title-deeds:—**Held**: notwithstanding the voluntary settlement, pltf. was entitled to a decree for completing the purchase.

Semble: the principle of *Smith v. Garland*, No. 743, *ante*, does not apply to a deft. who says he is willing to complete on having a good title.—**PETER v. NICOLLS** (1871), L. R. 11 Eq. 391; 24 L. T. 381; 19 W. R. 618.

747. Second purchaser with notice.]—**BUTTERFIELD v. HEATH**, No. 617, *ante*.

See, generally, Sect. 4, sub-sect. 3, *ante*.

PART II. SECT. 6, SUB-SECT. 1.

a. General rule—Legal estate re-vesting in grantor—Rights of grantor's wife.]—Property was conveyed to a trustee for the purpose of disappointing creditors, & afterwards pltf. claiming to be beneficially interested, filed a

bill for a conveyance to himself. In those circumstances the bill would have been dismissed, had not deft. by his answer admitted that he was a trustee, & it appearing that the wife, who was not a party, & was living separate from her husband, was entitled to the beneficial inheritance:—

Held: an inquiry directed to ascertain how the rents of the estate be applied.—**PHILAN v. FRASER** (1857), 6 Gr. 336.—**CAN.**

f. — Valid until avoided.]—A voluntary or covinous conveyance under 27 Eliz. c. 4, is voidable only, &

SECT. 6.—POSITION OF GRANTEEES UNDER CONVEYANCES VOIDABLE MERELY AS BEING VOLUNTARY.

SUB-SECT. 1.—AS AGAINST GRANTOR.

748. General rule.]—A deed may be voluntary & yet not fraudulent. A voluntary deed may be good against the party who made it, though it might be set aside as against creditors or a fair purchaser.—**TEYNHAM (LORD) v. MULLINS** (1674), 1 Mod. Rep. 119; 86 E. R. 778; *sub nom.* **WHITE v. STRINGER (TENHAM'S (LORD) CASE)**, 2 Lev. 105; 3 Keb. 322.

Annotation:—**Expld.** Russel v. Hammond (1738), 1 Atk. 13.

749. — Binding until subsequent sale for value.]—(1) Voluntary settlement void under 27 Eliz. c. 4, against a subsequent purchaser for valuable consideration with notice, though a fair provision for a wife & children, an injunction, restraining the husband from selling, was refused: but a demurrer by the husband overruled, as covering too much: pltf. being entitled until a sale to an execution of the trust.

(2) Limitation to brothers or other relations within the consideration of a settlement, & therefore not voluntary.

(3) Purchase-money cannot be laid hold of in favour of claims under a previous settlement void under 27 Eliz. c. 4 as being voluntary. Articles executed against a voluntary settlement.

(4) Consideration of marriage considered as extending to persons not directly within it; viz. to brothers, uncles, & other relations, upon the marriage of a son; as within the contract between him & his father. Voluntary settlement good between the parties.

(5) Ct. of equity will not act in favour of a mere voluntary settlement; & therefore upon a subsequent purchase with notice & covenant to lay out the money to the same uses, will not lay hold of the money.—**PULVERTOFT v. PULVERTOFT** (1811), 18 Ves. 84; 34 E. R. 249, L. C.

Annotations:—*As to* (1) **Consd.** Buckle v. Mitchell (1812), 18 Ves. 100; Bill v. Cureton (1835), 2 My. & K. 503. **Refd.** Smith v. Garland (1817), 2 Mer. 123; Alexander v. Wellington (1831), 2 State Tr. N. S. 763; Garrard v. Lauderdale (1831), 2 Russ. & M. 451; Dillon v. Coppin (1839), 4 My. & Cr. 647; M'Fadden v. Jenkyns (1842), 1 Hare, 458; Meek v. Kettlewell (1842), 1 Hare, 464; Walker v. Jeffreys (1842), 1 Hare, 341; Kekewich v. Manning (1851), 1 De G. M. & G. 176; Peter v. Nicolls (1871), L. R. 11 Eq. 391; Clarke v. Willott (1872), L. R. 7 Exch. 313; Watts v. Watts (1876), 24 W. R. 623. *As to* (2) & (4) **Consd.** Heap v. Tonge (1851), 9 Hare, 90. **Refd.** Doe d. Baverstock v. Rolfe (1838), 8 Ad. & El. 650; Hughes v. Stubbs (1842), 1 Hare, 476; Meek v. Kettlewell (1842), 1 Hare, 464; Griffith v. Ricketts, Griffith v. Lunell (1849), 7 Hare, 299; Ford v. Stuart (1852), 15 Beav. 493; Donaldson v. Donaldson (1854), 1 Jur. N. S. 10; Scott v. Scott (1854), 23 L. T. O. S. 27; Salt v. Standish (1863), 2 New Rep. 573. *As to* (5) **Refd.** M'Fadden v. Jenkyns (1842), 1 Hare, 458; Meek v. Kettlewell (1842), 1 Hare, 464; Townend v. Toker (1866), 35 L. J. Ch. 610, n.; Clarke v. Willott (1872), L. R. 7 Exch. 313; Watts v. Watts (1876), 24 W. R. 623.

750. —.]—**DICKINSON v. BURRELL, DICKINSON v. BURRELL, STOURTON v. BURRELL**, No. 773, *post*.

751. — Legal estate re-vesting in settlor.]—By a voluntary settlement of 1866, real estate

was granted unto & to the use of a trustee upon certain trusts; the settlement contained the usual covenant for further assurance, but no power of revocation by the settlor. In 1867, the trustee executed a deed of disclaimer, & the settlor also purported to put an end to the settlement:—*Held*: the settlement was not thereby rendered inoperative, but the trust was imposed on the settlor, in whom, by operation of law the estate had revested after the creation of the trust.

In 1888, the settlor mortgaged part of the property comprised in the voluntary settlement; in 1899, the mtge. was paid off, & a transfer thereof taken for the benefit of the settlor's estate:—*Held*: the beneficiaries under the settlement were entitled to have the settlor's estate marshalled, & the mtge. discharged out of the unsettled portion of his assets.—*MALLOTT v. WILSON*, [1903] 2 Ch. 494; 72 L. J. Ch. 664; 89 L. T. 522.

752. Deed made improvidently.]—*VILLERS v. BEAUMONT*, No. 714, *ante*.

753. Mortgage after voluntary settlement—Settlement good as to equity of redemption.]—A man makes a voluntary deed, & then a mtge. of the same lands. The first deed upon a trial at law is found fraudulent; he to whom the deed is made, exhibits a bill to redeem the mtge.:—*Held*: though the first deed was fraudulent, because voluntary *quoad* the mtge. money, & *pro tanto*, yet it was good as to the equity of redemption, & would pass that; for a voluntary deed will bind the party that makes it, & his heirs.—*RAND v. CARTWRIGHT* (1864), 1 Cas. in Ch. 59; Nels. 101; 22 E. R. 691; *sub nom.* *RAMM v. CARTWRIGHT*, Freem. Ch. 183.

754. — Settlement avoided pro tanto only.]—Mtge. in fee is a revocation *pro tanto* only of a settlement with power of revocation.—*THORNE v. THORNE* (1883), 1 Vern. 182; 23 E. R. 402.

Annotations:—*Consd.* *Fitzgerald v. Fauconberge* (1731), Fitz-G. 207. *Refd.* *Banks v. Sutton* (1732), 2 P. Wins. 700.

755. — Mortgage paid off but kept alive for benefit of settlor—Right of volunteers to marshal.]—*MALLOTT v. WILSON*, No. 751, *ante*.

756. Settlement of equity of redemption—Subsequent sale by mortgagee—Right to surplus pro-

ceeds of sale.]—*Re WALHAMPTON'S ESTATE*, No. 767, *post*.

757. On subsequent sale by grantor—Whether entitled to purchase-money.]—*LEACH v. DENN* (1840), 1 Ch. App. 461, n.; 1 Rep. Ch. 146; 12 Jur. N. S. 481, n.; 14 W. R. 811, n.; 21 E. R. 533.

Annotations:—*Consd.* *Buckle v. Mitchell* (1812), 18 Ves. 100. *Refd.* *Evelyn v. Templar* (1787), 2 Bro. C. C. 148; *Pulvertoft v. Pulvertoft* (1811), 18 Ves. 81; *Townend v. Toker* (1866), 1 Ch. App. 446.

758. — Settlement reserving power of revocation.]—*EVELYN v. TEMPLAR*, No. 737, *ante*.

759. —]—*PULVERTOFT v. PULVERTOFT*, No. 749, *ante*.

760. —]—When a voluntary settlement of lands is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money payable to the settlor. Bill by purchaser against the vendor, who had previously executed a voluntary settlement of the property, & against the trustees & *cestuis que trust* under the settlement to have the settlement declared void & delivered up, & for a specific performance, sustained, the only objection to the title being the voluntary settlement.—*DAKING v. WHIMPER* (1859), 26 Beav. 508; 53 E. R. 1017.

Annotations:—*Consd.* *Re Walhampton Estate* (1884), 20 Ch. D. 391. *Refd.* *Fletcher v. Kettelman* (1871), 40 L. J. Ch. 624.

761. —]—*TOWNEND v. TOKER*, 594, *ante*.

762. — Particular settled property—Subsequent general conveyance for creditors.]—*CADELL v. BEWLEY*, No. 721, *ante*.

SUB-SECT 2.—AS AGAINST SUBSEQUENT PURCHASERS FROM GRANTOR.

763. Whether court will declare void—& order delivery—At instance of purchaser.]—*DAKING v. WHIMPER*, No. 760, *ante*.

764. —]—*DE HOUGHTON v. MONEY*, No. 720, *ante*.

765. —]—In a suit for specific performance

good & valid until avoided.—*HERR v. C* (1883), 5 O. R. 152. **CAN.**

753 i. Mortgage after voluntary settlement—Settlement good as to equity of redemption.]—*Semle*: a voluntary settlor mortgaging the settled property & paying off the mortgage can acquire no interest adverse to the settlement under 27 Eliz. although he take the reconveyance in his own name.—*Re MACDONALD* (1871), 2 V. R. (Law) 12.—**AUS.**

g. Grantor not chargeable with rents.]—A voluntary grantor of real estate is not chargeable, at the suit of the objects of his bounty, for rents of such estate subsequently received by him, or which but for his neglect might have been so received.—*MITCHELL v. RITCHEY* (1865), 11 Gr. 611.—**CAN.**

h. Execution of voluntary deed.]—The ct. will not, in favour of a volunteer, order the due execution of an instrument informally executed, although the relief would be granted to a purchaser for value.—*ROSS v. FOX* (1867), 13 Gr. 683.—**CAN.**

PART II. SECT. 6, SUB-SECT. 2.

764 i. Whether court will declare void—& order delivery.]—The principle to be applied by the ct. is the same as that laid down for the guidance of the Ct. of Claims, *viz.*, that the right to obtain the grant & to retain it must depend upon the real justice & good conscience of the case.—*SPENCER v. GRAY* (1818), 1 Legge, 477.—**AUS.**

764 ii. —]—Land was purchased at a Govt. land sale by C., but in the name of B., deft. who was an infant & son of a friend of C. C. completed the purchase & took a grant in the same name, but subsequently sold the property to plff.:—*Held*: the obtaining of the grant to deft. by means of money supplied by C. was a fraudulent conveyance within the meaning of 27 Eliz. c. 4, & void against plff.—*BYERS v. BROWN* (1859), 2 Legge, 1136.—**AUS.**

764 iii. —]—A purchaser will not be compelled to take a title to land which has, prior to the sale to him, been made the subject of a voluntary settlement by vendor.—*PURSER v.*

HALLORAN (1862), 1 Q. S. C. R. **AUS.**

764 iv. —]—L. devised lands to his widow provided she did not marry or misbehave, & to his son after his wife's death. A. afterwards by deed conveyed to others, & their assignees commenced ejectment, urging that the widow's estate had determined, & that it was defeasible, & had been defeated by subsequent transfer for value under 27 Eliz. c. 4:—*Held*: the widow's estate was not absolutely determined by her again marrying; the party next entitled not having claimed the estate.—*LEECH v. LEECH* (1865), 11 Gr. 572.—**CAN.**

k. — Lien.]—A prior deed was voluntary, & could not be supported as a deed for value, as it was a family settlement:—*Held*: it was not postponed under *Covinous & Fraudulent Conveyances* (Irish) Act, 1634 (c. 3), to the subsequent deeds for valuable consideration, as the references in the latter to the voluntary deed showed sufficiently that they were subject to the prior charges although they were created by a voluntary

Sect. 6.—Position of grantees under conveyances voidable merely as being voluntary: Sub-sects. 2, 3, 4 & 5.]

against a vendor & those claiming under a voluntary settlement made by him previous to the contract for sale, the ct. refused to declare that the settlement was void under 27 Eliz. c. 4.—*FLETCHER v. KETTEMAN* (1871), 40 L. J. Ch. 624.

See, now, Law of Property Act, 1925 (c. 20), s. 173.

SUB-SECT. 3.—AS AGAINST SUBSEQUENT MORTGAGEES FROM GRANTOR.

766. Mortgage of settled & unsettled estates—Right of volunteers to marshal.]—A. executed a voluntary settlement of real estate to uses in favour of his four children, & he covenanted that the estate should remain to those uses & for quiet enjoyment. A. afterwards mortgaged the settled estate with his own unsettled estates & died:—*Held*: the children were entitled to throw the mtges. on the unsettled estate, & as against legatees, to prove under the covenants against the settlor's assets for the damage they had sustained by the mtge.—*HALES v. COX* (1863), 32 Beav. 118; 8 L. T. 134; 55 E. R. 46; *sub nom. Re HALES*, *HALES v. COX*, 1 New Rep. 344; 9 Jur. N. S. 1305; 11 W. R. 331.

Annotations:—*Appld. Mallott v. Wilson*, [1903] 2 Ch. 494. *Reid. Re Walhampton Estate* (1884), 26 Ch. D. 391; *Harding v. Howell* (1889), 14 App. Cas. 307; *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461.

See, further, EQUITY, Vol. XX., pp. 500, 501. Nos. 2314–2316.

767. Separate mortgages of settled & unsettled estates—Right of mortgage to consolidate.]—(1) A. having executed a voluntary settlement of the W. estate mortgaged it in fee to X. He afterwards mortgaged the Q. estate, & that mtge. became

vested in X.:—*Held*: X. was not entitled to consolidate as against the persons claiming under the voluntary settlement the mtges. on the W. & Q. estates.

(2) A. having mortgaged estates in fee simple, subsequently made a voluntary settlement of same estates & all his interest therein to grantees to uses to hold, subject to the mtge. & to a power of raising a sum of money for himself, to the use of himself for life with remainder to his first & other sons in tail, with remainders over. The mtgee. afterwards sold the estates under the power of sale in the mtge. & after retainer of his debt & costs paid the balance of the sale moneys into ct. under the Trustee Relief Act. Upon a petition for payment out A. contended that the sale had destroyed the voluntary settlement, & that the persons claiming thereunder had no equity against the sale moneys, which must be treated as if the sale had been made by A. himself:—*Held*: the voluntary settlement was a complete disposition by the settlor of the proceeds of the sale of the estate in case the prior mtgee. should exercise his power, & the volunteers under the settlement were entitled as against the settlor to the fund in ct.—*Re WALHAMPTON'S ESTATE* (1884), 26 Ch. D. 391; 53 L. J. Ch. 1000; 51 L. T. 280; 32 W. R. 874.

Annotation:—*Generally, Reid. Re Holland, Gregg v. Holland* (1901), 49 W. R. 476.

Settlor taking transfer of mortgage.]—See No. 751, *ante*.

See, now, Law of Property Act, 1925 (c. 20), s. 173.

SUB-SECT. 4.—AS AGAINST SUBSEQUENT VOLUNTEERS.

768. Against person claiming under second voluntary conveyance.]—*GOODWIN v. GOODWIN* (1658), 1 Rep. Ch. 173; 21 E. R. 541.

deed.—*BLAKE v. BLAKE* (1887), 19 L. R. Ir. 261.—IR.

1. ———.]—A. assigned to her son a dwelling-house & farm in consideration of natural love & affection. The deed contained a covenant by the son, that he, his exors., administrators, or assigns, would maintain A. & her daughter during their lives, & permit them to occupy the dwelling-house:—*Held*: there was a lien on the lands for such maintenance which was binding as against a subsequent purchaser for value with notice.—*KELAGHAN v. DALY*, [1913] 2 I. R. 328.—IR.

*binding agreements to perform conditions of prior grant.]—*In ejectment plff. claimed under a deed from her father, made in 1846, on the day after her marriage, expressed to be in consideration of natural love & affection, & of £5, in fee, reserving the use & occupation of the premises to grantor & his wife during their lives with maintenance, & after their decease plff. & her heirs should pay to each of her sisters £25. Plff. & her husband lived with her father & mother on the land for several years but separated in 1854, & went abroad, & did not return until 1876. In 1854, the father sold & conveyed the land for value to deft.:—*Held*: the deed to plff. must be regarded as voluntary, there being no binding agreement to perform the condition as to maintenance, etc., or to pay the sums named to the sisters; & it was void under 27 Eliz. c. 4, as against deft., a subse-

quent purchaser for value, though with notice.—*DEMAREST v. MILLER* (1877), 42 U. C. R. 56.—CAN.

n. *Beneficiary under will—Alteration of will.]—*Deft. gave plff. a bond conditioned not to alter his will, by which, as recited in the bond, he had devised to plff. certain land. He afterwards sold & conveyed the land to one C.:—*Held*: the condition was broken.—*MCCORMICK v. McRAE* (1854), 11 U. C. R. 187.—CAN.

o. *Dower of widow of voluntary grantee.]—*A. conveys land without consideration to N., who remained in possession some years & left. A. subsequently conveyed the same land to T. for value. In an action for dower by the widow of N. against T.:—*Held*: the first deed, being without consideration, was fraudulent as against the second, & that the claim for dower resting upon the seisin under it was not sustainable.—*WILSON v. WILSON* (1859), 8 C. P. 525.—CAN.

PART II. SECT. 6, SUB-SECT. 3.

p. *Mortgage of settled & unsettled estates—Exoneration of settled estate—Where settlor dead.]—*A settlor, having by a voluntary settlement, settled certain real estate, subsequently mortgaged it with other property, & died:—*Held*: as the mtge. only defeated the settlement *pro tanto*, the mtge. money should be paid out of the other property included in the mtge., in exoneration of the settled estate.—*JOHNSTON v. BROPHY* (1878), 4 V. L. R. 77.—AUS.

q. *Foreclosure against volunteer—Limit of rights of mortgagee—Under Alberta statute.]—*A mtgee. who has brought a foreclosure action against a volunteer cannot enforce a receiver order in respect of the rents & profits from the mtged. property under Alta. Volunteers & Reservists Relief Act, 1916, c. 6, s. 8, because that sect. applies only to a right to collect the rents which may be enforced without action.—*CANADA LIFE ASSURANCE CO. v. DICKSON* (1916), 35 W. L. R. 1; 11 W. W. R. 1.—CAN.

PART II. SECT. 6, SUB-SECT. 4.

768 i. Against person claiming under second voluntary conveyance.]—Where there are two voluntary settlements, the ct. will, at the suit of those interested under the first, set aside the second.—*HOULDING v. POOLE* (1851), 2 Gr. 685.—CAN.

768 ii. —.]—In ejectment, both parties claimed the title through one N. Deft. contended that a deed from N. to C. & J., dated Sept. 12, 1838, was voluntary, & therefore void:—*Held*: the deed could only be void as against a subsequent purchaser for value, & as there was evidence to show that C. & J. were in possession on Aug. 31, 1839, when N. conveyed to A., through whom deft. claimed, the deed to A. was void, & he was precluded from saying the deed to G. & J. was void because voluntary.—*WELLER v. HARTGRAVES* (1864), 14 C. P. 360.—CAN.

r. *Against grantor's assignee.]—*A

769. —.]—An uncle settled a jointure on his wife, but with a power of revocation; afterwards upon the marriage of his nephew, he agreed to settle £700 *per annum* on him, but the lands being short of that value, shall not be supplied out of the jointure; for though that was fraudulent as to purchasers, being made with a power of revocation, it was not so to the nephew or his wife, because made long before their marriage.—**PARKER v. SERJEANT** (1674), *Cas. temp. Finch*, 146; 23 E. R. 80.

770. —.]—Neither law nor equity will aid one volunteer against another.—**DEN d. VERNON v. OGLE** (1773), *Lofft*, 216; 98 E. R. 618.

See, generally, Sect. 3, sub-sect. 2, B. (a), *ante*.

771. — **Latter for payment of debts.**—**DARCY (LORD) v. ALLERTON** (1631), *Toth.* 54; 21 E. R. 121.

772. — **Grants to elder & younger sons—Both otherwise provided for.**—**CLAVERING v. CLAVERING**, No. 681, *ante*.

773. — **Former conveyance voidable by grantor—Undue influence.**—A person who had previously conveyed away his interest in certain real estate for value, but, as was alleged, under undue influence, subsequently executed a voluntary settlement in favour of himself for life, with remainder to his children on attaining twenty-one:—*Held*: the infant children could maintain a bill to set aside the previous conveyance.

There are many things connected with voluntary settlements of property which may justify the cts. in treating them for certain purposes, as subject to distinct rules. For instance, the ct. will refuse either to set aside a voluntary settlement at the suit of the settlor, or to enforce against such an intended settlor an agreement to execute the settlement. There are also certain statutory provisions which affect voluntary settlements only, but independent of those provisions there is no difference in the effect of voluntary & other settlements.—**DICKINSON v. BURRELL**, **DICKINSON v. BURRELL**, **STOURTON v. BURRELL** (1806), *L. R.* 1 Eq. 337; 35 Beav. 257; 35 L. J. Ch. 371; 13 L. T. 660; 12 Jur. N. S. 199; 14 W. R. 412; 55 E. R. 894.

Annotations:—*Reid*. **Dawson v. G. N. & City Ry.**, [1 K. B. 260; *Defries v. Milne*, [1913] 1 Ch. 98; *Bruty v. Edmundson* (1915), 113 L. T. 1197; *Ellis v. Torrington*, [1920] 1 K. B. 399.

774. **Against heir of grantor.**—**BURRELL'S CASE**, No. 539, *ante*.

775. **Against devisee of grantor—Though for payment of debts.**—After a voluntary settlement a man cannot devise same estate, though for payment of his debts.—**BALE v. NEWTON** (1687), 1 Vern. 464; 1 Eq. Cas. Abr. 23; 23 E. R. 589.

776. —.]—A voluntary deed in favour of younger children, though retained in the possession of the grantor, & afterwards destroyed by him, established against legatees.—**SEAR v. ASHWELL** (1739), 3 Swan. 411, n.; 36 E. R. 928, L. C.

Annotation:—*Consd.* **Roberts v. Williams** (1841), 11 L. J. Ch. 65.

deed given by a debtor under Insolvent Confined Debtors' Act can have no greater effect than a deed from the sheriff when he sells under an execution; neither the one nor the other will, in the absence of fraud, defeat a previous voluntary deed executed by debtor.—**BLACK v. COGSWELL** (1879), 19 N. B. R. 44.—**CAN.**

777. —.]—A father makes a voluntary settlement on his family, without power of revocation inserted, & afterwards makes a contrary disposition by will; this will not affect the former settlement.—**BOUGHTON v. BOUGHTON** (1739), 1 Atk. 625; 9 Mod. Rep. 212; 26 E. R. 393, L. C.

778. — **Prior conveyance imperfect.**—A father having, by a voluntary settlement, conveyed certain freehold & covenanted to surrender certain copyhold estates to trustees in trust for the benefit of his daughters, afterwards devised part of same estates to his widow, who, after his death was admitted to some of the copyholds. A suit having been instituted by the daughters to have the trusts of the settlement carried into effect, & to compel the widow to surrender the copyholds to which she had been admitted, a decree was made for carrying into effect the trusts as far as they related to the freeholds, *pltf.'s* title to them being complete; but as to the copyholds, the bill was dismissed with costs.—**JEFFERYS v. JEFFERYS** (1841), *Cr. & Ph.* 138; 41 E. R. 443, L. C.

Annotations:—*Consd.* **Crouch v. Waller** (1859), 4 De G. & J. 302. *Reid*. **Kokewick v. Manning** (1851), 1 De G. M. & G. 176; *Price v. Price* (1851), 14 Benv. 598; *Gale v. Gale* (1877), 6 Ch. D. 144; *Gandy v. Gandy* (1885), 30 Ch. D. 57; *Re Holland*, *Gregg v. Holland*, [1901] 2 Ch. 145.

779. **Against grantor's representative.**—**WILLIAMSON v. CODRINGTON**, No. 731, *ante*.

780. —.]—Voluntary agreement by husband good against his exors., though not against creditors.—**A.-G. v. WHORWOOD**, **WHORWOOD v. UNIVERSITY COLLEGE, OXFORD** (1750), 1 Ves. Sen. 534; 27 E. R. 1188, L. C.

Annotations:—*Cary v. Abbot* (1802), 7 Ves. 490; *Morice v. Durham (Bp.)* (1805), 10 Ves. 522; *A.-G. v. Haberdashers' Co.* (1834), 1 My. & K. 420.

781. **Against grantor's heir.**—A voluntary conveyance made to the brother by the half blood but which was void & defective at law, made good by act of equity against the heir.—**WATTS v. BULLAS** (1702), 1 P. Wins. 60; 2 Eq. Cas. Abr. 286; 21 E. R. 293.

Annotations:—*Consd.* **Goring v. Nash** (1744), 3 Atk. 186; *Hale v. Lamb* (1764), 2 Eden, 292. *Reid*. **Chapman v. Gibson** (1791), 3 Bro. C. C. 220.

See, now, Law of Property Act, 1925 (c. 20), s. 173.

P. 5.—AS AGAINST PURCHASERS FROM SUBSEQUENT VOLUNTEERS.

782. **Ultimate purchase for valuable consideration.**—**DOE v. MARTYR**, No. 732, *ante*.

783. **Purchase from devisee—Though for value.**—A voluntary conveyance is void against a subsequent purchaser for value, under 27 Eliz. c. 4, when the vendor is the same person who executed the voluntary conveyance; but not otherwise; & therefore a purchaser from the devisee of one, who in his lifetime made a voluntary conveyance of the same property, is not within the statute.—**DOE d. NEWMAN v. RUSHAM** (1852), 17 Q. B. 723;

JONES d. MOFFETT v. WHITTAKER (1841), *Long. & T.* 141.—**IR.**

s. — *Necessity for proof.*—A. held a bond for the conveyance of property, & assigned it absolutely to B., but for the purpose of security only. B. sold the property to C., & C. sold to others. C. had no notice that the

PART II. SECT. 6, SUB-SECT. 5.

782 i. **Ultimate purchase for valuable consideration.**—Where A. made two conveyances of lands for voluntary consideration, & grantee of the second conveyance assigned to B. for value:—*Held*: B. could avoid the former conveyance, under 10 Car. 1, c. 3 (Ir.).—

grantees under conveyances
~~merely as being voluntary~~: Sub-sect. 5.
 Sect. 7: Sub-sects. 1 & 2. Sect. 8. Part III.
 1.]

J. Q. B. 139; 19 L. T. O. S. 153; 16 Jur.
 ; 117 E. R. 1459.

Annotations:—*Conrad. Godfrey v. Poole* (1888), 13 App. Cas.
 7. *Reid. Lewis v. Rees* (1856), 3 K. & J. 132.

784. —.]—G. was entitled under an agreement, to have a lease of certain land granted to him. He then by voluntary deed assigned his interest under the agreement to trustees, upon certain trusts therein declared, in favour of his children & their issue. The lease was afterwards granted to G. G. by his will recognising the settlement, & professing to appoint under a power contained in it, though he in fact exceeded the power, gave the property in question to H., one of his children. After the death of G., a suit was instituted to execute the trusts of his will; & the parties to that suit, who were interested under both the settlement & the will, being put to their election elected to take under the will, & thereupon H. was declared entitled to the property in question. H. afterwards became bkpt. & his interest was sold by his assignees to J. through whom O., deft. in the present suit, claimed. On the death of H. a bill was filed by his children, who were interested, subject to the life estate of H., under the settlement, & who were not parties to the former suit against O., to obtain execution of the trusts of the voluntary settlement, so far as regarded their interests under it:—*Held*: plffs. were entitled to the relief which they sought.—*GILBERT v. OVERTON* (1864), 2 Hem. & M. 110; 4 New Rep. 420; 33 L. J. Ch. 683; 10 L. T. 900; 10 Jur. N. S. 721; 12 W. R. 1141; 71 E. R. 402.

See, now, Law of Property Act, 1925 (c. 20), s. 173.

SECT. 7.—EFFECT OF RESERVATION OF POWERS.

SUB-SECT. 1.—POWER OF REVOCATION.

785. Power not exercised.]—*BULLOCK v. THORNE* (1599), Moore, K. B. 615; 72 E. R. 794.

Annotations:—*Reid. Buller v. Waterhouse* (1676), T. Jo. 94; *Jones v. Winwood* (1838), 3 M. & W. 653.

786. Power exercisable in future.]—*TWYNE'S CASE*, No. 108, *ante*.

bond was for security merely. A. having become bkpt., his assignee applied to redeem:—*Held*: he was entitled, in the absence of any evidence that C. was a purchaser for value.—*CHERRY v. MORTON* (1860), 8 Gr. 402.—*CAN.*

PART II. SECT. 7, SUB-SECT. 1.

1. Conveyance for good consideration—Agreement to maintain.—One plff., owner of a farm valued at about \$4,500, was, as also his wife, old, feeble & illiterate. He negotiated with deft., the wife's nephew, with the object of effecting an arrangement for their support & maintenance. The consideration in the deed was natural love & affection, \$1 & the life lease. Deft. was also to pay \$30 in cash yearly, & provide plffs. with a horse & vehicle & house room. The deed did not contain any power of revocation in case of deft.'s default:—*Held*: in the circumstances, the deed & life lease must be set aside.—*HAGARTY v. BATKMAN* (1890), 19 O. R. 381.—*CAN.*

.]—A father executed a general disposition, conveying to his son his whole estate under burden of paying a provision to the grantor's two daughters, & an annuity to the grantor & his wife, & survivor of them: the deed was delivered, & possession ceded to the son:—*Held*: the deed was not of a revocable nature, & the father could not revoke it.—*BRAIDWOOD v. BRAIDWOOD* (1835), 14 Sh. (Ct. of Sess.) 64; 11 Fac. Coll. 44.—*SCOT.*

b. Absence of power—Voluntary settlement.—The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside.—*HILLOCK v. BUTTON* (1881), 29 Gr. 490.—*CAN.*

c. ———.—Voluntary gifts, not subject in express terms to a power of revocation, but not meant to be irrevocable, may be set aside or revoked by the donor.—*CLATTENBURG v. MORINE* (1895), 40 N. S. R. 193.—*CAN.*

787. ———.]—*STANDEN v. BULLOCK* (1600), cited in 3 Co. Rep. at p. 82 b; Moore, K. B. 605; 76 E. R. 817.

Annotation:—*Reid. Re St. Saviour's, Southwark* (1606), Lane, 21.

788. Power exercisable by consent of another.]—*TWYNE'S CASE*, No. 108, *ante*.

789. ———.]—If a man reserves such a power, with the consent of J., who is his own relation, or one that may be supposed to be at his command, that shall be fraudulent within the statute; but if it be with the consent of others, as here it was of his wife's friends, who cannot be supposed to consent but upon very good grounds, there it will not be fraudulent (*per CUR.*).—*BANBURY'S (LORD) CASE* (1676), Freem. Ch. 8; 22 E. R. 1021, L. C.

790. ———.]—*BULLER v. WATERHOUSE* (1676), T. Jo. 94; 84 E. R. 1163.

791. Conveyances for good consideration.]—*CROSS v. FAUSTENDITCH*, No. 697, *ante*.

792. Conveyance for valuable consideration.]—(1) If a man, in consideration that his son shall marry the daughter of B., covenants to stand seised to the use of his son, for life, & after to the use of his other sons, in reversion or remainder, these uses thus limited in remainder, are fraudulent against a purchaser, though the first be upon good consideration, viz. for marriage.

(2) Though the consideration of marriage is a good consideration, yet if a power of revocation be annexed to it, it is void as unto strangers.—*ST. SAVIOUR'S, SOUTHWARK CASE* (1606), as reported in Lane, 21; 145 E. R. 266.

Annotations:—*Generally, Mentd. Needler v. Winchester* (Bp.) (1614), Hob. 220; *Phillips v. Bury* (1694), Comb. 265; *R. v. Kempe* (1694), 1 Ld. Raym. 49; *Bankers' Case* (1695), Skin. 601; *Rutter v. Chapman* (1841), 8 M. & W. 1; *R. v. Eastern Archipelago Co.* (1853), 1 E. & B. 310; *Bostock v. North Staffordshire Ry.* (1855), 24 L. J. Q. B. 225.

793. Power exercisable only on substitution of other security.]—*GRIFFIN v. STANHOPE*, No. 545, *ante*.

794. ———.]—(1) A grant of an annuity with a power of revocation, provided he settles another annuity as good, is not within the statute (*LORD HOBART, C.J.*).

(2) If it were a power to revoke with the payment of £20 only, that would make it not within the statute (*LORD HOBART, C.J.*).—*BENNET'S*

wish to protect himself from his own improvidence or against importunities of relatives, the absence of a power of revocation in the deed is not a ground for setting it aside.—*FONSECA v. JONES* (1911), 21 Man. L. R. 168.—*CAN.*

e. ——— Implied power.—Whether a deed contains a power of revocation or not, & however formally executed, the retention of the deed in the custody of the donor makes it revocable.—*UNIACKE v. GILES* (1828), 2 Mol. 257; 2 Ir. L. Rec. 1st ser. 161.—*IR.*

1. Power of grantor to revoke prior settlement by will.—Where A. executed a deed of settlement without any power of revocation, substantially carrying out the terms of his will, & later made another will whereby he assumed to revoke the settlement except the provision made in favour of his wife:—*Held*: in the absence of anything to show that the settlement was unreasonable or improvident, or that it was

Where settlor may

CASE (1622), cited in Freem. Ch. at p. 8; 22 E. R. 1021.

Annotation: —*Reid. Taylor v. Jones* (1743), 2 Atk. 600; *Doe d. Otley v. Manning* (1807), 9 East, 59; *Trowell v. Shenton* (1878), 8 Ch. D. 318. *Mentd. Parker v. Housefield* (1834), 2 My. & K. 419.

795. Power exercisable on payment—Nominal v. STANHOPE, No. 545, ante.

796. CASE, No.

SUB-SECT. 2.—OTHER POWERS.

797. Power to lease—For ninety-nine years—With or without rent.]—LAVENDER v. BLACKSTONE (1875), 2 Lev. 146; 3 Keb. 527; 83 E. R. 490.

Annotations: —*Reid. Taylor v. Jones* (1743), 2 Atk. 600; *Doe d. Otley v. Manning* (1807), 9 East, 59; *Trowell v. Shenton* (1878), 8 Ch. D. 318. *Mentd. Parker v. Housefield* (1834), 2 My. & K. 419.

798. Power to mortgage.]—TARBACK v. MARBURY, No. 82, ante.

799. — Revocation pro tanto only.]—THORNE v. THORNE, No. 754, ante

SECT. 8.—PENALTIES.

See, now, Law of Property Act, 1925 (c. 20), s. 173, which replaces 27 Eliz. c. 4, but makes no provision for penalties.

800. When payable—Conveyance void only as voluntary.]—To make a voluntary settlement void against a subsequent purchaser within 27 Eliz. c. 4, it must be covinous & fraudulent, not voluntary only. A purchaser, to entitle himself to protection against such fraudulent settlement & to set it aside, must be a purchaser *bonâ fide*, or for good consideration; as marriage; but the consideration need not be money.

The enacting part considers it in the same lig & makes an express provision against such pract as if they were a crime. . . . But no person ma a voluntary settlement by way of his family was ever in criminal

ROUTLEDGE (1777), 2 Cowp. 705; 98

Annotations: —*Reid. Kinchant v. Kinchant* (1784), 1 Bro. C. C. 369; *Jones v. Boulter* (1789), 1 Cox, Eq. Cas. 288; *Doe d. Bothell v. Martyr* (1805), 1 Bos. & P. N. R. 332; *Doe d. Otley v. Manning* (1807), 9 East, 59; *Metcalf v. Pulvertott* (1812), 1 Ves. & B. 180; *Copie v. Middleton* (1817), 3 Madd. 410; *Doe d. Robinson v. Alsop* (1821), 5 B. & Ald. 142; *Gully v. Exeter (Bp.)* (1828), 5 Bing. 171; *Clarke v. Wright* (1861), 6 H. & N. 849. *Mentd. Doe d. Tunstall v. Bottrell* (1839), 5 B. & Ad. 181.

801. Amount of penalty—Entire year's profits—Without apportionment against each defendant—Liability of infant.]—A bill exhibited upon 27 Eliz. c. 4, in which these points were resolved:—(1) Where W. had agreed for \$1,000 paid by T. to assure \$100 per annum during his own life & his wife's: & for that a mtge. was made, although W. & others not pay the money, yet they were purchasers within the statute because they were named as parties in trust for the benefit of T.; (2) the estate which they had upon that mtge. was a sufficient purchase within the statute; (3) one entire year's profits, which was the penalty of the statute, should be forfeited without apportionment, as well upon a mtge. as upon an absolute sale; so also upon a lease or a petty annuity made by fraud, etc., one year's value of the land should be forfeited; (4) every deft. found guilty should pay a year's value of the land, every one by himself, & not a year's value jointly amongst them all; (5) the infancy of one of defts. should not excuse him of that penalty, he being sixteen years of age, & privy to that conveyance, & having justified that fraudulent deed to be made *bonâ fide*, & for that he should be punished as if he were at full age.—BOULTON v. WISEMAN (1614), Noy. 105; 74 E. R. 1070.

Part III.—Conveyances Impeachable from Position of Parties.

SECT. 1.—INFIRMITY OR INCAPACITY OF GRANTOR.

802. Deaf mute—Undue influence of relation benefited by deed.]—A man deaf & dumb suffers a common recovery of entailed lands, assisted by his uncle, & then settles the same to certain uses. Upon the circumstances of the case it appeared he had done nothing but what in conscience he ought; yet he being under these circumstances, he ought to be taken care of in equity; & it appearing that the uncle was concerned in point of interest, the settlement was set aside.—FERRES v. FERRES (1708), 2 Eq. Cas. Abr. 695; 22 E. R. 585, L. C.

803. Man in extremis—Though not non compos

nor delirious.]—Although there is no direct proof that a man is *non compos* or delirious, yet if the deed be executed in *extremis*, it cannot be supposed he had a mind adequate to the business he was about; & might more easily be imposed upon.—FANE v. DEVONSHIRE (DUKE) (1718), 6 Bro. Parl. Cas. 137; 2 E. R. 984, H. L.

804. — Though not imbecile.]—Agreement between uncle & nephew for a sub-lease to the latter at a fixed rent, with covenant for perpetual renewal, of premises held by the uncle under a church lease, renewable on fines at will of lessors, set aside on the ground of surprise & misapprehension of its effect in one or both of the parties; the facts being, that the agreement was entered

executed through fraud or misrepresentation, it was not revocable.—HOWLAND v. MACDONALD (1907), 9 O. W. R. 337; 14 O. L. R. 110.—CAN.

PART III. SECT. 1.

g. Man in extremis.]—To protect sick persons from importunity, & to save their heirs from mischief, the law

of Scotland declares that if a deed affecting heritage be executed on death-bed, it may be set aside *ex capite lecti*.—NEWTON (OR FERKUSON) v. NEWTON (1870), L. R. 2 Sc. & Div 13.—SCOT.

Sect. 1.—Infirmity or incapacity of grantor.]

into a few days before the uncle's death, when he was confined to bed by the illness of which he died, & was in such a state of bodily & mental imbecility as rendered him incapable of transacting business which required deliberation & reflection, the agreement being at same time one for valuable consideration, & in that view of it unreasonable.

Suppose there had been no evidence of debility [mental imbecility] at the time, it might be questioned whether such an instrument, obtained under such circumstances, without any previous consultation as to the terms of the contract, might not be considered as the effect of surprise (LORD REDESDALE).—WILLAN v. WILLAN (1814), 2 Dow, 274; 3 E. R. 863, H. L.

Annotations:—*Mentd.* McCarthy v. Decaix (1831), 2 Russ. & M. 614; Browne v. Tighe (1834), 8 Bl. N. S. 272.

805. Voluntary settlement—Not reserving power of revocation.]—A voluntary settlement, executed by the settlor when he was, or was supposed to be, *in extremis*, was set aside, on the ground that it did not reserve to him, as it ought to have done, a power of revocation.—FORSHAW v. WELSBY (1860), 30 Beav. 243; 30 L. J. Ch. 331; 4 L. T. 170; 7 Jur. N. S. 209; 9 W. R. 225; 54 E. R. 882.

Annotations:—*Reid.* Coutts v. Acworth (1869), L. R. 8 Eq. 558; Hall v. Hall (1873), 8 Ch. App. 430.

806. —.]—Purchase from a poor sick man, shortly before his death, at an undervalue, & under circumstances of great precipitation & without proper protection, set aside at the instance of his heir-at-law.—CLARK v. MALPAS (1862), 4 De G. F. & J. 401; 31 L. J. Ch. 696; 6 L. T. 596; 26 J. P. 451; 10 W. R. 677; 45 E. R. 1238, L.J.J.

Annotations:—*Reid.* Baker v. Monk (1864), 33 Beav. 419; O'Rourke v. Bollingbroke (1877), 2 App. Cas. 814; Fry v. Lane, *Re* Fry, Whittet v. Bush (1888), 40 Ch. D. 312; Rees v. De Bernardy, [1896] 2 Ch. 437; Grindell v. Bass (1920), 89 L. J. Ch. 591.

807. Weak man—Deed obtained by misrepresentation.]—Diversity betwixt a deed & a will gained from a weak man, & upon a misrepresentation; equity will set aside the first, but not the latter.—JAMES v. GREAVES (1725), 2 P. Wms. 270; 24 E. R. 726.

808. —.]—BRIDGEMAN v. GREEN (1757), Wiln. 58; 97 E. R. 22; *affg.* (1755), 2 Ves. Sen. 627, L. C.

Annotations:—*Appld.* Huguenin v. Baseley (1807), 14 Ves. 273. *Reid.* Dent v. Bennett (1839), 4 My. & Cr. 269; Cooke v. Lamotte (1851), 15 Beav. 234; Reynell v. Sprye, Sprye v. Reynell (1852), 21 L. J. Ch. 633; Cox v. Bruton (1857), 5 W. R. 544; Lyon v. Home (1868), L. R. 6 Eq. 655; Baker v. Loader (1872), L. R. 16 Eq. 49; Moxon v. Payne (1873), 8 Ch. App. 881; Alford v. Skinner (1887), 36 Ch. D. 145; Berry v. Glazebrook (1891), 7 T. L. R. 574; Morley v. Loughnan, [1893] 1 Ch. 736. *Mentd.* Harrison v. Wiltshire (1834), 4 L. J. Ch. 30; Cockell v. Taylor (1852), 15 Beav. 103; Smith v. Kay (1859), 7 H. L. Cas. 751; Coultwas v. Swan (1871), 19 W. R. 485; Vano v. Vano (1873), 8 Ch. App. 383; *Re* Yates, *Ex p.* Brown (1879), 27 W. R. 651; *Re* McCallum, McCallum v. McCallum, [1901] 1 Ch. 143; Turnbull v. Duval, [1902] A. C. 429.

809 i. Man of weak mental capacity.]—Pltf. brought an action against deft., his son, for rescission of a voluntary transfer of land:—*Held:* pltf. was to deft.'s knowledge feeble-minded, weak, & incapable of transacting business; & the deed was set aside.—SPONG v. SPONG (1914), 18 C. L. R. 544.—AUS.

—A deed of real

was given to purchaser by a person of very weak mind, unfit for business, which required judgment & discretion. The consideration was considerably less than the value of the property, & the bargain was an exceedingly improvident one for grantor:—*Held:* the deed set aside.—CHISHOLM v. SCHROEDER (1885), 40 N. S. R. 8.—CAN.

809. Man of weak mental capacity.]—Bill by the heir of a vendor against the purchaser to set aside a sale & deed of conveyance, on the ground that the consideration was grossly inadequate, & that the deft. availed himself of the mental weakness & incapacity of the vendor.

Inadequacy of consideration alone is not sufficient to vitiate a sale. But it appearing as the result of evidence that there was a degree of mental weakness on the part of the vendor, not indeed so great as to vitiate any instrument which he might execute, but such as to make it eminently necessary that he should have protection & advice; that fact, coupled with the circumstance that the property was sold at an inadequate price, was held sufficient to justify the interference of the ct. in setting aside the sale, & declaring that the deed was to stand only as a security for moneys found to be actually due.—LONGMATE v. LEDGER (1860), 2 Giff. 157; 2 L. T. 256; 6 Jur. N. S. 481; 8 W. R. 386; 66 E. R. 67; *affd.*, see 4 De G. F. & J. p. 402, L. C.

Annotations:—*Consd.* Clark v. Malpas (1862), 31 Beav. 80. *Reid.* Fry v. Lane, *Re* Fry, Whittet v. Bush (1888), 40 Ch. D. 312.

Persons of unsound mind generally.]—See LUNATICS.

810. Grantor in embarrassed circumstances.]—Where a purchaser takes advantage of the distress or ignorance of the vendor, or of any particular authority over him, a ct. of equity may set aside the purchase as fraudulent, even after the purchaser's death.—GOULD v. OKEDEN (1731), 4 Bro. Parl. Cas. 198; 2 E. R. 135, H. L.

Annotations:—*Reid.* Douglas v. Culverwell (1862), 4 De G. F. & J. 20; Adams v. Swarder (1864), 10 Jur. N. S. 223.

811. —.]—A., aged thirty, borrows £5,000 on bond to pay £10,000 if he survives B., aged seventy-eight. A. survives a year & eight months, having on death of B. confirmed the bargain by a new bond, etc., & freely, paying part: no relief, except as to the penalty.

This ct. has an undoubted jurisdiction to relieve against every species of fraud.

Fraud may be apparent from the intrinsic nature & subject of the bargain itself; such as no man in his senses & not under delusion would make on the one hand, & as no honest & fair man would accept on the other; which are unequivocal & unconscientious bargains.

Fraud may be presumed from the circumstances & condition of the parties contracting; & this goes farther than the rule of law; which is, that it must be proved, not presumed: but it is wisely established in this ct. to prevent taking surreptitious advantage of the weakness or necessity of another; which knowingly to do is equally against conscience as to take advantage of his ignorance.

The last head of fraud, on which there has been relief, is that which infects catching bargains with heirs, reversioners, or expectants, in the life of the father, etc., against which relief always extended.

b. — Illiterate foreigner.]—Pltf., an illiterate foreigner, in possession of land under an agreement of sale, having paid \$900, broken 100 acres, & erected buildings valued at \$1,000, executed a quit-claim deed in favour of deft. I., & was given in return a six-year lease on half-crop rental, terminable six months later by lessor. Pltf. had no advice or

These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting; weakness on one side, usury on the other, or extortion or advantage taken of that weakness (LORD HARDWICKE, C.).—CHESTERFIELD (EARL) v. JANSSEN (1751), 2 Ves. Sen. 125; 1 Atk. 301; 1 Wils. 286; 28 E. R. 82, L. C.

Annotations:—Consd. Aylesford v. Morris (1873), 8 Ch. App. 484. **Reid.** Baugh v. Price (1752), 1 Wils. 320; Gwynne v. Heaton (1778), 1 Bro. C. C. 1; Fullagar v. Clark (1812), 18 Ves. 481; Bowes v. Heaps (1814), 3 Ves. & B. 117; King v. Hamlet (1834), 2 My. & K. 456; Kempson v. Ashbee (1874), 39 J. P. 164; Beynon v. Cook (1875), 10 Ch. App. 391, n.; Heap v. Marris (1877), 46 L. J. Q. B. 761. **Mentd.** Tylour v. Rochfort (1751), 2 Ves. Sen. 281; Carpenter v. Heriot (1759), 1 Eden, 338; Murray v. Harding (1773), 2 Wm. Bl. 859; Cockshott v. Bennett (1788), 2 Term Rep. 763; Fox v. Mackreth (1788), 2 Bro. C. C. 400; Fawcett v. Gee (1797), 3 Anst. 910; Whittingham v. Burgoyne (1797), 3 Anst. 900; The Cognac (1832), 2 Hag. Adm. 377; Sloman v. Kelly (1840), 4 Y. & C. Ex. 169; Doe d. Haughton v. King (1843), 7 Jur. 517; Downes v. Green (1844), 12 M. & W. 481; O'Brien v. Kenyon (1851), 6 Exch. 382; Cockell v. Taylor, Preston v. Collett, Collett v. Preston (1852), 21 L. J. Ch. 545; Egerton v. Brownlow (1853), 4 H. L. Cas. 1; Archer v. James (1859), 2 B. & S. 67; Nevill v. Snelling (1880), 15 Ch. D. 679; Bulli Coal Mining Co. v. Osborne, [1899] A. C. 351; Nocton v. Ashburton, [1914] A. C. 932.

812. —]—Where a person in pecuniary difficulties executed a conveyance of land, at an undervalue, under circumstances which tended to show a belief, on his part, that the transaction was intended to be a mtge. transaction, but not an absolute sale, same solr. acting for both parties, the ct. set aside the instrument as an absolute sale.—DOUGLAS v. CULVERWELL (1862), 4 De G. F. & J. 20; 31 L. J. Ch. 543; 6 L. T. 272; 10 W. R. 327; 45 E. R. 1089, L. JJ.

Annotations:—**Mentd.** Re Unsworth's Trust (1865), 2 Drew. & Sm. 337; Macleod v. Jones (1884), 53 L. J. Ch. 534.

813. —]—A mtgor. in embarrassed circumstances in May, 1864, conveyed his equity of redemption in the mortgaged property under pressure to the mtgee., for a sum considerably less than its value, & in June following he was, on his own petition, adjudicated bkpt. On bill by the assignee, the deed was set aside.—FORD v. OLDEN (1867), L. R. 3 Eq. 461; 36 L. J. Ch. 651; 15 L. T. 558.

814. Grantor ignorant of rights.]—GOULD v. OKEDEN, No. 810, ante.

assistance except that of her husband, also an illiterate foreigner. Both documents were prepared by deft. I. & witnessed by deft. A.; & two days later I. executed an agreement for sale in favour of A.:—**Held:** the transaction could not stand; & the three instruments were declared null & void.—KOKORUTZ v. IRWIN (1912), 19 W. L. R. 945; 1 W. W. R. 774.—CAN.

k. Ill-health of settlor—Evidence of sufficient explanation.]—Where at the execution of a voluntary settlement settlor is not in a fit state of health, & is inexperienced in legal business, & the solr. is a stranger, & the deed contains unusual clauses, the clearest evidence is required that settlor at the time of signing the deed fully understood it, & for such evidence the ct. looks to the solr. who prepared the deed, & if such evidence is not forthcoming the deed cannot be upheld. The mere formal reading over of the deed is not enough.—ANDERSON v.

ANDERSON (1903), 23 N. Z. L. R. 101.—N.Z.

817 i. Drunkard.]—The mere fact of a person executing a deed while intoxicated, will not, as a rule, suffice to set such deed aside, unless undue advantage was taken.—CLARKSON v. KITSON (1854), 4 Gr. 244.—CAN.

817 ii. —.]—NEVILL v. NEVILL (1856), 6 Gr. 121.—CAN.

817 iii. —.]—MCGREGOR v. BOULTON (1866), 12 Gr. 288.—CAN.

817 iv. —.]—Where an old man, greatly addicted to drinking, executed deeds of all his property, real & personal, to the tavern keeper with whom he boarded, & accepted in consideration a bond for his support for life, which was an inadequate consideration, & five months afterwards grantor died:—**Held:** on the application of one of his heirs, the deeds would be set aside.—HUME v. COOKE (1869), 16 Gr. 84.—CAN.

815. —.]—Pltf., a markswoman, was heiress-at-law to a person who died seised of or entitled to real estate. One of defts. set up a will of deceased, which will was, as regarded the personality of deceased, pronounced a forgery, but which, as regarded the realty, was never impeached at law. Pltf. was afterwards persuaded to execute deeds conveying away all her interest in deceased's realty for an inadequate consideration. She subsequently filed her bill, praying that the deeds might be set aside on the grounds that they were obtained by fraud, that they were never explained or read over to her, & that she was, at the time she executed them, in ignorance of her title to any portion of deceased's estate:—**Held:** the ct. could order the deeds to be set aside, this case not being at all analogous to the cases of heirs coming to the ct. under circumstances of this kind, & asking that mere terms of years, or dry legal estates, should be set aside in order to allow the heirs to proceed at law.—CARTLEDGE v. RADBURN (1866), 14 L. T. 187; 14 W. R. 603.

816. Man under arrest.]—Though a man is arrested by due process, yet if a wrong use is made of it against him by obliging him to execute a conveyance while under arrest, this ct. will relieve.—NICHOLLS v. NICHOLLS (1737), West temp. Hard. 192; 1 Atk. 409; 25 E. R. 890, L. C.

See, generally, CONTRACT, Vol. XII., pp. 95, 96.

817. Drunkard.]—Particular acts of excessive drinking by a party executing a conveyance not a sufficient ground to set aside a conveyance; nor inadequacy of price above where there is no fraud, especially where the person claiming against the conveyance has allowed fifteen years to elapse without taking any step.—SMITH v. DOWNING (1737), West temp. Hard. 90; 25 E. R. 836, L. C.

818. — Of weak intellect—Undue influence of surgeon.]—BENNET v. VADE (1742), 2 Atk. 324; 9 Mod. Rep. 312; 26 E. R. 597; *sub nom.* BENNET v. VADE, Jones v. VADE, 1 Dick. 84, L. C. *subsequent proceedings, sub nom.* BENNET v. LEE (1743), 2 Atk. 529, L. C.

Annotations:—**Reid.** Bellamy v. Sabine (1835), 2 P. M. 425. **Mentd.** Beadles v. Burch (1839), 9 L. J. Ch. 57; Middleton v. Sherburne (1841), 4 Y. & C. Ex. 358; Allen v. M'Pherson (1847), 1 H. L. Cas. 191; Jones v. Gregory (1863), 2 De G. J. & Sm. 83.

819. — Just come of age.]—Lease set aside with costs; as obtained by the contrived &

817 v. —.]—A contract entered into by a person who to the knowledge of the other party is so drunk as to be incapable of knowing what he is about, is not void but voidable at his option; therefore, he must in order to escape liability disaffirm within a reasonable time or at any rate, if he delays his election to disaffirm, he does so at his peril, if such delay causes loss or damage to the other party.—GRAIN CO. v. ROWE, [1917] 3 W. W. R. 373; S. C. R. 232.—CAN.

l. — With knowledge of act.]—Where a person given to drinking made a deed to his wife, understanding what he was doing, but without professional advice, a bill by his heir impeaching the deed was dismissed.—CORRIGAN v. CORRIGAN (1868), 16 Gr. 341.—CAN.

m. —.]—T., a weak & feeble person, & suffering from drink, but mentally capable of understanding what he was doing, executed a settlement of his real estate to trustees in

Sect. 1.—Infirmity or incapacity of grantor. Sect. 2: Sub-sect. 1.]

habitual intoxication of the lessor, immediately on coming of age, at a very inadequate rent; & acts of confirmation held not sufficient.

It is not at all shown that at either period [of the alleged acts of confirmation] pltf. was apprised of the true value of his estate (GRANT, M.R.).—*SAY v. BARWICK* (1812), 1 Ves. & B. 195; 35 E. R. 76.

See, generally, CONTRACT, Vol. XII., pp. 41, 42, Nos. 199–217.

820. Donor old.]—Old age alone not a sufficient ground to presume imposition.—*LEWIS v. PEAD* (1789), 1 Ves. 19; 30 E. R. 210.

821. ———.]—Where a party, in the situation of a companion to a testatrix, upwards of eighty-three years of age, obtained a transfer of stock from testatrix, without consideration, & testatrix by her will gave her property to other parties, the ct. held it a *prima facie* case for inquiry, & ordered the stock to be brought into ct. without prejudice; the dividends to be paid to the transferee until the hearing of the cause, which was instituted for the purpose of impeaching the transaction.—*BATE v. BATE* (1845), 5 L. T. O. S. 367; *sub nom. BATE v. BANK OF ENGLAND*, 9 Jur. 545.

822. ——— Sale at undervalue — Suppression of material facts.]—Sale, by an old woman of eighty-eight, of an estate in possession for one-fourth its value set aside, she being in distress & without legal assistance, & being also under the impression that she could not make out a good title, while the purchaser, knowing that she could, concealed the fact from her.—*SUMMERS v. GRIFFITHS* (1866), 35 BEAV. 27; 55 E. R. 804.

823. ——— & infirm & ignorant.]—An ignorant old woman of weak intellect, & without professional advice, conveyed property to deft., in consideration of an annuity payable weekly, secured only by a power of distress & the covenant of deft. The evidence in the suit did not show either that pltf. knew what she was doing when she executed the conveyance, or that deft. had given the full value for the property:—*Held*: the purchase must be set aside with costs, & the conveyance stand as security only for so much as might be found actually due from deft. to pltf.—*BAKER v. MONK* (1864), 33 BEAV. 419; 10 L. T. 86; 28 J. P. 407; 10 Jur. N. S. 624; 12 W. R. 521; 55 E. R. 430; *affd.*, 4 De G. J. & Sm. 388, L. JJ.

Annotations:—*Reid*. *Fry v. Lane*, *Re Fry*, *Whittet v. Bush* (1888), 40 Ch. D. 312; *Rees v. De Bernardy*, [1896] 2 Ch. 437; *Grindell v. Bass* (1920), 89 L. J. Ch. 591. *Mentd.* *Hoddel v. Pugh* (1864), 10 Jur. N. S. 531.

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trust for his sons upon their coming of age, & the deed contained no power of revocation, & no power of appointment:—*Held*: the deed was binding on settlor & could not be set aside.—*TONKS v. TONKS* (1886), 5 N. Z. L. R. 220 (S. C.).—N.Z.

n. Donor old — Undue influence & absence of independent advice.]—Pltf., old & infirm, was induced by his son, with whom he resided & who had great influence with him, to leave to the decision of two referees the terms of his will, & to execute a will in pursuance of their award. A lease to the son was executed at the same time. The son having failed to establish that his father had competent, independent

advice, or had entered into the transaction willingly, or without pressure:—*Held*: the lease void & the will revocable at the pleasure of pltf.—*DONALDSON v. DONALDSON* (1866), 12 Gr. 431.—CAN.

o. ———.]—WIDDIFIELD *v.* SIMONS (1882), 1 O. R. 483.—CAN.

p. ———.]—TRUSTS & GUARANTEE CO. *v.* HART (1900), 20 C. L. T. 65; 31 O. R. 414.—CAN.

q. ——— Absence of ———.]—Where grantor, aged seventy, sick & in feeble health, & in the opinion of some witnesses, though not of others, he did not understand the nature of his act & the effect of the deed was to

824. Donor old & nearly blind — Placing confidence in donee.]—Deed of gift ordered to be delivered up, as obtained by undue influence over the donor, who was eighty-four years old, & nearly blind, & placed a confidence in the donee.—*GRIFFITHS v. ROBINS* (1818), 3 Madd. 191; 56 E. R. 480.

Annotations:—*Distd.* *Pratt v. Barker*, *Pretty v. Barker* (1826), 1 Sim. 1. *Reid*. *Hunter v. Atkins* (1834), Coop. temp. Brough. 464.

825. Grantor illiterate—& pressed for money.]—On a bill to set aside a purchase, the answer of defts. the devisees of the purchaser, admitting great inadequacy of price, & stating their ignorance as to other circumstances of fraud alleged, a receiver appointed.

There may be cases of inadequacy of price so great as to form a ground for cancelling a contract.

The young man was a common sailor, lately come on shore, & much pressed for money. If the case stated be true, & it is more than probable it is true, the inadequacy was so monstrous, the situation of the young man, & the state of his intellect were such, that it is hardly possible to suppose that the transaction can stand (LORD ELDON, C.).—*STILWELL v. WILKINS* (1821), Jac. 281; 37 E. R. 857, L. C.; *affg.* S. C. *sub nom. STITWELL v. WILLIAMS*, 6 Madd. 49.

Annotations:—*Mentd.* *George v. Evans* (1840), 4 Y. & C. Ex. 211; *Carrow v. Ferrior*, *Dunn v. Ferrior* (1868), 3 Ch. App. 719.

826. ——— Onus of proof that grant understood.]—An illiterate person who could not write signed an instrument, purporting to grant all his property to his wife as her sole & absolute property, & shortly afterwards died. On a suit instituted by the wife, to have the husband's heir declared a trustee for her:—*Held*: it was incumbent on pltf. to show that the grantor understood the nature of the instrument; & as the evidence merely showed that the instrument had been read over to the grantor by an unprofessional person who had prepared it, & as to whose capacity to explain it there was no evidence, except such as rendered such capacity very doubtful, the bill was dismissed.—*PRICE v. PRICE* (1852), 1 De G. M. & G. 308; 18 L. T. O. S. 312; 42 E. R. 571, L. JJ.

827. ———.]—CARTLEDGE *v.* RADBURN, No. 815, *ante*.

828. Woman enfeebled & of weak mind— Voluntary settlement of whole of property—No power of revocation.]—A mere voluntary deed of gift, the nature of which is not fully understood by the donor, may be set aside after the donor's death, at the suit either of the heir-at-law of the donor or of persons claiming under a will of the donor.

deprive him of means of support, & the evidence was uncertain respecting the existence of adequate consideration for the deed & favoured the view that it was intended as a gift:—*Held*: the deed would be set aside.—*McKAY v. WINSLOWE* (1905), 37 N. B. R. 213; 3 N. B. Eq. Rep. 84; 25 C. L. T. 88.—CAN.

r. ——— Knowledge of act.]—In an action brought by A., aged eighty-two, to set aside a transfer of land made by him to his daughter:—*Held*: the charge of undue influence failed, the consideration being reasonably adequate & pltf. being in full possession of his faculties & understanding the fully.—*GRAHN v. LITWIN*

Where, therefore, a voluntary deed, containing no power of revocation, was executed by a lady of upwards of seventy years of age, who had been in a very infirm state of body & mind, but from which she had recovered at the date of the deed, depriving herself of all her property in favour of a niece with whom she was living when she executed the deed, & to whom the donor had a clear intention of leaving all her property, to the exclusion of her other relations, but such deed was not either explained to the donor or understood by her, & it appeared that she understood that under the deed she would be left in the enjoyment of an estate for her life in the property, the subject of the deed, such deed was set aside after the death of the donor at the suit of persons claiming under a will prior in date to the deed.—**ANDERSON v. ELSWORTH** (1861), 3 Giff. 154; 30 L. J. Ch. 922; 4 L. T. 822; 7 Jur. N. S. 1047; 9 W. R. 888; 66 E. R. 363.

Annotation:—**Reid**. *Coutts v. Acworth* (1869), L. R. 8 Eq. 558.

829. Young woman just of age—Settlement not reserving power of revocation—Or general power of appointment by deed.—A voluntary settlement was agreed to be made by a young lady, an orphan, some weeks before she attained twenty-one, upon the recommendation of the family solr., & was executed by her eight weeks after she attained twenty-one without any independent advice. Thereby she assigned to her stepfather & an uncle as trustees the whole of her fortune upon trusts for herself for life, with remainder to her children or testamentary appointees, & in case there were no children, then, in default of appointment, to her next of kin. A power of raising £700, & paying it to the settlor, was reserved, but the settlement contained no power of revocation, or of appointment by deed, & gave her no voice in the investments or in the appointment of new trustees:—*Held*: although the solr. & trustees acted really with the intention of benefiting pltf., the settlement must be set aside on the ground of imprudence.—**EVERITT v. EVERITT** (1870), L. R. 10 Eq. 405; 39 L. J. Ch. 777; 23 L. T. 136; 18 W. R. 1020.

Annotations:—**Consd.** *Phillips v. Mullings* (1871), 7 Ch. App. 241. **Refd.** *Hall v. Hall* (1873), 28 L. T. 383; *James v. Couchman* (1885), 29 Ch. D. 212.

830. Grantor recently come of age.—**SMITH v. BURROUGHS**, No. 907, *post*.

831. — Lapse of two years.—A mining lease granted by a person two years after coming of age set aside. A young lady, two years after she came of age, granted a mining lease, as to part of the property in possession, & as to rest, in reversion to her brother-in-law & uncle, at the

suggestion & advice of her father's exor., & with no independent advice. Three months afterwards, the exor. was taken into partnership with the lessees. It appeared that applications of other persons to become lessees had been discountenanced, & concealed from the knowledge of the lady:—*Held*: to support the lease in equity, the lessees were bound to show that no better terms could have been obtained; that the grantor had the fullest information on the subject; that she had separate, independent & disinterested advice, & that she had deliberately & intentionally made the grant; & the lessees having failed in proving this, the lease was cancelled.—**GROSVENOR v. SHERRATT** (1860), 28 Beav. 659; 3 L. T. 76; 6 Jur. N. S. 1228; 8 W. R. 682; 54 E. R. 520.

Self-protective settlements.—See **SETTLEMENTS**.

SECT. 2.—PRESUMED UNDUE INFLUENCE.

SUB-SECT. 1.—IN GENERAL.

See, also, **CONTRACT**, Vol. XII., pp. 98 *et seq.*

832. General rule.—Deeds set aside as absolute securities & conveyances & ordered to stand as security only for what should appear due upon a general account, after a considerable lapse of time, seventeen years, upon the nature of the deeds themselves the circumstances, under which, & the confidential relation of the person by whom they were obtained & no confirmation: the other parties being throughout under same influence, control, & ignorance of their rights.—**PURCELL v. McNAMARA** (1866), 14 Ves. 91; 33 E. R. 455, L. C.

Annotations:—**Refd.** *Hugoulin v. Basoley* (1866), 13 Ves. 105; *Smyth v. Smyth* (1817), 2 Madd. 75. **Mentd.** *Whalley v. Whalley* (1821), 3 Bl. 1.

833. ——In cases of parent & child, guardian & ward, trustee & *cestui que* trust, etc., etc. of equity, although in general they will not disturb the enjoyment of benefits conferred by acts purely voluntary, will regard the gifts of the latter, made without consideration, with much jealousy; but where the parties stand in the relation of attorney & client, so immediately is the former under the eye of the etc., & so anxiously do they watch the interests of the latter, that although the voluntary gift of the client may be supported, it is so indispensably necessary to show it to be *bonâ fide*, & free from the imputation of any of the above objections, as to render it in some sort essential to its validity & stability, that some other professional man than the donee should have the conduct of it, or at least that some

(1911), 19 W. L. R. 144; 4 Sask. L. R. 270.—**CAN.**

a. Grantor illiterate—Woman without professional advice.—Where a woman of sixty, who had a first charge on property for her maintenance, was induced to exchange it for a life lease of part of the property, subject to conditions which rendered the transaction an improvident one on her part; & she was illiterate & dull of intellect, & had no professional or other competent adviser, & did not understand the nature or effect of the transaction:—*Held*: not binding.—**McLAUGHLIN v. McDONALD** (1865), 12 Gr. 82.—**CAN.**

t. — Duty of notary.—It is the duty of a notary when executing a deed to explain to an illiterate grantor

the legal & equitable obligations imposed by the deed, & consequent on its execution.—**AYOTTE v. BOUCHER** (1883), 9 S. C. R. 460.—**CAN.**

a. Woman of weak mental capacity.—**COLLINGWOOD v. COLLINGWOOD** (1874), 21 Gr. 108.—**CAN.**

b. ——**McGARRIGAN v. FERGUSON** (1908), 4 N. B. Eq. Rep. 12; 5 E. L. R. 105.—**CAN.**

c. ——A deed of settlement is not effectual, when executed by a party not in such a state of mind as to enable her to judge correctly the effect of the deed as depriving her of all power of revoking & altering it, & as not being her free & voluntary act, although not obtained by the undue influence of the parties in whose favour

it was granted.—**WATSON v. NOBLE** (1827), 2 Wils. & S. 648; 4 Sh. (Ct. of Sess.) 200.—**SCOT.**

PART III. SECT. 2, SUB-SECT. 1.

832 i. General rule.—If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, & when the facts show that one party has taken undue advantage of the other by reason of the circumstances mentioned, a transaction resting upon such unconscionable dealing, will not be allowed to stand.—**WATERS v. DONNELLY** (1884), 9 O. R. —**CAN.**

: Sub-sect. 1.]

indifferent third person should be privy to the whole transaction.—**GODDARD v. CARLISLE** (1821), 9 Price, 169; 147 E. R. 57.

Annotations:—**Apld.** *Liles v. Terry*, [1895] 2 Q. B. 679. **Refd.** *Barron v. Willis*, [1899] 2 Ch. 578.

834. —[The influence which is “undue” in the case of gifts *inter vivos* is different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos*, it is considered by the courts of equity that the natural influence arising out of the relation of parent & child, husband & wife, doctor & patient, attorney & client, confessor & penitent, or guardian & ward exerted by those who possess it to obtain a benefit for themselves is an “undue” influence. Gifts or contracts brought about by it are, therefore, set aside, unless the party benefited can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free & unfettered judgment. The law regarding wills is different. The natural influence which such relations as those in question involve may lawfully be exerted to obtain a will or legacy, so long as testator thoroughly understands what he is doing & is a free agent; & hence the rules adopted in courts of equity in relation to gifts *inter vivos* are not applicable to the making of wills.]

Testatrix, a Roman Catholic, gave the bulk of her property to A., whom she named residuary legatee & devisee. A., who was a Roman Catholic priest, had lived in her house & been her confessor for a number of years:—**Held**: undue influence could not be inferred from the relation in which A. stood to the testatrix, confessor & penitent, combined with the disposition of the property, & it lay on the party who impeached the residuary clause on the ground of undue influence to establish the allegation.—**PARFITT v. LAWLESS** (1872), L. R. 2 P. & D. 462; 41 L. J. P. & M. 68; 27 L. T. 215; 36 J. P. 822; 21 W. R. 200.

—**Consd.** *Howes v. Bishop*, [1909] 2 K. B. 390. **Refd.** *Hampson v. Guy* (1891), 64 L. T. 778; *Chaplin v. Brammall* (1907), 97 L. T. 860; *Craig v. Lainoureux*, [1920] A. C. 349.

835. Influence in family arrangements & undue influence distinguished.—[If a person obtain by voluntary donation a large pecuniary benefit from another, the burden of proving the transaction righteous falls on the person taking the benefit, & this is proved by showing that the donor fully understood what he was doing; but where the relation of the parties is such that undue influence might have been exercised, it must also be shown that the disposition of the donor was not produced by undue influence. In many cases, the ct., from the relations existing between the parties, infers the probability of undue influence, as in the cases of guardian & ward, solr. & client, spiritual adviser & pupil, medical adviser & patient, & the like. Transactions between such persons are watched with jealousy, not only to see that the party fully understood

the act, but also that it was not brought about by the exercise of that influence. The relation of parent & child becomes within this class.

Such an influence is not discountenanced by the ct., but it ought to be exercised for the benefit of the person subject to, & not of the person possessing it.

In family arrangements, though the influence exist, & has probably been exercised, yet if the transaction be one that tends to the peace or security of the family, to the avoiding of family disputes & litigation, or to the preservation of the family property, the same principles are not applied as to dealings between strangers, but such principles are then applied, as, on the most comprehensive experience, have been found to tend most to the interest of families. The cases relating to the resettlement of the family property appear stronger.

Eleven months after a tenant in tail attained twenty-one he concurred with his father in barring the entail & resettling the family estates, the ct. being of opinion that the father thereby took direct benefits proceeding from the son: that the property had not been resettled in a reasonable & proper mode, if the interest of the family alone was to be regarded: that in the preparation of the deed, the son had no professional assistance, & that the contents were not properly made known to him, set aside the arrangement.

When a party is subject to the obligation of showing that an unprofessional person understood the contents of a deed which he executed, the mere proof of its having been read over to him, unaccompanied with proper explanations, is not sufficient to satisfy the ct. that the person hearing it read understood it.—**HOGHTON v. HOGHTON** (1852), 15 Beav. 278; 21 L. J. Ch. 482; 17 Jur. 99; 51 E. R. 545.

Annotations:—**Distd.** *Beanland v. Bradley* (1854), 2 Sm. & G. 339; *Dimsdale v. Dimsdale* (1856), 25 L. J. Ch. 806. **Consd.** *Hartopp v. Hartopp* (1856), 21 Beav. 259. **Distd.** *Jenner v. Jenner* (1860), 2 De G. F. & J. 359. **Consd.** *Chambers v. Crabbe* (1865), 34 Beav. 457; *Potts v. Surr* (1865), 34 Beav. 543. **Apld.** *Turner v. Collins* (1871), 7 Ch. App. 329. **Consd.** *Fane v. Fane* (1875), L. R. 20 Eq. 698; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200. **Refd.** *Cobbett v. Brook* (1855), 20 Beav. 524; *Wright v. Vanderplank* (1856), 4 W. R. 410; *Head v. Godlee*, *Reynolds v. Godlee* (1859), *John*, 536; *James v. Holmes* (1862), 31 L. J. Ch. 567; *Carnegie v. Carnegie* (1874), 30 L. T. 460; *Lovell v. Wallis* (1884), 50 L. T. 681; *Bischoff's Trustee v. Frank* (1903), 89 L. T. 188. **Mentd.** *A.-G. v. Magdalen College, Oxford* (1854), 18 Beav. 223; *Bury v. Oppenheim* (1859), 26 Beav. 594.

See, generally, FAMILY ARRANGEMENTS.

836. Undue influence inter vivos & vitiating wills distinguished.—**PARFITT v. LAWLESS**, No. 834, *ante*.

837. Onus of proof—Of undue influence.—[A bill by A. as heiress-at-law of J. & E., to set aside conveyances made by them to W., of real & personal estates, on the ground of fraud, undue influence, & want of consideration, alleged that J., who was deaf & dumb all his life, was incapable

836 l. Undue influence inter vivos & vitiating wills distinguished.—[A deed to a son, who had managed the farm for some years, the consideration being a personal bond to maintain grantor & his wife for life, without any other security:—**Held**: such a conveyance, unless made freely & voluntarily after independent & proper advice, was not made good by evidence of a verbal

agreement several years before, that the son should work the farm & maintain his father & mother, in consideration of the property being left to the son by will; a deed & will being essentially different.—**BREMAN v. KNAPP** (1867), 13 Gr. 398.—**CAN.**

d. Onus of proof.]—To set aside

instruments on the ground of undue influence it is not necessary that there should be proof of the exercise of influence; it rests upon the party obtaining the benefit to rebut the presumption that arises when such a transaction takes place between a parent & child, or others standing in a position where it is presumed influence may exist on the part of grantee over

of executing or understanding any deed, & that E. was seduced by W. & being subject to his authority, executed the deeds without professional advice, & for insufficient consideration, consisting only of a bond of W. for securing the price. There was not sufficient evidence of J.'s incapacity, nor did the deeds executed by him convey any property descendible to his heirs. The allegations of the seduction of E., & of improper influence over her, were not sustained by the evidence, although there was some evidence of an illicit connection between her & W. It appeared also that A. had the benefit of the bond given to E. & hand long acquiesced in & admitted the validity of the transactions:—*Held*: the bill was properly dismissed for want of sufficient proof of the charges as alleged, so as to justify the ct. to set aside concluded transactions.—*FARMER v. FARMER* (1848), 1 H. L. Cas. 724; 9 E. R. 946, H. L.

838. ———.]—A. in 1850 took a lease of a house in G. Street which he contracted to rebuild, he shortly afterwards assigned the lease to B., who was a builder, for the sum of £2,550, & advanced him several large sums of money to enable him to rebuild the house. This money was lent at rates of interest which at that time was usurious. The £2,550 as well as the sums of money advanced, were secured by mtges. on the house, but before the house was completed B. assigned it to A., receiving as the principal part of the purchase money the mtges. he had granted, & at same time he executed a deed of release, exonerating A. from all possible demand in respect of any money which he had paid by way of usurious interest. B. afterwards filed his bill, seeking to have this deed of release set aside, alleging that it had been obtained from him by fraud & undue influence, & praying to have all his dealings with deft. reviewed, on the ground that they were usurious:—*Held*: to have the deed of release set aside plff. had failed in establishing any title, & he was decreed to pay the costs of the appeal.

The onus of getting rid of the effect of a settled account or anything signed is always on the party

grantor.—*DELONG v. MUMFORD* (1878), 25 Gr. 586.—CAN.

e. ———.]—A party alleging undue influence will be required to give particulars of the acts thereof.—*HOPPER v. DUNSMUIR* (1903), 10 B. C. R. 159.—CAN.

f. ———.]—In a transaction between two persons where one is so situated as to be under the control & influence of the other, the cts. in India have to see that such other does not unduly & unfairly exercise that influence & control over such person for his own advantage or benefit, & will call upon him to give clear & cogent proof that the transaction complained of was such an one as the law would support & recognise.—*SITAL PRASAD v. PARBHU LALL* (1888), 1. L. R. 10 All. 535.—IND.

g. ———.]—Where there was no evidence of any actual exercise of undue influence by mtgees. or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that mtgor. was in urgent need of money:—*Held*: this circumstance is not sufficient of itself to place mtgees. in a position to dominate the will of mtgor.—*SUNDAR KORB v. SHAM KRISHN* (1906), 1. L. R. 34 Calc. 150; L. R. 34 Ind. App. 9.—IND.

h. ———.]—*CHATRING MOOLCHAND v.*

alleging the fraud or undue influence (*LORD ORANWORTH, C.*)—*FOWLER v. WYATT* (1858), 30 L. T. O. S. 340, L. C.

Annotation:—*Mentl. Luke v. South Kensington Hotel Co.* (1879), 11 Ch. D. 121.

839. ——— That grant voluntary.]—Whenever a person obtains, by voluntary donation, a benefit from another, he is bound, if the transaction be questioned, to prove that the transaction was righteous, & that the donor voluntarily & deliberately did the act, knowing its nature & effect. The rule is not confined to the cases of attorney & client, parent & child, etc., but is general.

A nephew, who was provided for by his aunt's will, obtained a *post obit* bond from her. It was set aside, he not having proved that she knew that the effect of the bond was to make her will irrevocable.—*COOKE v. LAMOTTE* (1851), 15 Beav. 234; 21 L. J. Ch. 371; 51 E. R. 527.

Annotations:—*Consd. Hobday v. Peters* (No. 1) (1860), 28 Beav. 349. *Apld. Mitchell v. Homfray* (1881), 8 Q. B. D. 587; *Berry v. Glazebrook* (1891), 7 T. L. R. 574. *Refd. Houghton v. Houghton* (1852), 15 Beav. 278; *Beanland v. Bradley* (1854), 2 W. R. 602; *Cobbett v. Brock* (1855), 20 Beav. 524; *James v. Holmes* (1862), 31 L. J. Ch. 567; *Coutts v. Acworth* (1869), 38 L. J. Ch. 691; *Turner v. Collins* (1871), 7 Ch. App. 334, n.; *Carnegie v. Carnegie* (1874), 30 L. T. 460; *Henry v. Armstrong* (1881), 18 Ch. D. 668; *Bischoff's Trustee v. Frank* (1903), 89 L. T. 188.

840. ——— Voluntary post-nuptial settlement—Application by settlor.]—In 1872 plff., in order to protect his property, executed a voluntary post-nuptial settlement of all his real & personal estate except a sum of cash under £1,000 in favour of his wife, for her separate use, & children. The settlement contained no power of revocation. In 1880 plff. brought an action against the trustees & his infant children to set aside the deed on the ground of undue influence, misrepresentation, & ignorance of its effect:—*Held*: the burden of proof of a sufficient ground for setting the deed aside was on plff.—*HENRY v. ARMSTRONG* (1881), 18 Ch. D. 668; 41 L. T. 918; 30 W. R. 472.

Annotation:—*Refd. Ogilvie v. Littleboy* (1897), 13 T. L. R. 399.

(1907), 1. L. R. 32 Bom.

208.—IND.

k. ——— That grant bond fide.]—To sustain a deed of gift to a person standing in a confidential relation to donor, donee must establish by clear evidence that the nature & effect of the deed were fully & truly explained to donor: that he perfectly understood them: that he was made alive, by explanation & advice, to the effect & consequences of executing it, & that the deed was a willing act on his part, & not obtained by the exercise of any of that influence which the confidential relationship of donee put it in his power to employ; otherwise such deed of gift will be set aside.—*MASON v. SENEY* (1865), 11 Gr. 447.—CAN.

l. ———.]—Where a father made a deed of gift of all his property to his son, & there was no evidence of undue influence on the part of the son, or of his having taken an unconscientious advantage of his father, & the ct. was satisfied that the deed had been duly executed:—*Held*: the son was not required to prove that the father in making the deed was aware of its nature & consequences; & the deed was upheld.—*ARMSTRONG v. ARMSTRONG* (1874), 14 Gr. 528.—CAN.

m. ———.]—*FINN v. ST. VINCENT DE PAUL HOSPITAL* (1910), 17 O. W. R. 673; 2 O. W. N. 343; 22 O. L. R. 381.—CAN.

n. ———.]—*MANNU SINGH v. UMADAT PANDE* (1890), 1. L. R. 12 All. 523.—IND.

o. ———.]—*WAJID KHAN v. EWAZ ALI KHAN* (1891), 1. L. R. 18 Calc. 545; L. R. 18 Ind. App. 144.—IND.

p. ———.]—*BAI MANIGAVRI v. NARONDAS CALLJANDAS* (1891), 1. L. R. 15 Bom. 549.—IND.

q. ———.]—Where an old illiterate *purdanashin* woman executes an improvident deed of gift in favour of a person standing towards her in a fiduciary capacity, the onus lies on donee to establish not only that donor understood the transaction, but that she was in a position to exercise a free & unfettered judgment, that the intention to give was her own voluntary act, & that she had independent & competent advice.—*KAMINI DASHEK v. KRISHNA CHANDRA MUKERJEE* (1912), 1. L. R. 39 Calc. 933.—IND.

r. ———.]—Every *prima facie* presumption of fraud or undue influence may be rebutted by positive proofs of fair dealing, showing that the contracting party was under no influence unduly exercised.—*MOORE v. M'KAY* (1828), Beav. 282.—IR.

s. ———.]—*MORRIS v. MORRIS* (1910), 53 I. L. T. 145.—IR.

Sect. 2.—Presumed undue influence: Sub-sects. 1

841. Party exercising influence not benefiting under deed—Whether ground for relief.]—Qu.: whether a transaction can be set aside for undue influence, when it has been exercised not by the party obtaining benefits under it, but by a third person.—**BENTLEY v. MACKAY** (1862), 31 Beav. 148; 31 L. J. Ch. 697; 6 L. T. 632; 8 Jur. N. S. 857; 10 W. R. 593; 54 E. R. 1092; *on appeal*, 4 De G. F. & J. 279, L. JJ.

842. When court will consider.]—(1) Where a man lived with a woman in the character of her husband, & obtained money from her that he might invest it, the ct. refused, without positive proof, to declare he was not a trustee, or to permit him after eleven years to claim the money & the investments as his own, or to say that it was a loan, & plead Stat. Limitations in bar to the suit. (2) Upon a balance of testimony, weight will be given to the character in which parties stand to one another.—**JAMES v. HOLMES** (1862), 4 De G. F. & J. 470; 31 L. J. Ch. 567; 6 L. T. 589; 8 Jur. N. S. 732; 10 W. R. 634; 45 E. R. 1266, L. C.

B-SECT. 2.—FROM WHAT RELATIONSHIP PRESUMED.**A. In General.**

See, also, CONTRACT, Vol. XII., pp. 98 et seq.

843. Whether confined to specified relationships.]—The Ct. of Ch. grants relief where undue

841 i. Party exercising influence not benefiting under deed—Whether ground for relief.]—A deed in favour of a third person, obtained through the influence of one occupying a fiduciary relation to grantor, & not giving him the advice which he ought to have received cannot be sustained.—**DAWSON v. DAWSON** (1866), 12 Gr. 278.—**CAN.**

841 ii. —.]—**SHEARD v. LAIRD** (1888), 15 A. R. 339.—**CAN.**

i. Whether absence of independent advice & ignorance of donor sufficient.]—The absence of independent advice will not vitiate a deed of settlement executed by a woman if the obtaining of independent advice would not have made any difference in the result.—**LINDERSTAM v. BARNETT** (1915), 19 C. L. R. 528.—**AUS.**

a. —.]—**ELGIE v. CAMPBELL** (1865), 12 Gr. 132.—**CAN.**

b. —.]—**Pitt.**, a farmer, unacquainted with legal matters, was taken by debt. to a lawyer's office, & charged with having defrauded debt., & was threatened that if he left the office without settling the claim he would be arrested, & in consequence **pitt.** executed a mtge. for \$800. *Held:* the mtge. was void.—**ARMSTRONG v. GAGE** (1877), 25 Gr. 1.—**CAN.**

c. —.]—Where it is shown that a voluntary deed has been executed without independent advice, grantor standing in such a relation to grantee, that he was likely to be under influence, the ct. owing to the peculiar relationship of the parties will set the conveyance aside, although no fraud or moral wrong can be imputed to grantee; & although it is probable, from all the circumstances of the case, that if the contents & legal effect of the instrument had been fully to grantor by an independent adviser, grantor would still have executed the deed though probably with some modifications in the details.

IRWIN v. YOUNG (1881), 28 Gr. 511.—**CAN.**

d. —.]—A conveyance by A., aged ninety, to his son was prepared on the instructions of the latter, & recited that the son had agreed to pay his father \$10 a month for his life, but no such agreement had in fact been made, & there was no other consideration. The deed was not explained to the father, & the solr.'s clerk who witnessed it could not say that he had even read it over to him. There was no direct fraud, but the father, who had become childish, was under the influence of his son, & had acted without advice.—*Held:* the deed, having been executed without proper advice, would be set aside.—**LAVIN v. LAVIN** (1882), 7 A. R. 197.—**CAN.**

KOLP v. HUNTER (1911), 19 W. L. 709; 4 Sask. L. R. 379.—**CAN.**

f. —.]—Where mtgees. deliberately excluded from the room a friend of an illiterate foreigner, with him at his request to advise him as to the effect of his acts, & the foreigner was persuaded to sign a mtge. which he did not understand.—*Held:* the mtge. would be set aside.—**KARDOSY v. MANNEY-HARRIS** (1916), 34 W. L. R. 100; 10 W. W. R. 839.—**CAN.**

g. —.]—**LONG v. DONEGAN** (1873), 21 W. R. 830.—**IR.**

h. —.]—A daughter & her husband obtained from her father, aged eighty-three, facile, & addicted to drink, an agreement by which he conveyed to them, without any onerous consideration, funds of about £4,000, reserving an annuity of £40; & the deed was prepared by their agents without the intervention of any man of business on his part; & under the erroneous impression that unless he executed it he might be reduced to poverty.—*Held:* deed not binding on him.—**McDIARMID v. A**

influence is used, although there may be no special relationship existing between the parties, such as that of solr. & client, trustee & *cestui que trust*, etc., but where, in consequence of confidence reposed by one person in another, information is acquired, by which an advantage is obtained by the latter to the injury of the former.

Where a solr.'s clerk, who was consulted confidentially by a lady about a mtge. on her property, through information which he acquired from an investigation of the title, prevailed on the mtgees. to sell the mtge. debt to him for less than the amount of the debt.—*Held:* the mtgor., or her representatives, were entitled to have the benefit of the bargain, & to redeem on payment of the sum paid for the purchase of the debt.—**HOBDAY v. PETERS** (No. 1) (1860), 28 Beav. 349; 29 L. J. Ch. 780; 2 L. T. 590; 6 Jur. N. S. 794; 8 W. R. 512; 54 E. R. 400.

Annotations:—**Mentd.** **Blachford v. Woolley** (1863), 9 Jur. N. S. 568; **Sharpe v. Foy** (1868), 4 Ch. App. 35; **Kingdon v. Castleman** (1877), 46 L. J. Ch. 448; **Re Roper, Roper v. Doncaster** (1888), 39 Ch. D. 482.

844. Whether every fiduciary relationship.]—It is not every fiduciary relation between a donor & donee which will induce a ct. of equity to set aside a gift, but only those special relations which from their nature raise a presumption of undue influence. It is sufficient if an independent adviser sees that the donor understands what he is doing & intends to do it; he need not advise him to do it or not to do it.—*Re COOMBER, COOMBER v. COOMBER*, [1911] 1 Ch. 723; 80 L. J. Ch. 399; 104 L. T. 517, C. A.

(1828), 3 Wils. & S. 37; 4 Sh. (Ct. of Sess.) 583.—**SCOT.**

k. Sale at undervalue—As proof of.]—A sale at an undervalue to a person under whose influence grantor is, is as objectionable as a gift would be under like circumstances.—**MASON v. SENEY** (1865), 12 Gr. 143.—**CAN.**

l. —.]—**JOHNSTON v. JOHNSTON** (1872), 19 Gr. 133.—**CAN.**

m. —.]—**BUTLER v. MILLER** (1867), 1 I. R. Eq. 195.—**IR.**

n. Evidence of valuable consideration.]—**CORBETT v. SMITH** (1893), 1 Cout. Dig. 588.—**CAN.**

PART III. SECT. 2, SUB-SECT. 2.—A.

843 i. Whether confined to specified relationships.]—The equitable rule is that if the donor is in a situation in which he is not a free agent, & is not equal to protecting himself, a ct. of eq. will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so because of their position. The application of the rule is not limited to any particular defined relationships or sets of circumstances.—**VANZANT v. COATES** (1917), 40 O. L. R. 556; 39 D. L. R. 485; 13 O. W. R. 453.—**CAN.**

843 ii. —.]—Where no specific relations exist & the parties are at arm's length, being strangers, undue influence may be exerted, but its existence must be proved by evidence; & in such cases the nature of the benefit or the age, capacity, or health of the party, on whom the undue influence is alleged to have been exerted, are of great importance. In short the test is confidence reposed by one party & betrayed by the other, which means that there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves.—**GANESH v. VISHNU** (1907), 1 I. L. R. 32 Bom. 37.—**IND.**

845. Presumption of continuance.]—In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is, whether the person conferring a benefit on the other had competent & independent advice. The age or capacity of the person conferring the benefit, & the nature of the benefit, are of but little importance in such cases; they are important only where no such confidential relation exists. Where a confidential relation is established the ct. will presume its continuance, unless there is distinct evidence of its determination. The ct. will not undo a trifling benefit conferred by one person on another, standing in a confidential relation to him, unless there be *mala fides*.—*RHODES v. BATE* (1866), 1 Ch. App. 252; 35 L. J. Ch. 267; 13 L. T. 778; 12 Jur. N. S. 178; 14 W. R. 292, L. J.J.

*Annotations:—*Consd. *Mitchell v. Homfray* (1881), 8 Q. B. D. 587; *Allcard v. Skinner* (1887), 38 Ch. D. 145. *Apld.* *Liles v. Terry*, [1895] 2 Q. B. 679. *Consd.* *Barron v. Willis*, [1900] 2 Ch. 121; *Wright v. Carter* (1902), 86 L. T. 110. *Refd.* *King v. Anderson* (1874), 23 W. R. 196; *Bainbrigg v. Browne* (1881), 44 L. T. 705; *Taylor v. Johnston* (1882), 19 Ch. D. 603; *Cavendish v. Strutt* (1903), 19 T. L. R. 483; *Re Coomber, Coomber v. Coomber* (1911), 80 L. J. Ch. 399.

B. Parent and Child.

846. General rule.]—*MANNERS v. BANNING* (1709), 2 Eq. Cas. Abr. 282; 22 E. R. 238, L. C.

847. —.]—*GODDARD v. CARLISLE*, No. 833, *ante*.

848. —.]—*HOGHTON v. HOGHTON*, No. 835, *ante*.

849. —.] *PARFITT v. LAWLESS*, No. 834, *ante*.

850. When presumed—Threats by parent—To deprive son of allowance—Son ignorant of rights surrendered.]—The father makes his son of the first marriage agree to a provision for the father's second wife & their children, in his the son's own wrong, & who was at the time of the agreement ignorant of his right, & threatened by his father to be kept at home bare, & without any allowance, if he refused; but if he complied, he was to be allowed £200 a year for his maintenance, etc. The son was relieved, & the agreement set aside.—*SCROPE v. OFFLEY* (1736), 1 Bro. Parl. Cas. 276; 2 Eq. Cas. Abr. 54; 1 E. R. 565, H. L.

*Annotations:—**Mentd.* *Hervey v. Hervey* (1739), 1 Atk. 561; *Zouch d. Woolston v. Woolston* (1761), 2 Burr. 1136; *Nottidge v. Dering, Raban v. Dering*, [1910] 1 Ch. 297.

851. ——— To exercise power of appointment to detriment of children.]—If a father, possessing a power of appointment among children, induces them, by threats of using that power of appointment in a particular manner to join in securities for his relief from pecuniary embarrassments, that is an exercise of undue influence. To affect the person to whom the security is given, with notice of that undue influence, it is not enough to show that he or his agents were aware of the reluctance of the children to concur in the security.—*RHODES v. COOK* (1826), 2 Sim. & St. 488; 4 L. J. O. S. Ch. 147; 57 E. R. 432.

*Annotation:—**Refd.* *Baker v. Bradley* (1854), 2 Sm. & G. 531.

852. ——— Children joining in sale of reversionary interest—Purchase money not received by children.]—(1) Where tenants for life, being the father & mother of children, induced them to join in a conveyance of their reversionary interests in certain property, but the children received none of the purchase-money, & the trustee of the property refused to concur in the conveyance, a bill to complete the transaction filed by the purchaser, against the trustee, & the children after the death of the surviving parent, was dismissed; but without costs, except as to the trustee.

(2) The burden of proof that such a transaction was originally a fair one, rests upon the party seeking to complete it.—*HANNAH v. HODGSON* (1861), 30 Beav. 19; 30 L. J. Ch. 738; 5 L. T. 42; 7 Jur. N. S. 1092; 9 W. R. 729; 54 E. R. 705.

853. ——— Sale by child to parent after attaining majority—In consideration of advances during minority & present advance.]—(1) A son attained twenty-one in 1855, & in 1857 he conveyed to his father his reversionary estate & interest, in consideration of moneys advanced for his commission, outfit & debts during his minority, & a further sum of £500 then advanced:—*Held*: the deed could not stand except as a security for the £500.

(2) Transaction between father & son, seven years after the latter came of age, by which the father obtained a benefit of £5,790 in the event of the son dying without children, supported; there being a valuable consideration on the part of the father, the settlement being a fit & proper family arrangement, & the transaction not having been impeached until after the death of the father.—*POTTS v. SURR* (1865), 31 Beav. 543; 13 W. R. 909; 55 E. R. 745.

854. ——— Settlement by daughter on marriage—Interest taken by parent.]—A father living on affectionate terms with his daughter is the proper person to recommend & advise her, & her natural agent in matters relating to the preparation & provisions of her marriage settlement, & there is no occasion for any independent legal advice, beyond that of the family solr., who is preparing the settlement. If, however, the father is taking under the settlement a benefit from the daughter, she ought to be separately advised.—*TUCKER v. BENNETT* (1887), 38 Ch. D. 1; 57 L. J. Ch. 507; 58 L. T. 650, C. A.

*Annotation:—**Mentd.* *Bonhote v. Henderson*, [1895] 2 Ch. 202.

855. Whether relationship conclusive of presumption—Arrangement concerning reversionary interest.]—The relation of father & daughter does not of itself render the validity of an arrangement, between persons thus related respecting a reversionary interest of the daughter so doubtful as to justify a trustee in refusing to transfer a fund, in pursuance of the arrangement, without the indemnity of the ct.—*FIRMIN v. PULHAM* (1848), 2 De G. & Sm. 99; 11 L. T. O. S. 43; 12 Jur. 410; 64 E. R. 45.

*Annotations:—**Refd.* *Cockcroft v. Sutcliffe* (1856), 25 L. J. Ch. 313; *De Witte v. Addison* (1899), 80 L. T. 207.

856. Onus of proof—On party alleging fairness of transaction—Sale by parent claiming by purchase from sons.]—The father, vendor, claimed

PART III. SECT. 2, SUB-SECT. 2.—B.

o. When presumed—Insufficient consideration.]—Where a father obtained a conveyance of the interest of his sons under a marriage settlement for an

alleged consideration which did not exceed one-fifth of the value of such interest, & was never paid; after the death of settlor & one of the sons, in a suit by the devisees of deceased

son:—*Held*: transaction would be set aside.—*MCGREGOR v. RAPKLE* (1871), 17 Gr. 38; 18 Gr. 446.—*CAN.*

p. — *Child charging property as security for debt of parent.]*—*COX v.*

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the estate by purchase from his son; the purchaser is entitled to evidence of the fairness of the transaction.—*BOSWELL v. MENDHAM* (1822), 6 Madd. 878; 56 E. R. 1134.

—*HANNAH v. HODGSON*, No.

852, *ante*.

858. —Where the relation of two persons is such as to enable, one to exercise an influence over the other, & the former obtains a considerable benefit from the latter, he must if the transaction is questioned, show by the clearest evidence, that the gift was freely & deliberately made.

Where, therefore, a lady of about twenty-three years of age, gave about a third of her property to her father, & the father failed to show that the gift was made without any influence on his part, the transaction was set aside.—*DAVIES v. DAVIES* (1863), 4 Giff. 417; 2 New Rep. 384; 9 L. T. 162; 9 Jur. N. S. 1002; 11 W. R. 1040; 66 E. R. 769.

Annotation:—*Reid. Baker v. Loader* (1872), L. R. 16 Eq. 49.

859. Rebuttal of presumption — Bond executed in parent's absence.]—A son in plentiful circumstances gives his father a bond to pay him £120 annuity for his life; if done freely & without coercion, good; & what words or circumstances will not be construed a coercion.

The son without the priority of his father, & in his absence executed the bond, & directed it to be delivered to his father, so that for ought appears it was his free act (*per Cur.*)—*BLACKBORN v. EDOLEY* (1719), 1 P. Wins. 600; 24 E. R. 534, L. C.

Annotations:—*Mentd. Lethoullier v. Tracey* (1754), Amb. 220; *Stanley v. Lennard* (1758), 1 Eden, 87; *Campbell v. Harding* (1831), 2 Russ. & M. 390; *Tarbock v. Tarbock* (1835), 4 L. J. Ch. 129; *Ellicombe v. Gompertz* (1837), 3 My. & Cr. 127; *Baker v. Tucker* (1850), 3 H. L. Cas. 106; *Key v. Key* (1853), 4 De G. M. & G. 73; *Towns v. Wentworth* (1858), 11 Moo. P. C. C. 526.

860. — Sale by child to parent — Adequate consideration.]—*POTTS v. SURR*, No. 853, *ante*.

ADAMS (1904), 35 S. C. R. 393; 25 C. L. T. Occ. N. 25.—CAN.

q. — — — — —.]—*M'MACKIN' v. HIBERNIAN BANK*, [1905] 1 I. R. 296.—IR.

r. — — — — — Age immaterial.]—*AHEARN v. AHEARN* (1910), 45 I. L. T. 28.—IR.

PART III. SECT. 2, SUB-SECT. 2.—C.

868 i. Brother-in-law & sister-in-law.]—*CLARKE v. HAWKE* (1863), 11 Gr. 527.—CAN.

868 ii. — — — — —.]—*LOCKHART v. LOCKHART* (1890), 22 N. S. R. (10 R. & G.) 333.—CAN.

868 iii. — — — — —.]—Where a widow, having for valuable consideration released by deed all claim on her husband's estate to her husband's brother five days after the death of her husband, brought a suit to set aside the deed:—*Held*: the questions to be decided were whether undue advantage had been taken of pltf.'s position; whether pltf. had been sufficiently informed as to her rights or had proper advisers; & whether the contract was an unconscionable or catching bargain.—*BUCHI RAMAYYA v. JAGAPATHI* (1884), 1 L. R. 8 Mad. 304.—IND.

i. Uncle & niece.]—An infant, entitled to real estate, was brought up by her uncle, & previous to her attaining twenty-one he had obtained her

promise to convey to him one of two lots of land left by her father, asserting that he had advanced money for their purchase. After her marriage the niece, feeling herself bound by this promise, conveyed the lot selected by her uncle, which was much more valuable than the other. The money, if any, paid was much less than the value of the lot conveyed:—*Held*: the conveyance would be set aside having been obtained by undue influence.—*MCGONIGAL v. STOREY* (1867), 14 Gr. 94.—CAN.

s. Step-brothers.]—*DENISON v. DENISON* (1867), 13 Gr. 114, 396.—CAN.

t. Widow & sons-in-law.]—*WALLIS v. ANDREWS* (1869), 16 Gr. 624.—CAN.

a. Brothers & sisters.]—A farmer died intestate leaving two sons & two daughters, & considerable property, most of which was in the possession of one of the sons. After the funeral, through the influence & importunity of the sons, & without full or correct information as to the value of the estate, one daughter, in her husband's absence, & without any independent advice, transferred her interest in the estate to the son in possession, in consideration of a note for one-fifth of the value of her share, payable in six years, without interest. There were moral reasons why she should have made a generous settlement with this son, but the settlement having been

obtained as stated:—*Held*: not binding.—*CASSIE v. COCHRANE* (1873), 20 Gr. 545.—CAN.

862. Loss of right to impeach — By delay.]—*WILLOUGHBY v. BRIDEOAKE, BRIDEOAKE v. LEES*, No. 969, *post*.

863. — — — — —.]—*POTTS v. SURR*, No. 853, *ante*.

864. — — — — — Re DRAYSON, LISTER v. LISTER (1888), 4 T. L. R. 732.

See, further, CONTRACT, Vol. XII., pp. 101 et seq.

C. Quasi-parental, Fraternal, etc.

865. Grandparent & grandchild.]—Where a person, by a deed, eight days before his death, grants a benefit to his grandson & son-in-law, there is no such confidential relation as to induce this ct. to presume fraud.—*BEANLAND v. BRADLEY* (1854), 2 Sm. & G. 339; 2 W. R. 602; 65 E. R. 427.

866. Father-in-law & son-in-law.]—*BEANLAND v. BRADLEY*, No. 865, *ante*.

867. Step-father & step-daughter — Voluntary settlement—No benefit taken by step-father.]—*MARA v. RAY*, [1872] W. N. 127.

868. Brother-in-law & sister-in-law.]—*GROSVENOR v. SHERRATT*, No. 831, *ante*.

869. Uncle & niece.]—*GROSVENOR v. SHERRATT*, No. 831, *ante*.

See, further, CONTRACT, Vol. XII., pp. 104, 105.

D. Spiritual Adviser and Devotee.

870. General rule.]—*HOGHTON v. HOGHTON*, No. 835, *ante*.

871. — — — Confessor & penitent.]—*PARFITT v. LAWLESS*, No. 834, *ante*.

See, generally, CONTRACT, Vol. XII., pp. 105, 106.

obtained as stated:—*Held*: not binding.—*CASSIE v. COCHRANE* (1873), 20 Gr. 545.—CAN.

PART III. SECT. 2, SUB-SECT. 2.—D.

870 i. (General rule.)—A., being about eighteen years old, entered a convent & when of full age assigned nearly all her property to the nuns for the convent's benefit. Later A. quitted the convent & filed a bill to set aside the assignment:—*Held*: these transactions fall within the principle of the cases of guardian & ward, which decide that dealings between them ought not to stand.—*WHYTE v. MEADE* (1840), 2 L. Eq. R. 420.—IR.

871 i. — — — Confessor & penitent.]—*KERWAN v. CULLEN* (1854), 4 I. Ch. R. 322.—IR.

b. Where influence exercised by strangers to grantee—Also consideration substantial.]—Pltf. having obtained a verdict & judgment against deft. in an action for seduction, while an appeal by deft. was pending, executed a release of judgment, upon deft. paying pltf.'s costs. Pltf. was induced to do this by the persuasions of the bishop, & H., a member of a church to which pltf. belonged, & by their threats that otherwise he would be expelled from the church, the tenets of which forbade the members to go to law. The bishop & H. acted in good faith, from religious motives, & were not in any sense agents of deft.:—*Held*: the consideration

E. Guardian and Ward.

872. General rule.]—GODDARD v. CARLISLE, No. 833, *ante*.

873. —.]—HOGHTON v. HOGHTON, No. 835, *ante*.

874. —.]—PARFITT v. LAWLESS, No. 834, *ante*.

875. Application of rule—Whether confined to ordin legally constituted.]—GRIFFIN v. DE BRULLE (1781), cited in 14 Ves. at p. 283; 3 P. Wms. at p. 131, n.; 33 E. R. 530.

876. When presumed—Gift by ward to guardian—Ward just of age.]—Gift of annuity to guardian or trustee soon after coming of age set aside upon general principles of public utility, & here also on particular circumstances of imposition. A person, however, may bind himself, soon after coming of age, under proper circumstances, as if, being actually in possession, & quite *sui juris*, he makes such a grant by way of reward.—HYLTON v. HYLTON (1754), 2 Ves. Sen. 547; 28 E. R. 319, L. C.

Annotation:—*Reid*. Wood v. Downes (1811), 18 Ves. 120.

877. —.]—A gift by a ward to her guardian, shortly after her attaining her majority, will be set aside by a ct. of equity.—FAULKNER v. SALMON (1831), 9 L. J. O. S. Ch. 155.

878. Rebuttal of presumption—Sale by ward to guardian—Adequate consideration.]—What acts of a guardian with respect to an infant's estate shall be good. If he gave a full consideration for his ward's estate, it will not be set aside.—OLDIN v. SAMBORN (1737), 2 Atk. 15; 26 E. R. 406, L. C.

879. — Grant by way of reward.]—HYLTON v. HYLTON, No. 876, *ante*.

See, further, CONTRACT, Vol. XII., pp. 106, 107.

F. Husband and Wife.

880. General rule.]—PARFITT v. LAWLESS, No. 834, *ante*.

See, generally, HUSBAND & WIFE.

for the release being substantial, & the influence to obtain it having been exercised without deft.'s knowledge, & for a purpose entirely foreign to him, the release was binding on plff., even though the spiritual influence exercised, was undue influence, which was doubtful.—LEHMAN v. KESTER (1909), 18 O. L. R. 395; 13 O. W. R. 346, 1205.—CAN.

PART III. SECT. 2, SUB-SECT. 2.—E.

872 i. General rule.]—In the case of adult *cestuis que trust*. Equity will sanction dealings between them & their trustees in certain cases, but not so in the case of infants where the interest of the guardian, next friend, or trustee, is clearly in conflict with his duty. It will not be permitted that a person occupying a fiduciary relation of any nature whatsoever towards an infant shall place himself or be placed in a position in which his interest can possibly conflict with his duty.—LARNACH v. ALLEYNE (1862), 1 W. & W. 342.—AUS.

c. When presumed—Ward charging property as security for debt of guardians.]—Beneficiaries under a settlement were induced by relatives, by whom they had been brought up, to sign promissory notes given by the relatives to a creditor, & under pressure of legal proceedings to assign their

interest in the settled lands, which were in the possession of the relatives, to enable them to mortgage the lands to the creditor. The beneficiaries were only just of age, ignorant of their rights, & without any effective legal advice:—*Held*: the transaction was procured by undue influence, & was unfair, & the assignment & mortgage set aside.—O'CONNOR v. FOLEY, [1905] 1 I. R. 1.—IR.

d. Rebuttal of presumption—Bond by ward to guardian.]—Where a bond passed by a nephew to his uncle, a solr. who had brought him up, was admitted to be without pecuniary consideration, on bill by the nephew alleging fraud:—*Held*: valid, although the transaction was suspicious.—ITONS v. STEELE (1838), 1 I. Eq. R. 171.—IR.

(Gift by way of gratitude.)—A gift by a ward to a guardian is presumed to be invalid on the ground of undue influence. To support it the guardian must prove some free voluntary motive for it, such as gratitude or affection. A gift made in order to obtain the consent of the guardian to the marriage of the ward is void & incapable of ratification.—HAYES v. ANDERSON (1912), 8 R. 25.—S. AF.

PART III. SECT. 2, SUB-SECT. 2.—G.

f. General rule.]—The ct. will not support a deed, where an attorney is

G. Legal Adviser and Client.

881. Counsel & client—Acting as confidential advisers.]—H., a widow, letting lodgings for her livelihood, but having expectations of considerable property which would devolve to her upon the intestacy of an aunt, who was in a state of imbecility, induced M., who was lately called to the Irish Bar, upon a promise to give him a third of the property when realised, to assist her in obtaining a commission of lunacy against the aunt, & getting herself appointed committee of the person & estate of the lunatic. This engagement, so far as related to the division of the property, was embodied in a deed, dated in 1818, assigning to M. one-third of the property which H. should become entitled to on the death of her aunt. M. accordingly, with the assistance of his brothers, of whom one was a physician & the other a student in surgery, aided H. in attaining this object, & counteracting the opposition of an adverse attorney, of whose influence H. had great dread. In his co-operation to this end, M. incurred much expense, & suffered loss in his professional & other pursuits. He was also engaged by H. to reclaim a son of H., who had run away from school, & enlisted in the army as a private soldier. This son was placed under the care & inspection of M., but his board, etc., was paid for by H. The commission having been obtained, H., upon the death of her aunt, sold out one moiety of the govt. funds which constituted the bulk of the property, & paid over the proceeds to M.; the other moiety of the funds was afterwards transferred by H. to M. The whole amount transferred was £33,000 3 per cents. & £3,000 East India Stock. In 1819, shortly after the date of the transfer, mutual releases were executed between H. & M. In 1822, H. filed a bill stating the facts, & that she had brought an action against M. for £21,538, being, as she calculated, the proceeds of two-thirds of the funds transferred & possessed by him, & praying that he might be restrained from setting up the release as a defence to the action; that it might be declared fraudulent & void, & delivered up to be cancelled. M., by his answer setting forth services he had performed on behalf of H.

the purchaser, his client the vendor, & the consideration untruly stated.—UPPINGTON v. BULLEN (1842), 2 Dr. & War. 184.—IR.

g. —.]—As a general rule, the preparation of a deed by a law-agent in his own favour raises a presumption unfavourable to the validity of the deed. GIBBY v. CUNNINGHAM (1869), 42 Sc. Jur. 140.—SCOT.

h. Solicitor & client—Want of independent advice.]—An old man whose mental faculties were impaired by age, applied for advice to the attorney of persons against whom he had recovered a judgment; the attorney obtained from him a release of debtors without any consideration, & without his having any advice in regard to the transaction; & the only evidence was that of the attorney himself, the client being dead:—*Held*: the release could not be maintained in equity.—DEWAR v. SPARKING (1871), 18 Gr. 633.—CAN.

i. —.]—Low v. HOLMES (1858), 8 I. Ch. R. 53; Drury temp. Nap. 290.—IR.

l. —.]—ARMITAGE TRUSTEES v. ALLISON (1911), 32 N. L. R. 88.—S. AF.

m. Person offering to give legal advice—Capacity of grantor to act independently.]—R., the owner of premises,

Sect. 2.—Presumed undue influence: Sub-sect. 2, G., H., I., J., K., L. & M.]

stated a will made by H. under the advice of her solr., & various promises by her made by parol & in writing, to give to M., in consideration of the services, one-half instead of one-third of the property to which she should become entitled on the death of her aunt; & he contended, that under the subsequent agreements he was entitled to one-half by gift, admitting that he was a trustee for H. as to the other half of the funds. In Jan. 1823, H. filed an amended bill, making the brothers parties as accomplices in the fraud, but still as against M. praying only an account, & relief as to two-thirds of the funds, submitting, that in taking the account, a liberal remuneration should be allowed to the brothers. In Dec. 1823, H. filed a bill, said to be in the nature of a supplemental bill, praying that the deed of 1818, assigning to M. one-third, & the release, might be set aside & cancelled, & that he might account for all the funds transferred & moneys paid to him, without any allowance for services; & it was decreed accordingly, & this decree affirmed on appeal.—*MACCABE v. HUSSEY* (1831), 5 Bli. N. S. 715; 2 Dow. & Cl. 440; 5 E. R. 483, H. L.

Annotations:—Mentd. Attwood v. Small (1838), 6 Cl. & Fin. 232; Banco de Portugal v. Waddell (1880), 5 App. Cas. 161.

—.]—*See* BARRISTERS, Vol. III., pp. 334, 335; CONTRACT, Vol. XII., p. 107.

882. Solicitor & client.]—*GODDARD v. CARLISLE*, No. 833, *ante*.

See, further, SOLICITORS.

H. Persons Engaged to be Married.

See CONTRACT, Vol. XII., p. 107.

I. Medical Attendant and Patients.

883. General rule.]—*HOGHTON v. HOGHTON*, No. 835, *ante*.

884. —.]—*BENNET v. VADE* (1742), 2 Atk. 324; 9 Mod. Rep. 312; 26 E. R. 597; *sub nom.* *BENNET v. WADE, JONES v. WADE*, 1 Dick. 84, L. C.; *subsequent proceedings, sub nom.* *BENNET v. LEE* (1743), 2 Atk. 529, L. C.

Annotations:—Mentd. Bellamy v. Sabine (1835), 2 Ph. 425; Beadles v. Burch (1839), 9 L. J. Ch. 57; Middleton v. Sherburne (1841), 4 Y. & C. Ex. 358; Allen v. McPherson (1847), 1 H. L. Cas. 191; Jones v. Gregory (1863), 2 De G. J. & Sm. 83.

885. —.]—*PARFITT v. LAWLESS*, No. 834, *ante*.

886. —.]—An agreement was secretly entered into between a person in the eighty-sixth year of his age & his medical attendant, by which the patient, in consideration of the surgeon agreeing to attend him when necessary, during the remainder of his life, & of his past services, agreed that the surgeon should be entitled to receive £25,000 at

the death of the patient, to be paid by his exors. out of his personal estate. within six months after his decease. The agreement was, after the death of the patient, ordered to be given up to be cancelled.

Agreements entered into between medical attendants & their patients will be regarded by the ct. with jealousy.—*DENT v. BENNETT* (1839), 4 My. & Cr. 269; 8 L. J. Ch. 125; 3 Jur. 99; 41 E. R. 105, L. C.

Annotations:—Consd. Allen v. Davis (1850), 4 De G. & Sm. 133; Mitchell v. Homfray (1881), 50 L. J. Q. B. 460. *Reid.* Beanland v. Bradley (1854), 2 W. R. 602; Lyon v. Home (1868), L. R. 6 Eq. 655; Richards v. French (1870), 22 L. T. 327; Cavendish v. Strutt (1903), 19 T. L. R. 483. *Mentd.* Consett v. Bell (1842), 11 L. J. Ch. 401; Howes v. Bishop (1908), 25 T. L. R. 171.

887. When presumed—Inadequate 'consideration.]—Apothecary agreed to give his patient fifty guineas to receive five hundred, or an annuity of one hundred, if he should survive a year, which he did; bill against exors. dismissed as pltf. could not succeed at law; but without costs, on account of the money actually advanced which must have been repaid upon a bill to set aside the agreement.—*PRIESTLY v. WILKINSON* (1790), 1 Ves. 214; 30 E. R. 307, L. C.

888. —.]—*DENT v. BENNETT*, No. 886, *ante*.

889. — Untrue statement of consideration.]—A deed of gift of real estate from an aged & infirm person to his intimate friend & medical attendant, set aside for fraud; one of the circumstances in proof of fraud being that the deed stated, contrary to the truth, a money consideration.—*GIBSON v. RUSSELL* (1843), 2 Y. & C. Ch. Cas. 104; 7 Jur. 875; 63 E. R. 46.

890. Rebuttal of presumption—Patient aware of nature of deed—Deed fully explained by grantor's solicitor.]—The ct. refused to set aside a voluntary deed executed by an old & infirm man, in favour of a person who had attended him as a surgeon, & had been occasionally consulted by him respecting the management of his property, & received the dividends of some stock for him; it appearing that the nature & effect of the deed were fully explained to the grantor by his solr. before he executed it, & that he executed it of his own free will.—*PRATT v. BARKER* (1828), 4 Russ. 507; 6 L. J. O. S. Ch. 186; 38 E. R. 896, L. C.

Annotation:—Consd. Hunter v. Atkins (1834), 3 My. & K. 113.

891. —.]—A medical man obtained an agreement for the sale of land from his patient, an aged & infirm man. The testimony as to the value of the property was very conflicting. The ct. being of opinion that the patient was aware of the nature of the contract into which he was entering, decreed specific performance with costs.—*HOLMES v. HOWES* (1872), 20 W. R. 310.

See, further, CONTRACT, Vol. XII., pp. 107, 108.

leased them to E. & M., by a written indenture. Deft. M. offered to draw the lease for her, & did so, & it was executed by all the parties at the same time. The lease was read over to R. by M. on two separate occasions, & was given to R. to read for herself. R. was a middle-aged woman of property, & had been accustomed to transact all her own business, & manage her own property without assistance from any one, & it was not contended that she was not fully capable of making an agreement of this nature:—*Held*: the

lease would not be set aside as there was no fraud or misrepresentation; & deft. M. did not stand in any fiduciary relationship to R. by reason of his having drawn the lease, & the rule as to independent advice in such cases was not applicable here.—*ROBINSON v. ESTABROOKS & MCALARY* (1909), 4 N. B. Eq. Rep. 168; 7 E. L. R. 131.—*CAN.*

PART III. SECT. 2, SUB-SECT. 2.—I.

893 i. General rule.]—The relation

of a medical man to his patient is one of trust & confidence & he must act *bona fide* in advising him or any settlement made through him, or in consequence of advice given *malá fide*, it will be set aside.—*ROWE v. GRAND TRUNK RY. CO.* (1866), 16 C. P. 500.—*CAN.*

893 ii. —.]—*RALSTON v. TANNER* (1918), 43 O. L. R. 77.—*CAN.*

897 i. When presumed—Inadequate consideration.]—*AHEARNE v. HOGAN* (1844), Drury temp. Sug. 310.—*IR.*

J. Principal and Agent.

892. General rule.]—An instrument was executed in 1835, by which A. conveyed to B. all & singular the household furniture, silver plate, watches, china, glass, moneys, & securities for money of A., which should, at the time of the decease of A., be situate & lying in & upon two particular rooms in the mansion of A. A., by his will, dated in 1837, bequeathed all his plate, jewels, household furniture & effects whatsoever in this mansion to trustees, upon certain trusts. A died in 1839. B., who was the confidential servant of A., gave no explanation of the deed of 1835, & did not allege or set up any consideration for it:—*Held*: considering it as a deed *inter vivos*, it would not be aided in equity; & if it had effect at law, a ct. of equity would not allow it to stand.

The instrument is a singularly improvident one, & obtained by a confidential agent from a principal, without advice, & has been produced without any explanation (KNIGHT BRUCE, V.-C.).—CONSETT v. BELL (1842), 1 Y. & C. Ch. Cas. 569; 11 L. J. Ch. 401; 6 Jur. 869; 62 E. R. 1020.

Annotations:—*Mentd.* Finden v. Stephens (1846), 1 Coop. temp. Cott. 318; Stainton v. Carron Co. (1853), 18 Beav. 146; Alexander v. Brame (1855), 25 L. T. O. S. 298.

893. Deed drawn up by agent's solicitor.]—Gift by deed, subject to a power of appointment by the donor, from a person upwards of ninety years of age to a confidential agent, who had for many years been in habits of friendship with the donor, without the intervention of a disinterested third person, the solr. who drew the deed being the solr. of the person who took the benefit under it, declared void at the rolls; but supported under all the circumstances, upon appeal.—HUNTER v. ATKINS (1834), 3 My. & K. 113; Coop. temp. Brough. 464; 40 E. R. 43, L. O.

Annotations:—*Reid.* Edwards v. Meyrick (1842), 2 Haro. 60; Cooke v. Lamotte (1851), 15 Beav. 231; Hobday v. Peters (No. 1) (1860), 28 Beav. 349; Coutts v. Acworth (1869), L. R. 8 Eq. 558; Morgan v. Minett (1877), 6 Ch. D. 638.

See, generally, CONTRACT, Vol. XII., p. 108; AGENCY, Vol. I., p. 475, Nos. 1570, 1571.

K. Trustee and Cestui que trust.

894. General rule.]—GODDARD v. CARLISLE, No. 833, *ante*.

895. Executor & beneficiary.]—A gift to an exor. from a beneficiary will not be upheld save under exceptional circumstances—circumstances which negative any suspicion of misrepresentation, pressure, or unfairness on the part of the exor., & establish that the gift or promise was made by the beneficiary acting deliberately, & with a thorough knowledge & appreciation of what he is doing, & independently of any influence on the part of the exor., or fear consequent upon his position.—WHEELER v. SARGEANT (1893), 69 L. T. 181; 3 R. 663.

PART III. SECT. 2, SUB-SECT. 2.—J.

n. General rule.—Onus as to bona fides.]—There is nothing to prevent an agent from being the object of the bounty of his principal. If an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free & unfettered judgment with full knowledge of what he was doing, the gift will be upheld.—PHUL CHAND v. LAKKHU (1903), 1 L. R. 25 All. 358.—IND.

o. ———.]—KING v. ANDERSON (1874), 23 W. R. 196.—IR.

PART III. SECT. 2, SUB-SECT. 2.—M.

900 i. Man & mistress.]—Pltf., an infant, living with deft. as his mistress, handed him moneys part of which he invested, without her knowledge & consent, & alleged that deft. was a trustee for her:—*Held*: as pltf. was an infant, she could recover & the ct. would presume undue influence on the part of deft.—DESAULNIERS v. JOHNSTON (1909), 15 W. L. R. 20.—CAN.

900 ii. ———.]—A conveyance of land as a gift from A. to his mistress, on appeal dismissing an action to set

896. Trustee for sale—Purchasing & reselling at profit.]—Among the various acts which in a ct. of equity constitute fraud, the abuse of confidence is one. A. reposing an unlimited confidence in B. makes him a trustee of his estates, for the purpose of paying his debts; B. at the same time negotiates with A. for the absolute sale of those estates to himself, & obtains a conveyance at an under value; B. afterwards sells the estates at a very advanced price. This conduct of B. was held to be fraudulent, & he was decreed to account to A. for the advanced price, with interest & costs; although it appeared, that the purchaser at the advanced price was a considerable loser by his bargain.—MACKRETH v. FOX (1791), 4 Bro. Parl. Cas. 258; 2 E. R. 175, H. L.; *affg.* S. C. *sub nom.* FOX v. MACKRETH (1788), 2 Bro. C. C. 400, L. O.

Annotations:—*Reid.* Hardwicke v. Vernon (1799), 4 Ves. 411; Gibson v. Jeyes (1801), 6 Ves. 266; *Ex p.* Lacey (1802), 6 Ves. 625; *Ex p.* James (1803), 8 Ves. 337; Coles v. Trecothick (1804), 9 Ves. 234; *Ex p.* Bennett (1805), 10 Ves. 381; Randall v. Errington (1805), 10 Ves. 423; A.-G. v. Dudley (1815), Coop. G. 146; Baker v. Peck (1860), 3 L. T. 656; Walters v. Morgan (1861), 3 De G. F. & J. 718; Pell v. Midland Counties & South Wales Ry. (1869), 20 L. T. 288; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130. *Mentd.* Emma Silver Mining Co. v. Lewis (1879), 4 C. P. D. 396.

See, generally, TRUSTS & TRUSTEES.

L. Lunatic and Custodian.

See LUNATICS.

M. Other Relationships.

897. Barrister & acquaintance.]—MACCABE v. HUSSEY, No. 881, *ante*.

898. Aged lady & companion.]—BATE v. BATE, No. 821, *ante*.

899. Widower after marriage with deceased wife's sister.]—Where a widower married the sister of his deceased wife:—*Held*: (1) the relation thus constituted imposed upon the widower, claiming the benefit of a settlement made on him by his wife's sister, the *onus* of showing that at the time of entering into the transaction she was fully, fairly & truly informed of its character & of her legal status; (2) such a marriage & consequent cohabitation was not a sufficient consideration to support a conveyance by the wife's sister of her property to the widower absolutely.—COULSON v. ALLISON (1860), 2 De G. F. & J. 521; 3 L. T. 703; 45 E. R. 723, L. O.

Annotations:—*As to* (2) *Consd.* Phillips v. Probyn, [1890] 1 Ch. 811. *Reid.* Chapman v. Bradley (1863), 33 Beav. 61. *Generally, Reid.* Ayerst v. Jenkins (1873), L. R. 10 Eq. 275.

900. Man & mistress.]—JAMES v. HOLMES, No. 842, *ante*.

901. Nephew & aunt.]—A conveyance by an aunt to her nephew, without any consideration, of all her real estates, reserving a life-estate only to

it aside on the grounds of undue influence:—*Held*: pltf. knew what he was doing & there had been no duress or undue influence exercised by recipient.—CRIPPS v. WORSNER, [1917] 2 W. W. R. 1072; 36 D. L. R. 80.—CAN.

901 i. Nephew & aunt.]—SIVITHRI ANDARJANOM v. VARUDEVAN NAMBU-DRIPAD (1881), 1 L. R. 3 Mad. 215.—IND.

p. Employer & housekeeper.—Under-value only.]—A widow, to whom dower had been assigned, agreed with

Sect. 2.—Presumed undue influence: Sub-sect. 2, M. Sect. 3: Sub-sect. 1.]

herself, & containing no power of revocation, supported, it appearing that the proposal had emanated from the aunt; that the deed had been prepared, on her instructions, by the family solr.; that it had been fully explained to her, & that the nephew had possessed no further influence than that arising from his aunt's attachment for & confidence in him.—*TOKER v. TOKER* (1863), 3 De G. J. & Sm. 487; 32 L. J. Ch. 322; 8 L. T. 777; 46 E. R. 724, L. JJ.

*Annotations:—*Reid. *Townend v. Toker* (1866), 12 Jur. N. S. 477; *Countts v. Acworth* (1869), L. R. 8 Eq. 558; *Hall v. Hall* (1873), 8 Ch. App. 430.

902. Spinster & brother's agent.]—Where pltf., a single woman, was informed by her brother's agent that on his death she had succeeded to a small estate of which she knew nothing, & on the agent's representations of its value, which were inaccurate, & without legal advice, she conveyed the estate for an inadequate sum to the agent's daughter:—*Held*: the deed should be set aside with costs. There was no such relation between the parties as to incapacitate the agent from purchasing.—*HAYGARTH v. WEARING* (1871), L. R. 12 Eq. 820; 40 L. J. Ch. 577; 24 L. T. 825; 36 J. P. 132; 20 W. R. 11.

*Annotation:—*Reid. *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312.

See, generally, CONTRACT, Vol. XII., pp. 108, 109.

SECT. 3.—UNCONSCIONABLE BARGAINS.

SUB-SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), s. 174.

903. General rule.]—*CHESTERFIELD (EARL) v. JANSSEN*, No. 811, *ante*.

904. What court will consider—General rule.]—In determining whether a contract is a "hard bargain" the ct. will not, if there be valuable consideration, consider whether the consideration is sufficient, but whether one party has taken an unfair advantage of the position of the other party.—*MIDDLETON v. BROWN* (1878), 47 L. J. Ch. 411; 38 L. T. 334, O. A.

905. Absence of consideration.]—Relief against a bill of exchange said to be for value received, but gained by fraud, & for a fictitious consideration.—*DYER v. TYMEWELL* (1690), 2 Vern. 123; Freem. Ch. 112; 1 Eq. Cas. Abr. 126; 23 E. R. 688.

906. Inadequacy of consideration.]—*ARD-GLASSE (EARL) v. MUSCHAMP* (1684), 1 Vern. 237;

23 E. R. 438; *sub nom. ARGLAS (EARL) v. MUSCHAMP*, 2 Rep. Ch. 266.

*Annotations:—*Reid. *Barnardiston v. Lingood* (1740), 2 Atk. 133; *Chesterfield v. Janssen* (1750), 1 Atk. 301; *Gwynne v. Heaton* (1778), 1 Bro. C. C. 1; *Bowes v. Heaps* (1814), 3 Ves. & B. 117. *Mentd. Baugh v. Price* (1752), 1 Wils. 320; *Hawes v. Wyatt* (1790), 2 Cox, Eq. Cas. 263.

907. —.]—One just come of age, entitled to an estate of £3,000 *per annum* being drawn into a statute for £1,000 upon which he received only £300 is relieved upon the circumstances of fraud.—*SMITH v. BURROUGHS* (1696), 2 Vern. 346; 23 E. R. 820.

908. —.]—Lands of £353 *per annum* were devised in trust for the sole & separate use of K. during the joint lives of herself & her husband; the husband being afterwards outlawed for high treason, these lands became forfeited, & were granted by the Crown to S. his brother, subject to all legal & just incumbrances. S. having withheld the rents of these lands from K. whereby she was reduced to great necessity she was prevailed upon to release the same to S., in consideration of £100 paid down, though the arrears amounted to £1,200, & an annuity of £200 *per annum* during the joint lives of herself & her husband. This release was set aside as fraudulent & S. decreed to account for the whole of the rents & profits.—*AMORY v. LUTTRELL* (1710), 4 Bro. Parl. Cas. 159; 2 E. R. 108, H. L.

909. —.]—Inadequacy of price alone not sufficient to set aside an agreement.—*ANON.* (1787), cited in 2 Dick. 689; 21 E. R. 439.

910. —.]—*STILWELL v. WILKINS*, No. 825, *ante*.

911. —.]—Where a purchaser, who was a solr., after viewing a farm, & being informed of the rent at which it was let, agreed to buy at £5,000:—*Held*: (1) the difference between this price & £3,500, which the ct. considered to be the value of the property, was not so great as to shock the conscience, & thus constitute of itself a defence, on the ground of exorbitancy, to a suit of the vendor for a specific performance; (2) the omission on the part of the vendor to inform the purchaser of the result of a late valuation, or of the tenant having complained of the rent being excessive, & of the full amount not having been exacted, did not constitute a defence to such a suit.—*ABBOTT v. SWORDER* (1852), 4 De G. & Sm. 448; 22 L. J. Ch. 235; 19 L. T. O. S. 311; 64 E. R. 907, L. C.

*Annotation:—*Generally, *Reid. Abbott v. Calton* (1853), 22 L. J. Ch. 936.

912. —.]—*LONGMATE v. LEDGER*, No. 809, *ante*.

913. — Apart from fraud.]—The suit was to avoid a conveyance by fine & deed to lead the

A. by whom she was employed as housekeeper, to convey the same to him in trust for his infant son, to whom she was much attached, in consideration of a sum for which the widow's lands were answerable, & were liable to be sold, & also an annuity secured to her; the consideration, however, not being at all equal to the value of the property:—*Held*: in the absence of proof of any undue influence, the ct. refused to set aside the agreement as against the infant.—*GOURLAY v. RIDDELL* (1866), 13 Gr. 518.—CAN.

q. Husband & father-in-law.]—*PEGG v. EASTMAN* (1867), 13 Gr. 137.—CAN.

PART III. SECT. 3, SUB-SECT. 1.

r. What court will consider.]—The principles of justice, equity & good conscience do not of necessity disentitle a mtgee. from insisting on security for a greater sum than what has been actually advanced: in each case the question must be asked whether there has or has not been a hard & unfair bargain on the borrower.—*HARI v. RAMJI* (1904), 1 L. R. 28 Bom. 371.—IND.

906 i. Inadequacy of consideration.]—Mere inadequacy of consideration, unless it be so great as to amount to evidence of fraud, is not sufficient

ground for setting aside a contract, or refusing to decree specific performance of it, unless found in conjunction with such other circumstances as suppression of true value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding or even ignorance.—*KEDARI RANU v. ATMAR-AMBHAT* (1866), 3 Bom. A. C. 11.—IND.

913 i. — Apart from fraud.]—Fraud apart, a loan to a *purda-nashin* woman from her own *mukhtear* at an exorbitant rate of interest, the security being ample, may be a hard & un-

uses of the fine twenty-three years since, on supposition of fraud, purchasing the fee of the land for £11 worth £60 *per annum*; pltf. ignorant of the value, but deft. well apprised thereof; & pltf. ignorant also of his title, which he came to the notice of after the fine. The bill was dismissed.

If one will seal a release or other assurance to one in possession, for never so unequal consideration, it shall not be relieved, because of a new title discovered, unless there be some special fraud; as if A. having title, & B. in possession; B. conveys the land to A. in trust for B. & then gets A. to convey the land to him as in execution of the trust, whereby A. extinguishes his title, etc. (LORD GUILFORD, LORD KEEPER).—*HOBERT v. HOBERT* (1683), 2 Cas. in Ch. 159; 22 E. R. 893.

914. ———.] — *SMITH v. DOWNING*, No. 817, *ante*.

915. ———.] — Deed set aside as improvidently obtained, being obtained for an inadequate consideration from persons in low circumstances, & unapprised of their right until the time of the transaction, though no misrepresentation or actual fraud whatever appeared to have been made use of.

The party was taken by surprise; he had not sufficient time to act with caution; & therefore, though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation (LORD KENYON, M.R.).—*EVANS v. LEWELLIN* (1787), 1 Cox, Eq. Cas. 333; 2 Bro. C. C. 150; 29 E. R. 1191.

Annotations.—*Apld.* *Baker v. Monk* (1864), 4 De G. J. & Sm. 388. *Reid.* *Watkin & Bligh v. Brent* (1836), 1 Curt. 264; *Curson v. Belworthy* (1852), 3 H. L. Cas. 742; *O'Rourke v. Bolingbroke* (1877), 2 App. Cas. 814; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312; *Barnes v. Richards* (1902), 71 L. J. K. B. 341.

916. ———.] — M. being in embarrassed circumstances, in consideration of a loan of £900, made a lease to D., with covenant for perpetual renewal, of lands of the yearly value of from £400 to £500, at a rent of £150 subject to a private parole agreement, that M. might redeem within two years, on payment of £1,300. S., knowing the circumstances, with the consent of M., purchased the interest of D., to whom S. paid the £1,300. S. afterwards purchased the whole interest of M., in these & other lands, for the additional sum of £3,706, the clear profit rent at which the lands were let in the year following being £600 a year besides other advantages. M. having consented to the purchase from D., having had opportunities of being perfectly acquainted with the value of the lands, having acted deliberately, & no fraud appearing:—*Held*: there was no ground for setting aside the transaction.—*MEREDITHS v. SAUNDERS* (1814), 2 Dow, 514; 3 E. R. 950, H. L.

917. ———.] — *Parties not in fiduciary relationship*.]—Where no fiduciary relation exists between two parties dealing for the sale & purchase of an estate, mere inadequacy of consideration or irregularity in the statement of it in the deed of conveyance is not sufficient to impeach the contract.

A. was the possessor of a small property in land. B., a neighbouring landowner, had formerly offered to purchase the property, but his offer

had been refused. A. grew old, & became ill: he proposed some arrangement; & the land was conveyed to B. The deed of conveyance truly recited an advance of money to pay off a mtge. on the land, & then it recited other money considerations. Instead of these money considerations, the real agreement was that B. should allow A. to live in a certain cottage, occupied by one of B.'s tenants, providing him there a bedroom & sitting-room & attendance, & supplying him with food from B.'s table. This deed was prepared by B.'s solr.: it was sworn in evidence that A. had refused to have another solr. called in, & that the statements of the latter class of money considerations in the deed were only made as a security to A. in case the board & lodgings, etc., should not be properly provided. In a suit by persons whom many years before he had made his devisees to set aside this deed of conveyance:—*Held*: there being no actual fraud proved though it was charged, the irregularities in the statements contained in the deed were not sufficient to make a court of equity set aside the transaction.—*HARRISON v. GUEST* (1860), 8 H. L. Cas. 481; 11 E. R. 517, H. L.; *affg.* (1855), 6 De G. M. & G. 424, L. C.

Annotations.—*Consd.* *Denton v. Donner* (1856), 23 Beav. 285. *Distd.* *Baker v. Monk* (1864), 4 De G. J. & Sm. 388. *Apld.* *Rosher v. Williams* (1875), L. R. 20 Eq. 210. *Reid.* *Clark v. Malpas* (1862), 31 Beav. 80; *Summers v. Griffiths* (1866), 35 Beav. 27; *Baker v. Loader* (1872), L. R. 16 Eq. 49; *Hilliard v. Elffe* (1874), L. R. 7 H. L. 39; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312.

— Coupled with infirmity or incapacity of grantor.]—*See* Sect. 1, *ante*.

918. ———.] — *As evidence of fraud*.]—Though etc. of equity will not relieve against agreements, merely on the ground of the consideration being inadequate; yet if there be such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him which may amount to a fraud.—*KENRICK v. HUDSON* (1773), 4 Bro. Parl. Cas. 222; 2 E. R. 151, H. L.

Annotation.—*Reid.* *Douglas v. Culverwell* (1861), 3 Giff. 251.

919. ———.] — *Assignment of prize-money*.]—Assignment for sailor's share of prize-money at great under-value, set aside for fraud, but still to stand as security for what really advanced.—*How v. WELDON & EDWARDS* (1754), 2 Ves. Sen. 516; 28 E. R. 330.

Annotation.—*Reid.* *Falcke v. Grey* (1859), 29 L. J. Ch. 28.

920. ———.] — *Grant of annuity*.]—Taking an annuity worth nine years' purchase at five years, it is an unconscientious bargain, & the ct. will give the taker no assistance in a bargain for a repurchase.—*VAUGHAN v. THOMAS* (1783), 1 Bro. C. C. 556; 28 E. R. 1296.

Annotation.—*Consd.* *Falcke v. Gray* (1859), 4 Drew. 651.

921. ———.] — An annuity being purchased for four years' purchase, on a life of thirty subject slightly to the gout set aside for inadequacy of price.

If there is such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it knowing its inadequacy, it will show a command

Sect. 3.—Unconscionable bargains: Sub-sects. 1 & 2, A.]

over him which may amount to fraud (LORD THURLOW, C.).—HEATHCOTE v. PAIGNON (1787), 2 Bro. O. C. 167; 29 E. R. 96, L. C.

Annotations:—Consd. Griffith v. Spratley (1787), 1 Cox, Eq. Cas. 383; Falcke v. Gray (1859), 4 Drew. 651. **Reid.** Day v. Newman (1788), 2 Cox, Eq. Cas. 77; Gibson v. Jeyes (1801), 6 Ves. 266; Low v. Barchard (1803), 8 Ves. 133; Underhill v. Horwood (1804), 10 Ves. 209; Ware v. Horwood (1807), 14 Ves. 28; Pennell v. Millar (1857), 23 Beav. 172; Douglas v. Culverwell (1861), 3 Giff. 251. **Mentd.** Hoffman v. Cooke (1800), 5 Ves. 623; Re Temple, Ex p. Thistlewood (1812), 1 Rose, 290.

922. ———.]—Bill to redeem an annuity secured on land. Pltfs. rested on inadequacy of the price & also on the situation of pltfs. at the time of the transaction, having been in the greater distress, in prison & in want of common necessities. The ct. directed the Deputy Remembrancer to report what was the market price of the annuity at the time, but expressly protested against this being understood as a declaration of their opinion that inadequacy of price would alone be held a sufficient ground to set aside the annuity. On the report it appeared that the price given was very nearly the market price at the time and the bill was dismissed.—BARNARD v. FLINT (1793), 3 Anst. 733, n.; 145 E. R. 1022.

923. ——— Inadequacy alone insufficient.]—Mere inadequacy of value is not a sufficient ground to set aside an annuity.—SPEED v. PHILIPS (1796), 3 Anst. 732; 145 E. R. 1022.

924. ——— Inadequacy the result of subsequent events.]—To form a case for relief on the ground of oppression on the one side, & distress on the other, the disadvantage of the bargain must be within the view of the parties.—RAMSBOTTOM v. PARKER (1821), 6 Madd. 5; 56 E. R. 990.

——— **As ground for refusing specific performance.]—**See SPECIFIC PERFORMANCE.

925. Grantor in distressed circumstances.]—AMORY v. LUTTRELL, No. 908, ante.

926. ———.]—BARNARD v. FLINT, No. 922, ante.

927. ———.]—The purchase of a piece of land at an exorbitant price will not be allowed to stand when made the condition of a loan of money to a party whose necessities compelled him to borrow.—COCKELL v. TAYLOR, COLLETT v. PRESTON, PRESTON v. COLLETT (1851), 15 Beav. 103; 21 L. J. Ch. 545; 51 E. R. 475.

Annotations:—**Mentd.** Barnard v. Hunter (1856), 28 L. T. O. S. 152; Radcliffe v. Anderson (1860), E. B. & E. 819; Dickinson v. Burrell, Stourton v. Burrell (1866), L. R. 1 Eq. 337; Re Cambrian Mining Co. (1882), 48 L. T. 114; James v. Kerr (1889), 40 Ch. D. 449.

928. Grantor incapable of understanding grant—No independent advice.]—Where parties enter into a compromise respecting a doubtful right, they ought to stand on equal terms & to set aside a compromise entered into, in which the parties

meet on unequal terms, it is not necessary to prove a case of preconceived or deliberate fraud.

A compromise of doubtful right on equal terms would not be disturbed, but here the parties were not upon equal terms. The construction of the will was difficult; pltf., a poor labourer, away from his own connections, & introduced to deft.'s attorney. Deft.'s statement is, that the attorney read the will to pltf., & explained its difficulties; but it could not have been explained satisfactorily to the mind of pltf., nor could he have understood whether it was to his advantage to accept the proposal or proceed to establish his right (LORD LANGDALE, M.R.).—GOYMOUR v. PIGGE (1844), 7 Beav. 475; 13 L. J. Ch. 322; 3 L. T. O. S. 120; 8 Jur. 526; 49 E. R. 1149.

929. Inaccurate covenant for title by grantor—Knowledge of grantee—Grantee family attorney.]—BAUGH v. PRICE, No. 1050, post.

930. Burden of proof—That bargain not unconscionable.]—It is the duty of parties who have obtained the execution of a deed in their favour for a consideration, which is at best vague & precarious, to show, whenever the transaction is impeached by the person who has so executed in their favour, that the transaction was righteous, & that the effect of the deed was clearly understood by such person.—HEDGES v. HEDGES (1849), 13 L. T. O. S. 379.

931. Grounds for refusing relief—Impossibility of restoring parties to status quo—Parties married.]—A settlement or jointure on a marriage though made very unequally, & in favour of the wife, will not be set aside in equity as that cannot put the wife in *statu quo*.—NORTH v. ANSELL (1731), 2 P. Wms. 618; 2 Eq. Cas. Abr. 209; 24 E. R. 885. **Annotations:—****Mentd.** Campbell v. Ingilby (1856), 21 Beav. 567.

932. Grantor without definite expectations—Advance in hope of extorting payment from father.]—The principle on which a ct. of equity has granted relief from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money, applies also to the case of money being lent on unconscionable terms, not fully understood by the borrower, & known not to be fully understood by him by the lender, to a young man, being a minor at the time of the first transaction, the son of a father, possessing large property, who has no property of his own & no expectation of any, except such general expectations as are founded on his father's position in life, the money being lent without any thought of repayment by the borrower, but on the credit of such general expectations, & in the hope of extorting payment from the father to avoid the exposure attendant on the son's being made a bkpt.—NEVILL v. SNELLING (1880), 15 Ch. D. 679; 49 L. J. Ch. 777; 43 L. T. 244; 29 W. R. 375.

Annotations:—**Reid.** Wilton v. Osborn, [1901] 2 K. B. 110. **Mentd.** Fry v. Lane, Re Fry, Whittet v. Bush (1888), 40 Ch. D. 312.

925 i. Grantor in distressed circumstances.]—WINTHROP v. ROBERTS (1907), 6 W. L. R. 476; 17 Man. L. R. 220.—CAN.

i. ———.]—MADHO SING v. KASHI RAM (1887), 1 L. R. 9 All. 228.—IND.

925 j. Grantor incapable of understanding grant—No independent advice.]

—An improvident bargain for the sale of pltfs. property, where the parties were very unequal as regards means, intelligence & otherwise, & the papers were drawn by vendee, who omitted some important parts of the bargain, & vendors had not the protection of competent independent advice:—**Held:** not binding on vendors.—FALLON v. KEENAN (1866), 12 Gr. 388.—CAN.

925 ii. ———.]—SLATOR v. NOLAN (1876), 11 I. R. Eq. 367.—IR.

s. Principles of relief—Not affected by repeal of usury laws.]—CHAPPLE v. MAHON (1870), 5 I. R. Eq. 225.—IR.

t. ———.]—HOWLEY v. COOK (1873), 8 I. R. Eq. 570.—IR.

PART III.—CONVEYANCES IMPEACHABLE FROM POSITION OF PARTIES. 269

SUB-SECT. 2.—BARGAINS WITH EXPECTANT HEIRS.

A. In General.

See, now, Law of Property Act, 1925 (c. 20), s. 174.

933. Principles of relief—Presumption of fraud—Advantage taken of heir's necessity.]—B. remainder in tail in the estate in question, being distressed, conveyed two manors of the yearly value of £300 expectant on an estate for life in his uncle, S., for the sum of £300 to deft., his heirs & assigns, from & after the decease of S., without issue male.

B. brought a bill to be relieved against this bargain, as unconscionable:—*Held*: a void conveyance, even in point of law, for as pltf. had a remainder in tail only, he could but convey such estate as he had, & not dispose of the inheritance.

What the court is guided by in all these cases is the taking an undue advantage of an heir's being in distressed & necessitous circumstances, & this is the principal ground of these decrees (LORD HARDWICKE, C.).—BARNARDISTON v. LINGOOD (1740), 2 Atk. 133; Barn. Ch. 337; 26 E. R. 484, L. C.

Annotations:—*Refd.* Gwynne v. Heaton (1778), 1 Bro. C. C. 1; Day v. Newman (1788), 2 Cox, Eq. Cas. 77; Bowes v. Hoops (1814), 3 Ves. & B. 117; Talbot v. Stanforth (1861), 1 John. & H. 484; Beynon v. Cook (1875), 10 Ch. App. 391, n.

934. ———.]—CHESTERFIELD (EARL) v. JANSSEN, No. 811, *ante*.

935. ——— Presumption of incapacity.]—Protection in equity to an expectant heir, dealing for his expectancy, approaching nearly to an incapacity to contract. Relief against a very advantageous purchase from such a person without fraud; though mere inadequacy, unless from its grossness of itself evidence of fraud, is between persons, standing precisely equal, of no account.—PEACOCK v. EVANS, EVANS v. PEACOCK (1809-10), 16 Ves. 512; 33 E. R. 1079.

Annotations:—*Folld.* Gowland v. De Faria (1810), 17 Ves. 20. *Consd.* Headen v. Rosher (1821), M'Cl. & Yo. 89. *Apld.* Ryle v. Swindells (1824), M'Cl. 519. *Refd.* Marsack v. Reeves (1821), 6 Madd. 108; Kendall v. Beckett (1830), 2 Russ. & M. 88; King v. Hamlet (1833), Coop. temp. Brough. 281; Edwards v. Browne (1845), 2 Coll. 100; Edwards v. Burt (1852), 2 De G. M. & G. 55; Tottenham v. Green (1863), 1 New Rep. 466. *Mentd.* Newton v. Hunt (1833), 5 Sim. 511.

936. ——— Not affected by repeal of usury laws.]—GROFT v. GRAHAM (1863), 2 De G. J. & Sm. 155; 9 L. T. 589; 46 E. R. 334, L. J.

Annotations:—*Consd.* Nevill v. Snelling (1880), 15 Ch. D. 679. *Refd.* Wyatt v. Cook (1868), 18 L. T. 12; Aylesford v. Morris (1872), 42 L. J. Ch. 146; O'Rourke v. Bollingbroke (1877), 2 App. Cas. 814; James v. Kerr (1889), 40 Ch. D. 449. *Mentd.* Beynon v. Cook (1875), 10 Ch. App. 391, n.

937. ———.]—EMMET v. TOTTENHAM, TOTTENHAM v. EMMET, No. 1002, *post*.

938. ———.]—(1) The jurisdiction of this court over unconscionable bargains is not affected by the repeal of the usury laws, or by Sales of Reversions Act, 1867 (c. 4), as to dealings with reversionary interests.

(2) An exorbitant rate of interest agreed to be paid by a young and needy man on the security of property in reversion, held by an indefeasible

title, is unfair dealing within Sales of Reversions Act, 1867 (c. 4).

(3) Where a young man charged his reversionary interest, with exorbitant sums for interest on loans principally made to his brother, an infant, the ct. decreed the charge to stand as security only for the sums actually advanced, & for interest at 5 per cent.—TYLER v. YATES (1871), 6 Ch. App. 665; 40 L. J. Ch. 768; 25 L. T. 284; 30 J. P. 180; 19 W. R. 909, L. C.; *affg.* (1870), L. R. 11 Eq. 265.

Annotations:—*As to* (1) *Refd.* Aylesford v. Morris (1872), 42 L. J. Ch. 146; Nevill v. Snelling (1880), 15 Ch. D. 679.

939. ———.]—MILLER v. COOK, No. 990, *post*.

940. ———.]—The doctrines of equity as to the relief of expectant heirs from unconscionable bargains have not been affected by the repeal of the usury laws, or by the alteration of the law as to sales of reversionary interests.

A young nobleman in his twenty-second year, entitled to large property in the event of his surviving his father, was largely indebted. The creditor pressed for payment, & recommended the young nobleman to apply to a certain money-lender. The money-lender advanced enough money to in part pay off the creditor, & made a further advance to the young nobleman, taking by way of security his acceptance at three months for the sum advanced with interest & discount together exceeding the rate of 60 per cent. The acceptances became due, & the process was repeated, the young nobleman receiving a small advance. The young nobleman had no professional assistance in these matters, & no application was made to his father or to the solrs. of the father. The father died before the second set of bills became due, & the money-lender commenced actions upon them:—*Held*: the actions would be restrained; & a decree made for delivery up of the bills on payment of the sums actually advanced & interest at 5 per cent.

Sales of Reversions Act, 1867 (c. 4), is carefully limited to purchases "made *bonâ fide* & without fraud or unfair dealing," & leaves under-value still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases, which, according to the language of LORD HARDWICKE, raise "from the circumstances or conditions of the parties contracting—weakness on one side usury on the other, or extortion, or advantage taken of that weakness"—a presumption of fraud (LORD SELBORNE, C.).—AYLESFORD (EARL) v. MORRIS (1873), 8 Ch. App. 484; 42 L. J. Ch. 546; 28 L. T. 541; 37 J. P. 227; 21 W. R. 424, L. C. & L. J.

Annotations:—*Consd.* O'Rourke v. Bollingbroke (1877), 2 App. Cas. 814; Nevill v. Snelling (1880), 15 Ch. D. 679. *Refd.* Beynon v. Cook (1875), 10 Ch. App. 391, n.; Bennet v. Bennet (1876), 43 L. T. 246, n.; Fry v. Lane, *Re* Fry, Whitte v. Bush (1888), 40 Ch. D. 312; James v. Kerr (1889), 40 Ch. D. 449; Bronchley v. Higgins (1900), 70 L. J. Ch. 788; Wilton v. Osborn, [1901] 2 K. B. 110.

941. ——— Not affected by Sales of Reversions Act, 1867 (c. 4).]—TYLER v. YATES, No. 938, *ante*.

942. ———.]—MILLER v. COOK, No. 990, *post*.

PART III. SECT. 3, SUB-SECT. 2.—A.

a. Burden of proof—That bargain not unconscionable.]—Equity throws

around expectant heirs, as to their contracts, that sort of protection, which it affords to distress & ignorance, & the burden of proving the transaction

fair is thrown upon those dealing with them.—BERNAL v. DONEGAN, M QUIS (1815), 3 Dow, 183.—IR.

Sect. 3.—Unconscionable bargains: Sub-sect. 2, A.

943. ———.]—AYLESFORD (EARL) v. MORRIS, No. 940, ante.

See, now, Law of Property Act, 1925 (c. 20), s. 174.

944. ——— To whom applicable—Litigant claiming share of estate.]—J., a young man in very poor circumstances, was deft. in a probate action in which he claimed a share of certain real estate as co-heir of deceased. To enable him to conduct his defence he borrowed money from K. a solr., to whom he executed a mtge. whereby he, J., covenanted to employ a particular person as his solr. in the action, & if he should be successful in the action to pay K. £225 "by way of bonus"; & it was provided that K. should make such further advances to J. as & when K. should make such further advances to J. as & when K. should think fit to meet any further necessities of J. or to be applied in or towards the costs of the action. The deed then charged J.'s interest in the real estate in question with present & future advances & interest at 5 per cent. & the £225 bonus. J. received a further advance from K. making a total of £100 for advances & was ultimately successful in establishing his claim in the probate action:—*Held*: the transaction was voidable as an undue advantage obtained from J., when under the pressure of distress & in a position analogous to that of an expectant heir; & accordingly redemption was decreed on payment only of the sums actually advanced to J., with interest.—**JAMES v. KERR** (1889), 40 Ch. D. 449; 58 L. J. Ch. 355; 60 L. T. 212; 53 J. P. 628; 37 W. R. 279; 5 T. L. R. 174.

*Annotations:—***Reid**, Mainland v. Upjohn (1889), 41 Ch. D. 126; **Rees v. Bernardy**, [1896] 2 Ch. 437. **Mentd.** Field v. Hopkins (1890), 44 Ch. D. 524; **Eyre v. Wynn-Mackenzie** (1893), 63 L. J. Ch. 239; **Biggs v. Hoddinott**, **Hoddinott v. Biggs**, [1898] 2 Ch. 307; **Santley v. Wilde**, [1899] 2 Ch. 474; **Cole v. Booker** (1913), 29 T. L. R. 295.

945. Whether favoured by courts.]—Expectant heirs are not to be more highly favoured than other persons in ordinary money transactions. In dealing with them, persons advancing money must be able to show that they gave an adequate consideration for their reversionary interests. What was a fair market price must depend upon the relative circumstances attending the transaction at the time.

A., a son, aged 47, entitled to contingent interests in large estates on the death of his father, aged 69, subject to other incumbrances, granted an annuity of £3,545, in consideration of an advance of £28,000. He also, by another deed, dated the following day, granted an annuity of £675, in consideration of an advance of £4,500 on the same estates. There were the usual clauses of insurance of his life, payment of premiums & interest on the advances from time to time, & a clause for redemption. The negotiations had been entered upon with the knowledge & in one of the instances by the immediate agency, of the family solr. The borrower had, at the time of granting the annuities, no certain income:—*Held*: these prices were not inadequate, & the transaction in both cases was upheld.

General remarks on the question of what is the market value of securities upon contingent reversionary interests.—**TYNTE v. HODGE, TYNTE v. BEAVAN** (1864), 2 Hem. & M. 287; 5 New Rep. 104; 11 L. T. 490; 13 W. R. 172; 71 E. R. 474.

946. Similar previous transactions between parties settled voluntarily.]—Pltf., who was a money-lender, advanced £1,000 to deft. on July 29, 1914, & received from him a promissory note for £1,600 payable in four consecutive monthly instalments of £400 each, the first instalment to be paid on Oct. 1, 1914. There was a default clause to the effect that if any instalment was unpaid the whole amount was to become payable & interest at 60 per cent. was to be paid from the date of default. Default was made in the payment of the first instalment. Deft. had an income of about £2,000 a year, & was entitled to the reversion of certain property worth about £4,000 a year. Deft. had had previous transactions with pltf. & had settled them voluntarily. In an action on the promissory note:—*Held*: in the circumstances deft. was not entitled to relief under the equitable doctrine as to catching bargains made with expectant heirs & the past transactions ought not to be opened up, but that as the terms on which the money was lent in the present case were out of all reason the transaction must be opened up under the Money-Lenders Act, 1900 (c. 51), s. 1, & pltf. would have judgment for the principal with interest at 30 per cent.—**WOLFE v. LOWTHER** (1915), 31 T. L. R. 354.

B. Sales of Reversions.

(a) In General.

947. In respect of what interests relief given—Whether contingent reversion.]—A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age & a bachelor dying without issue, is not the subject of estimate or calculation. But the purchaser of this reversion having, in his treaty with the vendor, proposed to deduct one half of the reversion in respect of such contingency, & the treaty having been concluded upon that basis, the ct., as between the vendor & purchaser, will value the contingency accordingly.—**BAKER v. BENT** (1830), 1 Russ. & M. 224; Tambl. 368; 39 E. R. 86.

*Annotations:—***Expld.** Meller v. Hall, Hall v. Meller (1832), 1 L. J. Ch. 219. **Consd.** Talbot v. Staniforth (1861), 5 L. T. 47. **Reid.** Aldborough v. Trye (1840), 7 Cl. & Fin. 437; **Boothby v. Boothby** (1849), 2 H. & Tw. 214; **Boothby v. Boothby** (1852), 15 Beav. 212.

948. ——— Whether life interest subject to annuities.]—W. was entitled to the income of property subject to the payment of a life annuity to C., & of the interest on mtges., whereby the present income was reduced to a small amount. In consideration of the advance of £1,000, W. assigned the income by way of security for the payment of £3,300 on the death of C., redeemable on payment of £1,500 at the end of the first year. By a memorandum, W. further agreed to repay £400, & interest at 5 per cent. per month, which security was to be tacked to the former security:—*Held*: (1) W.'s interest in the income was not a reversion, & the transaction therefore could not be set aside as a sale at an undervalue; (2) the security for £400 & interest was valid.—**WEBSTER v. COOK** (1867), 2 Ch. App. 542; 36 L. J. Ch. 753; 16 L. T. 821; 15 W. R. 1001, L. C.

*Annotations:—***As to** (1) **Reid.** Wyatt v. Cook (1868), 18 L. T. 12; **Tyler v. Yates** (1870), L. R. 11 Eq. 265. **As to** (2) **Reid.** Aylesford v. Morris (1872), 42 L. J. Ch. 146; **Nevill v. Snelling** (1880), 15 Ch. D. 679.

949. In respect of what conveyances relief given—Post-nuptial settlement on wife & children.]—The principles of the ct. relating to sales & mtges. by expectant heirs of their reversionary interest

are not applicable to the case of a post-nuptial settlement by an expectant heir of a reversionary interest upon his wife & children.—*SHAFTO v. ADAMS* (1864), 4 Giff. 492; 3 New Rep. 363; 83 L. J. Ch. 287; 9 L. T. 676; 10 Jur. N. S. 121; 66 E. R. 800.

950. — Conveyance by aged uncle to nephew — Consideration partly love & affection — No evidence of fraud.]—The purchase of a reversion, by a nephew from an uncle of very advanced age, for a price grossly inadequate, the deed of conveyance in the operative part, but not in the recitals, expressing that the grant was made partly in consideration of love & affection, not impeached on the ground of fraud under the circumstances.

A reversion, valued at £6,000 & upwards, in consideration of annuities secured to be paid on the lives of two very old persons, & valued at less than £400, is conveyed by a deed executed by an uncle, aged 80, in favour of a nephew, who was so described in the deed. There was no recital that blood formed a part of the consideration; but in the operative part of the deed the grant is expressed to be made in consideration "of love & affection," as well as the annuities.

The grantor had previously made a valid will, devising the reversion to his nephew, the grantee; & after the execution of the will, & before the grant, had sold part of the reversion & received the price. The attorney, a stranger to both parties, who drew the will upon his own suggestion, but by the instructions of the uncle, & the deed upon the instruction of both parties, was dead.

The deed was executed in 1773: the grantor died in 1774, leaving an heir, who died in 1791, not having impeached the deed. In 1794 the heir of the heir filed a bill to set aside the deed, on the ground of fraud, which bill was dismissed for want of prosecution.

In 1812 the devisees of that heir filed a new bill for the same purpose:—*Held*: the description of the party as a relation was equivalent to a recital; the making the will was evidence of the truth of the consideration of love & affection; the absence of recital did not afford sufficient ground to presume fraud, which being denied by the answer, & not proved in the cause, no issue ought to be directed, as the ct. of equity had before it sufficient evidence to decide the case; & on these grounds, & under these circumstances, that the conveyance was rightly held valid, & the bill properly dismissed.—*WHALLEY v. WHALLEY* (1821), 3 Bli. 1; 4 E. R. 506, H. L.

Annotations:—*Refd.* *Portmore v. Taylor* (1831), 4 Sim. 182. *Mentd.* *Bennett v. Colley* (1833), *Coop. temp. Brough.* 248; *Brooksbank v. Smith* (1836), 2 Y. & C. Ex. 58; *Gibbs v. Guild* (1881), 8 Q. B. D. 290.

(b) Grounds for Relief.

See, now, Sales of Reversions Act, 1867 (c. 4); Law of Property Act, 1925 (c. 20), s. 174.

951. Whether inadequacy of consideration alone ground for relief—Before 1868.]—*NOTT v. JOHNSON & GRAHAM* (1687), 2 Vern. 27; *NICHOLS v. GOULD* (1752), 2 Ves. Sen. 422; *GWYNNE v. HEATON* (1778), 1 Bro. C. C. 1; *MOTH v. ATWOOD* (1801), 5 Ves. 845; *PEACOCK v. EVANS, EVANS v. PEACOCK* (1809-10), 16 Ves. 512; *GOWLAND v. DE FARIA* (1810), 17 Ves. 20; *EVANS v. BROWN* (1810), Wight. 102; *HILLIARD v. GAMBEL* (1829), Tambl. 375; *BAWTREE v. WATSON* (1834), 3 My. & K. 339; *DAVIES v. COOPER, COOPER v. JACK-*

SON (1840), 5 My. & Cr. 270; *BOOTHBY v. BOOTHBY* (1852), 15 Beav. 212; *SALTER v. BRADSHAW, BRADSHAW v. SALTER* (1858), 26 Beav. 161; *ST. ALBYN v. HARDING* (1859), 27 Beav. 11; *FOSTER v. ROBERTS* (1861), 29 Beav. 467; *JONES v. RICKETTS* (1862), 31 Beav. 130.

See, now, Sales of Reversions Act, 1867 (c. 4); Law of Property Act, 1925 (c. 20), s. 174.

952. — Since 1867.]—Pltf. being entitled to a sum of £2,916 stock in reversion expectant on the death of an old lady aged eighty-two, obtained a loan of £1,650 upon mtge. The mortgage deed contained a power of sale upon three months' notice, or on interest being one month in arrear. The interest being in arrear, the stock was sold under the power for £1,950 as subject to succession duty at 3 per cent. The tenant for life was then in a precarious state of health, & died within three months. It was afterwards found that only £7 was payable for succession duty. None of the purchase money was paid except the deposit, the remainder being left on a mtge. of the stock. There was evidence that, having regard to the age & health of the tenant for life, from £100 to £200 might have been obtained for the reversion:—*Held*: the sale could not be set aside, either on the ground of undervalue, as there was no fraud; nor the leaving of the purchase money on mtge.; nor the mistake as to the succession duty, that being merely a matter for compensation.—*BETTYES v. MAYNARD* (1883), 49 L. T. 389; 31 W. R. 461, C. A.

Annotation:—*Mentd.* *Belton v. Bass, Itatcliffe & Grotton*, [1922] 2 Ch. 449.

953. Consideration inadequate.]—A son, who after his father's death was a remainderman in tail, sold this remainder at an under rate: the ct. set aside the conveyance.—*TWISLETON v. GRIFFITH* (1716), 1 P. Wms. 310; 24 E. R. 403, L. C.

Annotations:—*Consd.* *Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125. *Refd.* *Baugh v. Price* (1752), 1 Wils. 320; *Gwynne v. Heaton* (1778), 1 Bro. C. C. 1; *Peacock v. Evans, Evans v. Peacock* (1809), 16 Ves. 512; *King v. Hamlet* (1834), 2 My. & K. 456; *Fry v. Lane, Re Fry* *Whittet v. Bush* (1888), 40 Ch. D. 312.

954. — & heir in embarrassed circumstances.]—A sale by an heir apparent, of interests in possession & in reversion, set aside, the consideration being inadequate & advantage having been taken of the vendor's embarrassments.—*PORTMORE (EARL) v. TAYLOR* (1831), 4 Sim. 182; 9 L. J. O. S. Ch. 203; 58 E. R. 69; *affd.* (1832), 4 Sim. 216, n., L. C.

Annotations:—*Distd.* *King v. Hamlet* (1835), 9 Bli. N. S. 575. *Consd.* *Webster v. Cooke* (1866), 15 W. R. 140. *Refd.* *Bromley v. Smith, Boustead v. Bromley, Smith v. Bromley* (1859), 26 Beav. 644; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312.

955. — Oppressive conduct of purchaser.]—A sale by private contract of a reversionary interest in a sum of stock set aside on account of inadequacy of price, & the unjust & oppressive conduct of the purchaser.—*NEWTON v. HUNT* (1832), 5 Sim. 511; 58 E. R. 430.

956. Value of reversion miscalculated by actuary.]—A married woman sold her contingent reversionary interest in personality for £76, with an agreement that the expenses of the assignment should be paid out of the purchase-money. The interest was valued by an actuary employed by the assignors (but erroneously, without reference to the contingency of the wife surviving her husband before the interest was reduced into possession), as an absolute reversion, at £131 5s.

Sect. 3.—Unconscionable bargains: Sub-sect. 2, B. (b), (c) & (d).]

The ct. refused to set aside the sale.—**SEWELL v. WALKER** (1847), 11 L. T. O. S. 411; 12 Jur. 1041.

957. Circumstances affecting value—Interest subject of Chancery suit.]—The purchase of a reversionary interest supported, though the consideration given was less than the average of the estimated valuations of the witnesses, on the ground that the interest was subject to a Chancery suit, which materially affected its value.—**PERFECT v. LANE** (1861), 3 De G. F. & J. 369; 30 Beav. 197; 31 L. J. Ch. 489; 6 L. T. 8; 8 Jur. N. S. 547; 10 W. R. 197; 45 E. R. 921, L. J.J.

Annotation:—*Reid. Lord v. Jeffkins* (1865), 35 Beav. 7.

958. ———.]—(1) In a suit to set aside a sale by private contract of a reversion:—**Held**: the highest price bid for it upon a previous attempt to sell it by auction was a fair test of its market value.

(2) In ascertaining the market value of a reversion, the fact of its being the subject of a Chancery suit, even though it does not affect the right to it, must be taken into consideration.

(3) Long delay in filing a bill to set aside the sale of a reversion is not to be disregarded.—**LORD v. JEFFKINS** (1865), 35 Beav. 7; 55 E. R. 796.

959. Evidence of value—Sub-sale at enhanced price.]—In 1850, A., being in embarrassed circumstances, but entitled to the equity of redemption of a sum of Consols, & of two policies on his life, & to a life interest in reversion in other funds, agreed to sell the property to B. at an undervalue. Before the agreement was completed, B. assigned his interest in the contract to C. for a larger sum than he had agreed to pay for it, & A. & B. then assigned it to C. accordingly. C. afterwards assigned it to D. for a still larger sum than he had paid to A. & B. D. had notice of the sums previously agreed to be paid, & paid for the property:—**Held**: the transaction, as a sale, was invalid as respected D., but an account was directed as to what was really due to her, & she was, under all the circumstances of the case, allowed to retain a policy which she had redeemed, & on which she had paid the premiums.—**NESHITT v. BERRIDGE, BUTLER v. BERRIDGE, BUTLER v. ALBERT INSURANCE CO.** (1863), 32 Beav. 282; 1 New Rep. 345; 8 L. T. 76; 9 Jur. N. S. 1044; 11 W. R. 446; 55 E. R. 111; *on appeal, sub nom. NESHITT v. BERRIDGE, BUTLER v. BERRIDGE*, 4 De G. J. & Sm. 45, L. C.

960. ——— Highest bid at previous auction.]—**LORD v. JEFFKINS**, No. 958, *ante*.

961. Evidence of fraud—Grantor not independently advised—Knowledge & consent of father.]—Mere inadequacy of price will entitle an expectant heir to apply to the Ct. of Equity to set aside, on terms, the sale of a reversion, & the *onus* of proving the transaction fair, & the price sufficient, is on the purchaser. The repeal of the usury laws has not affected the jurisdiction of the Ct. of Ch. to give adequate protection, in such cases, to expectant heirs or persons under pressure.

A settlement of an estate made on the marriage

of B. & L. charged a sum of £300 a year as an annuity in favour of the intended wife for her life, & a sum of £3,000 for portions for younger children. There were six younger children. B. got into money difficulties, & disposed of his own interests in the estate. The eldest son of B. became possessed (his father being still alive) of the estate itself, & sold it to R., subject to the charges upon it for the wife's annuity, & the children's portions. Some of the children sold their expectant portions to R., & to another person for varying sums of money. B., the father, proposed to R. to purchase the portion of J. the youngest but one of the family. The father was then sixty-one years of age, & a stockbroker, who knew nothing of the state of B.'s health, valued the portion (£500) at £326. R. refused to give more. The negotiations for the sale lasted some weeks, the son all that time residing with the father at Dover. The son came of age on Apr. 11, 1870, went over to Ireland on Apr. 18, saw R. & his solr. on Apr. 20, saw the deed on Apr. 28, was stated to have examined it, & expressed his approval of it (but that was denied), & executed it on Apr. 30, 1870. He never had a separate solr., or any one to act for him in the character of an independent adviser. The purchase-money was to be paid by yearly instalments. These were regularly paid till the end of 1874, & accepted by the son. At that time the son filed his bill to set aside the sale as fraudulent & void, & to have an account. The Master of the Rolls in Ireland had dismissed the bill, the Ct. of Appeal reversed that decision:—**Held**: there being no evidence of fraud, the bill could not be sustained, & the decision of the Ct. of Appeal in Ireland was reversed.—**O'RORKE v. BOLINGBROKE** (1877), 2 App. Cas. 814; 26 W. R. 239, H. L.

Annotation:—*Reid. Nevill v. Snelling* (1880), 15 Ch. D. 679.

962. ———.]—Where a purchase is made from a poor & ignorant man at a considerable undervalue, the vendor having no independent advice, a ct. of equity will set aside the transaction. This will be done even in the case of property in possession, & *a fortiori* if the interest be reversionary. The circumstances of poverty & ignorance of the vendor, & absence of independent advice, throw upon the purchaser, when the transaction is impeached, the *onus* of proving that the purchase was fair, just, & reasonable.—Sales of reversionary interests set aside, the vendors being poor, ignorant men, selling at a considerable undervalue, & having no professional adviser other than the solr. to the purchasers who gave to them a great advantage in the transactions.—There being no evidence of moral fraud on the part of the purchasers, & allegations of misconduct on their part having been made & not substantiated, no costs were given.—**FRY v. LANE. Re FRY, WHITTET v. BUSH** (1888), 40 Ch. D. 312; 58 L. J. Ch. 113; 60 L. T. 12; 37 W. R. 135; 5 T. L. R. 45.

963. ——— Sale at gross undervalue.]—**AYLESFORD (EARL) v. MORRIS**, No. 940, *ante*.

964. ———.]—**FRY v. LANE, Re FRY, WHITTET v. BUSH**, No. 962, *ante*.

965. Purchaser guilty of unfair dealing.]—Pltf., who was thirty years of age, being entitled

PART III. SECT. 3, SUB-SECT. 2.—B. (b).

965 i. Purchaser guilty of unfair dealing.]—**RAE v. JOYCE** (1892), 29 L. R. Ir. 500.—IR.

965 ii. ———.]—**KEVANS v. JOYCE**, [1896] 1 I. R. 442.—IR.

to a reversion expectant on the death of his mother, who was seventy-two years of age, executed a deed by which he sold £1,000 of his reversionary interest to deft. for £300. On the execution of the deed deft. gave pltf. a letter by which he agreed to resell the £1,000 to pltf. within two months on payment to deft. of £600. Pltf. had no independent advice in the matter, but wrote a letter to deft. prior to the sale showing he understood the nature of the bargain into which he was about to enter. There was evidence that the value of the reversion of £1,000 in the market was over £600; & it also appeared that deft. dictated a letter for pltf. to send to the solrs. of the trustees of the fund making inquiries as to it, which did not say he wanted the information for the purpose of borrowing money, but gave another reason:—*Held*: the purchase was not only made at an undervalue, but there had been unfair dealing on the part of deft., & therefore the transaction must be set aside on payment by pltf. of £300, & interest at 5 per cent.—*BRENCHLEY v. HIGGINS* (1900), 70 L. J. Ch. 788; 83 L. T. 751, C. A.

(c) *Effect of Lapse of Time.*

966. General rule.]—(1) In 1822 the owner of a reversion expectant on a life-estate & subject to incumbrances sold his reversion so subject. In 1825 the purchaser died & in 1830 the tenant for life died. In 1846, the reversioner filed a bill to set aside the sale as having been made at an undervalue, but not accounting for the delay:—*Held*: the length of time afforded such evidence of the validity of the transaction as a ct. of justice could not disregard &, although twenty years had not elapsed since the death of the tenant for life, the bill was dismissed with costs.

(2) The rules on which a ct. acts with respect to stale demands are never more properly applied than where the nature of the case throws the burden of proof on deft.—*SIBBERING v. BALCARRAS* (1850), 3 De G. & Sm. 735; 19 L. J. Ch. 252; 15 L. T. O. S. 245; 11 Jur. 753; 64 E. R.

Annotations:—*As to* (1) *Distd.* *Browne v. McClintock* (1873), L. R. 6 H. L. 456. *As to* (2) *Refd.* *Harcourt v. White* (1866), 28 Beav. 303; *Spackman v. Evans* (1868), L. R. 3 H. L. 171. *Generally, Mentd.* *Carey v. Cuthbert* (1873), 22 W. R. 219.

967. LORD C. JEFFKINS, No. 95. *ante.*

968. Action commenced promptly on reversion falling in—Forty years since sale.]—The purchase of a reversion cannot stand in equity unless the purchaser shows that he paid the full value for it.

The sale of a reversion set aside after forty years, the vendor having instituted proceedings for that purpose a year after it fell into possession, & the purchaser having failed to prove that he had paid full value for it.—*SALTER v. BRADSHAW, BRADSHAW v. SALTER* (1858), 26 Beav. 161; 28 L. J. Ch. 426; 5 Jur. N. S. 831; 53 E. R. 858.

Annotation:—*Refd.* *Talbot v. Stanforth* (1861), 5 L. T. 47.

969. Recital of payment of consideration questioned—After death of parties.]—In 1847, pltf. assigned to his father since deceased a vested

reversionary interest in a sum of £1,000 stock, to which he would become entitled on the death of his mother, then aged sixty-seven. Pltf. was at the time imprisoned for debt, & the manner in which the purchase-money, £500 in all, was made up & paid was recited in the assignment. No receipt for the consideration money was indorsed upon the deed.

In Nov. 1849, the father assigned the reversion to testatrix of debts., who died in 1859. Pltf.'s father & mother were now both dead, & the bill was filed to set aside the sale on the grounds of pressure, untruth in the recitals, non-payment of alleged consideration according to the tenor of the deed, & inadequacy of consideration:—*Held*: as between the purchaser from the father & pltf. & particularly having regard to the lapse of time, the consideration must be taken to have been duly paid or satisfied, & testatrix was entitled to believe, as against pltf. that the recitals in the original assignment were true, & as the evidence showed no inadequacy of price in the original sale the decree dismissing the bill was affirmed.—*WILLOUGHBY v. BRIDEOAKE, BRIDEOAKE v. LEES* (1865), 6 New Rep. 395; 13 L. T. 141; 11 Jur. N. S. 706; 13 W. R. 1056, L. JJ.

See, generally, EQUITY, Vol. XX., pp. 524 et seq.; ESTOPPEL, Vol. XXI., pp. 333 et seq., 347 et

(d) *Nature and Terms of Reli*

970. Specific performance refused.]—If an heir sells a reversion in the life of his father at an undervalue, the ct. will not in favour of such a purchaser decree a specific performance of a covenant for further assurance.—*JOHNSON v. NOTT* (1681), 1 Vern. 271; 23 E. R. 461.

Annotation:—*Refd.* *Day v. Newman* (1788), 2 Cox, Eq. Cas. 77.

971. —.]—Specific performance of an agreement for the purchase of a reversionary interest refused, where the sale was by private contract, & the price inadequate.—*KENDALL v. BECKETT* (1830), 2 Russ. & M. 88; 9 L. J. O. S. Ch. 24; 39 E. R. 327, L. C.

Annotations:—*Mentd.* *Sainsbury v. Jones* (1839), 5 My. & Cr. 1; *Aberman Ironworks v. Wickens* (1868), L. R. 5 Eq. 485; *Foulkes v. Davies* (1868), L. R. 7 Eq. 42.

972. Conveyance set aside.]—A purchase of a reversion from an heir in the life of his father at an undervalue set aside; though if the heir had died before his father, the purchaser would have lost all his money. *NOTT v. JOHNSON & GRAHAM* (1687), 2 Vern. 27; 23 E. R. 627, L. C.; *previous proceedings, sub nom.* *NOTT v. HILL* (1682), 2 Cas. in Ch. 120, L. C.; (1683), 1 Vern. 167.

Annotations:—*Consd.* *Gwynne v. Heaton* (1778), 1 Bro. C. C. 1. *Refd.* *Barnardiston v. Lingood* (1740), 2 Atk. 133; *Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125; *Baugh v. Price* (1752), 1 Wils. 320; *Day v. Newman* (1788), 2 Cox, Eq. Cas. 77; *O'Rourke v. Bollingbroke* (1877), 2 App. Cas. 814.

973. —.]—*SALTER v. BRADSHAW, BRADSHAW v. SALTER*, No. 968, *ante.*

974. — Account refused.]—Where a conveyance of an estate, obtained upon a pretended purchase from an aged & illiterate man by a person who stood towards him in a confidential position,

PART III. SECT. 3, SUB-SECT. 2.—
B. (d).

b. *General rule.*]—By the local law of Jersey a sale by an expectant J.—VOL. XXV.

heir of his expectancy is not void, but voidable, & cannot, in the absence of fraud or undervalue, be impeached after the lapse of a year & a day from

the time of the opening of the succession. By the same local law, parties wronged by unconscionable bargains are allowed a period of thirty years,

FRAUDULENT AND VOIDABLE CONVEYANCES.

Sect. 3.—Unconscionable bargains: Sub-sect. 2, B. C. (a.)]

was set aside, the ct., being of opinion that there was in fact no purchase, refused to give deft. a decree for an account of moneys paid by or owing to him, which he alleged (but failed to prove) was the consideration agreed upon for such purchase & conveyance.—*WILKINSON v. FOWKES* (1851), 9 Hare, 592; 22 L. J. Ch. 137; 68 E. R. 649.

975. — Costs.]—The purchase of a reversion at an undervalue was set aside, & under the special circumstances, was set aside with costs.—*BAW-TREE v. WATSON* (1834), 3 My. & K. 339; 40 E. R. 129.

976. — —.]—A reversion, expectant on the decease of a person aged fifty-six without issue, was sold for £20. On a reference, the master found that it was worth £350. The sale was set aside, but the purchaser had his costs of suit, except those of the inquiry before the master to ascertain the value.—*BOOTHBY v. BOOTHBY* (1852), 15 Beav. 212; 51 E. R. 518.

*Annotation:—***Reid.** *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312.

977. — —.]—(1) Purchase of a reversionary estate tail of a person without issue set aside merely for inadequacy of consideration, there being no fraud or pressure, & with costs, the purchaser having resisted the relief; but he was ordered to pay those occasioned by his unfounded allegations of fraud.

(2) When sales of reversionary interests are set aside from mere inadequacy of consideration, it is upon the repayment of the consideration with interest at the rate of 5 per cent.—*ST. ALBYN v. HARDING* (1859), 27 Beav. 11; 51 E. R. 5.

*Annotation:—***As to** (1) **Expld.** *Lord v. Jeffkins* (1863), 35 Beav. 7.

978. — —.]—*FRY v. LANE, Re FRY, WHITTET v. BUSH*, No. 962, *ante*.

979. Interest.]—*ST. ALBYN v. HARDING*, No. 977, *ante*.

980. Conveyance to stand as security for advance—& costs.]—Grant of a reversionary rent-charge, after the death of plff.'s father, who was old & infirm, upon reasonable terms, set aside; but to remain as a security for the money really advanced, & costs to be paid as in redeeming a mtge.—*GWYNNE v. HEATON* (1778), 1 Bro. C. C. 1; 28 E. R. 949, L. C.

*Annotations:—***Consd.** *Bowes v. Heaps* (1814), 3 Ves. & B. 117; *Portmore v. Taylor* (1831), 4 Sim. 182; *Pennell v. Millar* (1857), 23 Beav. 172; *Miller v. Cook* (1870), L. R. 10 Eq. 641. **Reid.** *Day v. Newman* (1788), 2 Cox, Eq. Cas. 77; *Peacock v. Evans, Evans v. Peacock* (1809), 16 Ves. 512; *Ryle v. Swindells* (1824), M'Cle. 519; *King Hamlet* (1834), 2 My. & K. 436; *Tottenham v. Green* (1863), 32 L. J. Ch. 201; *Nevill v. Snelling* (1880), Ch. D. 679; *Samuel v. Newbold*, [1906] A. C. 461. **Mentd.** *Hoffman v. Cooke* (1800), 5 Ves. 623; *Smyth v. Smyth* (1817), 2 Madd. 75; *Abrahams v. Dimmock* (1914), 110 L. T. 699.

981. — & interest—Simple interest only allowed.]—(1) The sale of a reversionary interest, in this ct. considered as the case of an expectant heir, forms an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside. During the continuance of the

same situation acquiescence has no effect; & the value is to be estimated at the time of the transaction, not according to the event.

(2) Interest at 5 per cent. upon the money advanced: compound interest refused.—*GOWLAND v. DE FARIA* (1810), 17 Ves. 20; 34 E. R. 8.

*Annotations:—***As to** (1) **Consd.** *Headen v. Rosher* (1825) M'Cle. & Yo. 89; *Potts v. Curtis* (1832), You. 543; *Newton v. Hunt* (1833), 5 Sim. 511. **Expld.** *Aldborough v. Trye* (1840), 7 Cl. & Fin. 436. **Reid.** *Williamson v. Goold* (1823), 8 Moore, C. P. 109; *Hinckman v. Smith, Smith v. Hinckman* (1827), 3 Russ. 433; *Kendall v. Beckett* (1830), 2 Russ. & M. 88; *Portmore v. Taylor* (1831), 4 Sim. 182; *Edwards v. Browne* (1845), 2 Coll. 100; *Edwards v. Burt* (1852), 2 De G. M. & G. 55; *Tynte v. Hodge, Tynte v. Beaven* (1864), 2 Hem. & M. 287; *Judd v. Green* (1875), 45 L. J. Ch. 108; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312. **Generally, Mentd.** *Marsack v. Reeves* (1821), 6 Madd. 108.

982. — —.]—Relief against an oppressive deed [a mtge. to secure an annuity] though obtained from an heir apparent, is given only on payment of the consideration with interest.—*DAVIS v. MARLBOROUGH (DUKE)* (1819), 2 Swan. 108; 2 Wils. Ch. 130; 36 E. R. 555, L. C.

*Annotations:—***Reid.** *Portmore v. Taylor* (1831), 4 Sim. 182; *King v. Hamlet* (1835), 9 Bl. N. S. 575; *Mansfield v. Ogle* (1855), 24 L. J. Ch. 450; *Bromley v. Smith, Boustead v. Bromley, Smith v. Bromley* (1859), 26 Beav. 644; *Webster v. Cook* (1867), 36 L. J. Ch. 753; *O'Rourke v. Bolingbroke* (1877), 2 App. Cas. 814; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312. **Mentd.** *Cooper v. Reilly* (1829), 2 Sim. 560; *Pelly v. Wathen* (1849), 7 Hare, 351; *Paynter v. Carew* (1854), Kay, App. XXXVI.

983. — — & costs.]—This was a bill filed in 1826, to make void a sale of reversion made in 1805; it was proved that the price was inadequate. In a suit to make void the sale of a reversion:—**Held:** it was not necessary to prove fraud or surprise; inadequacy of consideration being alone sufficient to authorise the ct. to make void the sale & treat the purchaser of a reversion only as a mtgee.; i.e. the vendor, paying the purchaser his principal interest, & costs, is entitled to a reconveyance.—*HILLIARD v. GAMBEL* (1829), Tambl. 375; 48 E. R. 149.

984. — —.]—Case in which, notwithstanding a transaction had been treated as an absolute assignment of a reversionary interest, the ct. will allow the property to be redeemed upon paying the principal & interest.—*WATERS v. MYNN* (1850), 15 L. T. O. S. 157; 14 Jur. 341.

985. — —.]—*BRENCHLEY v. HIGGINS*, No. 965, *ante*.

986. Where reversion resold—First purchaser a trustee for his vendor.]—If A. buy from B. a minor, under circumstances of distress, the reversion of a house worth £40 a year for £100, & sell it again in a few days for £200, equity will compel A. to account with B. for the difference.—*SPENCER v. CHASE* (1723), 9 Mod. Rep. 28; 88 E. R. 294.

*Annotation:—***Mentd.** *Stephens v. Frost* (1836), 2 Y. & C. Ex. 297.

987. Transaction reopened—Though money paid—Payment under duress.]—*CURWYN v. MILNER* (1731), 3 P. Wms. 292, n.; 24 E. R. 1071, L. C.

*Annotations:—***Reid.** *Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125; *Gwynne v. Heaton* (1778), 1 Bro. C. C. 1; *Bowes v. Heaps* (1814), 3 Ves. & B. 117.

reckoning from the date of the sale, to set them aside, but the ratio of inadequacy of consideration is strictly defined, & proof must be given that

less than half the value has been given for the property purchased; but the process for rescinding a bargain for inadequacy of consideration cannot

be applied to sales of property of uncertain value, e.g., a *spes successionis*.—*GODFRAY v. GODFRAY* (1866), 14 W. R. 522.—**CHANNEL ISLANDS.**

988. Covenant for title modified.]—Voluntary conveyance, by one lately come of age, to an agent, of a reversion of no great value, for a nominal consideration of £180, & containing covenants as in the case of a purchase, not absolutely rescinded, as not being a case of fraud; but the transaction modified by decree, that the agent should release the covenants at his own expense, & recite the impropriety of them as referable to a gift.—**CRAY v. MANSFIELD** (1750), 1 Ves. Sen. 379; 27 E. R. 1093.

Annotation:—**Mentd.** **Ingram v. Wyatt** (1828), 1 Hag. Ecc. 384.

989. Where reversionary interest in fund in court—Opportunity given to vendor to set aside conveyance.]—A. conveyed to B. his reversionary interest in a fund in ct., & B. obtained a stop order. When the fund fell into possession B. presented a petition for payment to him. On the hearing of the petition, A. insisted that the purchase was invalid, being a purchase of a reversionary interest at an undervalue. The ct. would not decide the point, but proposed to retain the funds in ct. for a limited time, if A. would undertake to file a bill to set aside the conveyance. A. not giving the undertaking, the fund was paid out to B.—**BETHUNE v. KENNEDY** (1811), 3 Beav. 462; 49 E. R. 182.

C. Mortgages and Other Securities.

(a) Mortgages.

990. Mortgage by heir just of age—Absence of surprise.]—**WILLIAMS v. SMITH** (1671), 3 Rep. Ch. 75; 21 E. R. 733.

991. Mortgage of reversion—To pay double amount advanced—Reversion falling in in two years.]—One entitled to an estate after the death of two old lives, takes £350 to pay £700 when the lives fall, & mortgages the estate as a security. No relief against this bargain, though both the lives died within two years.—**BATTY v. LLOYD** (1682), 1 Vern. 141; 23 E. R. 374.

Annotation:—**Refd.** **Mansfield v. Oglo** (1855), 7 De G. M. & G. 181.

992. — Two thousand pounds advanced—Covenant to pay five thousand pounds—Reversion falling in in four years.]—**BERNY v. PITT** (1686), 2 Vern. 14; 2 Rep. Ch. 396; 23 E. R. 620, 1. C.

Annotations:—**Consd.** **Twisleton v. Griffith** (1716), 1 P. Wms. 310; **Chesterfield v. Janssen** (1751), 2 Ves. Sen. 125; **Bowes v. Heaps** (1814), 3 Ves. & B. 117. **Refd.** **Barnardiston v. Lingood** (1710), 2 Atk. 133; **Baugh v. Price** (1752), 1 Wils. 320; **Day v. Newman** (1788), 2 Cox, Eq. Cas. 77; **O'Rourke v. Bollingbroke** (1877), 2 App. Cas. 814.

993. — Reversion contingent—Covenants to pay ten times amount advanced.]—A. tenant for life, remainder to his first, etc., son, in tail, remainder to his nephew B. B. enters into several statutes to C. for payment of ten for one upon the death of A. in case he died without issue male in the life of B.; C. in the life of A. brings a bill to compel B. either to pay principal & interest, or to be foreclosed of any relief against the bargain. B. by answer declares the bargain fairly made, & intends to abide by it, & that he would seek no relief against it. A. dies & B. brings a bill against the exor. of C., & notwithstanding B.'s former answer, he is relieved against the bargain, on payment of principal & interest without costs.—**WISEMAN v. BEAKE** (1690), 2 Vern. 121; Freem. Ch. 111; 23 E. R. 688.

Annotations:—**Refd.** **Chesterfield v. Janssen** (1751), 2 Ves. Sen. 125; **Bowes v. Heaps** (1814), 3 Ves. & B. 117;

Talbot v. Staniforth (1861), 1 John. & H. 484; **O'Rourke v. Bollingbroke** (1877), 2 App. Cas. 814; **Fry v. Lane, Re Fry, Whittet v. Bush** (1888), 40 Ch. D. 312. **Mentd.** **Taylor v. Rochfort** (1751), 2 Ves. Sen. 281; **Morse v. Royal** (1806), 12 Ves. 355.

994. — To secure extravagant price of goods sold.]—(1) An heir of twenty-two or twenty-three years of age, if a dealer in horses, or other tradesmen, impose upon him, by selling at extravagant prices, in numberless instances, shall be relieved in this ct., otherwise if in a single instance only.

(2) The ct., in relieving an heir against fraud, does not consider whether the estate in expectancy comes to him as heir to his father, & by descent, or from any other relation; but the rule which directs in this case, is the necessity that young heirs are in for the most part, which naturally lays them open to impositions of this kind.

(3) Where an extravagant price is charged for goods sold, & a mtge. is taken to secure it, the heir may be relieved so far as it stands as a security for the unjust gain; but after it is determined upon a *quantum meruit*, what was the real worth of the goods, the mtge. will still be binding upon the heir, for so much as is found by the verdict.—**FREEMAN v. BISHOP** (1740), 2 Atk. 39; Barn. Ch. 15; 26 E. R. 420, 1. C.

Annotation:—**As to (2) Refd.** **Fry v. Lane, Re Fry, Whittet v. Bush** (1888), 40 Ch. D. 312.

995. — Effect of approval of party in loco parentis.]—(1) Where an expectant heir, under pecuniary pressure, mortgages his reversionary interest to obtain an advance of money or credit for a purchase of goods, & the party in present possession of the property so mtged. stands in *loco parentis* to such heir, & knows & approves of the transaction, the heir has no equity to have it afterwards rescinded.

(2) Where an expectant heir, who, under pecuniary pressure, has granted securities over his reversionary estate, subsequently allows the consideration given for the securities to be so dealt with that it can never be restored to the other party in its original condition, he will not be relieved against those securities unless he can show a continuance of the pressure compelling him to act as he did.

(3) Where goods are sold to a person in distressed circumstances by a tradesman who knows they are bought merely with a view to raise money by selling them again, & they are charged at fair & reasonable prices, the ct. will not interfere to relieve the purchaser, or set aside securities given for the price.—**KING v. HAMLET** (1834), 2 My. & K. 456; Coop. temp. Brough. 281; 39 E. R. 1018, 1. C.; *affd.* (1835), 9 Bli. N. S. 575; 3 Cl. & Fin. 218, H. L.

Annotations:—**As to (1) Consd.** **Talbot v. Staniforth** (1861), 1 John. & H. 484; **O'Rourke v. Bollingbroke** (1877), 2 App. Cas. 814. **As to (2) Refd.** **King v. Savery** (1853), 1 Sm. & G. 271.

996. — Exorbitant rate of interest.]—Pltf., a young man at the university, during his minority & soon afterwards, procured advances at various high rates of interest from deft., a money lender for which he gave bills of exchange. Subsequently deft. sent to pltf. a written paper purporting to be a full account, but which was in fact nothing more than a list of the bills of exchange, & pltf. sent a letter in reply in which he stated that everything was settled between them as regarded all transactions & liabilities up to that date. Various fresh transactions then took place between the parties on

8.—Unconscionable bargains: Sub-sect. 2, C.

the forging of the alleged accounts & arrangements were made for a mtge. to be executed by pltf. in the course of which pltf. signed an acknowledgment that a further statement was an account settled between them & referred to in the indenture of mtge. The present bill was then filed, praying that pltf. might be declared chargeable only for such sums as had been actually advanced:—*Held*: as the two parties had never been on equal terms these acknowledgments were of no avail & the securities could stand only for the sums advanced with interest at 5 per cent.—*CROFT v. GRAHAM* (1863), 2 De G. J. & Sm. 155; 9 L. T. 589; 46 E. R. 334, L. JJ.

Annotations:—*Consd.* *Beynon v. Cook* (1875), 10 Ch. App. 391, n.; *Nevill v. Snelling* (1880), 15 Ch. D. 679. *Refd.* *Wyatt v. Cook* (1868), 18 L. T. 12; *Aylesford v. Morris* (1872), 42 L. J. Ch. 146; *O'Rourke v. Bolingbroke* (1877), 2 App. Cas. 814; *James v. Kerr* (1889), 40 Ch. D. 449.

997. ———.]—*BENYON v. FITCH*, No. 1030,

998. ——— Evidence of unfair dealing within Sales of Reversions Act, 1867 (c. 4).]—*TYLER v. YATES*, No. 938, *ante*.

999. ——— Interest charged on larger amount than advance.]—(1) Deft., a money lender, having agreed with pltf., who was just twenty-one, & was in difficulties, to lend him £150 on his reversionary interest under his father's will, exacted securities for £200, with interest at 20 per cent., reducible to 10 per cent. on punctual payment, & advanced only £123, but claimed interest on the whole amount secured. The ct. declared that the securities should stand as a security for the money actually advanced with interest at 5 per cent. although pltf. had been assisted by a solr., who, however, stated that he was not accurately informed of the transaction.

(2) The jurisdiction of the ct. over unconscionable bargains is not affected by the repeal of the usury laws, or by Sales of Reversions Act, 1867 (c. 4), s. 1.—*MILLER v. COOK* (1870), L. R. 10 Eq. 641; 40 L. J. Ch. 11; 22 L. T. 740; 35 J. P. 245; 18 W. R. 1001.

—As to (1) *Consd.* *Tyler v. Yates* (1870), L. R. 11 Eq. 265. *Refd.* *Aylesford v. Morris* (1872), 42 L. J. Ch. 146; *Nevill v. Snelling* (1880), 15 Ch. D. 679.

1000. ———.]—A man twenty-six years of age, entitled to a reversion of £600, but wholly without present means, applied to a money-lender, who advanced him £85 on a mtge. of the reversion for £100, with a provision that if default should be made in payment of the £100, the £100 should bear interest at 5 per cent. per month. Twelve years afterwards the reversion fell into possession, & on a bill filed by the personal representative of the mtgor., a decree was made for redemption on payment of the sum borrowed & simple interest at 5 per cent.—*BEYNON v. COOK* (1875), 10 Ch. App. 389; 32 L. T. 353; 23 W. R. 531, L. JJ.

Annotations:—*Consd.* *Seaton v. Lewis* (1895), 11 T. L. R. 430. *Refd.* *Nevill v. Snelling* (1880), 15 Ch. D. 679; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312.

Better terms not obtainable—Borrower independently advised.]—*SEATON v. LEWIS* (1895), 11 T. L. R. 430, O. A.

——— Effect on repeal of usury laws—On jurisdiction of equity to relieve.]—*See* Nos. 936, 938, 940, 999, *ante*, No. 1002, *post*.

1002. ——— Consideration untruly stated.]—By a deed of mtge., after reciting that certain sums amounting to £300 were due from E. to T., & that E. had agreed to make further advances to the extent of £764, & that, in consideration thereof, T. had agreed to secure to E. by judgments, & also by that indenture, the payment within six months of the death of T.'s father of the sum of £2,000 in case T.'s father should not outlive three years from the date of the deed, & of the sum of £3,000 in case T.'s father should outlive that period, with interest from the day of the death, it was witnessed that, in pursuance of the agreement, & in consideration of the premises, T. conveyed certain estates to E. with a proviso for redemption on fulfilment of the terms of the agreement.

At the time of the mtge., the amount actually due from T. to E., together with the advance, was only £680. T. was entitled to a bare fee in the mtged. estates, expectant on the death of his father, but subject to his father's appointment of the estates by deed or will. The father was seventy years old, & a confined lunatic. T. was thirty-seven years of age & had five children, of whom two were living.

The father died four years afterwards. Three years after the father's death E. filed a bill for foreclosure; upon which T. offered to pay the sums actually due & advanced on the occasion of the mtge., with 6 per cent. interest, & costs. This offer having been refused T. filed a bill to set aside the mtge., except as a security for the amount actually due:—*Held*: (1) the transaction must be considered as tantamount to a purchase by E. from T. of a reversionary interest in a sum of £2,000, to be in a certain event increased to £3,000, certainly secured on land, the amount of risk being inappreciable, & as the sum of £680 was a grossly inadequate consideration, & as the terms of the contract themselves showed pressure, the transaction, inasmuch as it was entered into with an expectant heir, must be set aside, except as a security for the sums actually due, the M. R. affirmed.

(2) The principles of the Ct. of Ch. by which the validity of dealings with expectant heirs is tried, are not affected by the repeal of the usury laws.—*EMMET v. TOTTENHAM, TOTTENHAM v. EMMET* (1865), 12 L. T. 838; 14 W. R. 3, L. C.

Annotations:—As to (1) *Refd.* *Aylesford v. Morris* (1872), 42 L. J. Ch. 146; *Beynon v. Cook* (1875), 10 Ch. App. 391, n.

1003. ———.]—Pltf., just of age, & in urgent need of funds, assigned to deft. a reversionary interest as security for a loan of £100 with interest at £60 per cent., & gave a promissory note for the same amount but only £50 was intended to be, & was actually retained by him, the rest being returned as a bonus for the loan:—*Held*: (1) the transaction, bearing a semblance other than the truth, was fraudulent, & ought to be set aside; (2) securities ordered to be given up on payment of sums actually advanced, with interest at 5 per cent.—*WYATT v. COOK* (1868), 18 L. T. 12; 16 W. R. 502.

1004. ——— Interest not paid.]—Reversioners entitled on decease of a tenant for life to a sum of £1,500 charged on land, mortgaged their interest to B. for £500. Though the mtge. was nominally for £500, & a receipt for the same amount was indorsed, only £250 was actually advanced; subsequently B. advanced £150 more

on the same security, & the mtge. deed in this case was expressed to be for £300, & contained recitals that the nature & effect of the deeds & receipts were perfectly understood by the borrowers, & that the difference between the sums actually advanced & the sums expressed to be secured was considered by them a reasonable remuneration for the delay considering the age of the tenant for life. These deeds were prepared by B.'s solr., acting on behalf of all parties, & the borrowers, who were in humble circumstances, had no independent advice. Interest was payable at 5 per cent. but only one instalment, on the first sum of £250 was ever paid. On the death of the tenant for life, the trustees, having paid the fund into ct.:—*Held*: upon the petition by the reversioners, alleging that the transaction was an unconscionable bargain, the mtge. & further charge could stand as security only for the sums actually advanced with six years' arrears of interest only.—*Re SLATER'S TRUSTS* (1879), 11 Ch. D. 227; 48 L. J. Ch. 473; 40 L. T. 184; 27 W. R. 448.

Annotations:—*Mentd. Re Marshfield, Marshfield v. Hutchings* (1887), 34 Ch. D. 721; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385.

(b) Bonds.

See, generally, BONDS, Vol. VII., pp. 175, 176.

1005. Post obit bond—Amount secured largely exceeding advances.]—*THORNICRAFT v. HARWOOD* (1730), Mos. 370; 25 E. R. 445, L. C.

1006. ———.]—*LAMPLUGH v. LAMPLUGH, LAMPLUGH v. COX, COX v. LAMPLUGH* (1769), 1 Dick. 411; 21 E. R. 329.

1007. ———.]—Unconscientious bargain to pay four times the money advanced subject to the contingency of the borrower, young & in good health, surviving a young, but very bad, life, & a very improbable chance of issue. The securities to stand only for the principal advanced, interest, & costs, under the circumstances: no fraud: the terms proposed by the borrower to several others being merely acceded to.—*BOWES v. HEAPS* (1814), 3 Ves. & B. 117; 35 E. R. 423.

Annotations:—*Reid. Talbot v. Stanforth* (1861), 31 L. J. Ch. 197; *Miller v. Cook* (1870), L. R. 10 Eq. 641; *Reynon v. Cook* (1875), 10 Ch. App. 391, n. *Mentd. Samuel v. Newbold*, [1906] A. C. 461.

(c) Other Securities.

1008. Joint securities by young heirs—In payment for goods at extravagant prices—Relief in favour of one—On payment of what received by him.]—Deft. being an exchange man had for many years past practised upon young heirs, by selling them goods at extravagant values, & to be paid five for one & more upon the death of their fathers, & had in that manner obtained from pltf. & two other young gentlemen, that were heirs to good estates, several securities, wherein they were bound severally & jointly in £4,000 for payment of great sums of money. Decreed pltf.'s security to be delivered up on payment of what deft. really & bona fide paid to him alone, & for his own proper use.—*BILL v. PRICE* (1687), 1 Vern. 467; 1 Eq. Cas. Abr. 91; 23 E. R. 592.

1009. ———.]—An heir who together with other young heirs, was drawn in to buy goods at extravagant prices, & to accept of assignments of bad securities, joined in giving securities for the moneys agreed on:—*Held*: he

should be relieved on paying the value of the goods which came to his hand, & should not be answerable for his companions.—*LAMPLUGH v. SMITH* (1688), 2 Vern. 77; 23 E. R. 660, L. C.

1010. *S. P. WITLEY v. PRICE* (1688), 2 Vern. 78; 23 E. R. 660, L. C.

(d) Nature and Terms of Relief.

1011. Security to stand for actual advance—& interest.]—*WALLER v. DALE* (1677), Cas. temp. Finch, 295; 1 Cas. in Ch. 276; 1 Dick. 8; 23 E. R. 162.

1012. ———.]—*BERNY v. PITT* (1686), 2 Vern. 14; 2 Rep. Ch. 396; 23 E. R. 620, L. C.

Annotations:—*Consd. Twisleton v. Griffith* (1716), 1 P. Wms. 310. *Reid. Barnardiston v. Lingood* (1740), 2 Atk. 133; *Chesterfield v. Jansson* (1751), 2 Ves. Sen. 125; *Baugh v. Price* (1752), 1 Wils. 320; *Day v. Newman* (1788), 2 Cox, Eq. Cas. 77; *Bowes v. Heaps* (1814), 3 Ves. & B. 117; *O'Rourke v. Bollingbroke* (1877), 2 App. Cas. 814.

1013. ———.]—*BILL v. PRICE*, No. 1008, ante.

1014. ———.]—*WISEMAN v. BEAKE*, No. 993, ante.

1015. ———.]—*THORNICRAFT v. HARWOOD* (1730), Mos. 370; 25 E. R. 445, L. C.

1016. ———.]—*LAMPLUGH v. LAMPLUGH, LAMPLUGH v. COX, COX v. LAMPLUGH* (1769), 1 Dick. 411; 21 E. R. 329.

1017. ———.]—*BOWES v. HEAPS*, No. 1007, ante.

1018. ———.]—A young nobleman, on attaining twenty-one, for a small consideration, conveyed his reversion in real estates, & assigned policies which had been effected on his life in his name, for securing £20,000, with a proviso for redemption & reconveyance of the estates & policies on payment. After a delay of fourteen years the transaction was set aside, & in the meantime, the policies had been sold under a power of sale:—*Held*: the mtge. must stand as a security for the moneys actually advanced [with interest], but not for the premiums which the mtgees. had paid for keeping up the policies.

In the same case the bill specifically asked for the reassignment of the policies, & the payment of the produce of those sold under the power of sale. The same relief was asked at the hearing, & was given by the decree. After the decree had been passed, pltf., finding the amount in respect of receipts & payments of the policies would be onerous to them, obtained a rehearing, & then asked that this part of the decree might be omitted. The ct. held them entitled, & rectified the decree accordingly, & without costs.—*PENNEIL v. MILLAR* (1857), 23 Beav. 172; 26 L. J. Ch. 690; 29 L. T. O. S. 35; 3 Jur. N. S. 850; 5 W. R. 215; 53 E. R. 68.

Annotations:—*Reid. Bromley v. Smith, Boustead v. Bromley, Smith v. Bromley* (1859), 26 Beav. 644; *Foster v. Roberts* (1861), 29 Beav. 467; *Nesbitt v. Berridge* (1863), 1 New Rep. 345; *Fry v. Lane, Re Fry, Whittot v. Bush* (1868), 40 Ch. D. 312. *Mentd. Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552.

1019. ———.]—*WYATT v. COOK*, No. 1003, ante.

1020. ———.]—*MILLER v. COOK*, No. 999, ante.

1021. ———.]—*Simple Interest*.]—*BEYNON v. COOK*, No. 1000, ante.

1022. ———.]—*AYLESFORD (EARL) v. MORRIS*, No. 940, ante.

Sect. 3.—Unconscionable bargains: Sub-sect. 2, C. (d), D. & E. Sect. 4: Sub-sect. 1.]

1023. —.]—EMMET v. TOTTENHAM, TOTTENHAM v. EMMET, No. 1002, ante.

1024. Security to stand for value of goods received—Goods charged at extravagant prices.]—LAMPLUGH v. SMITH, No. 1009, ante.

1025. —.]—WITLEY v. PRICE, No. 1010, ante.

1026. —.]—FREEMAN v. BISHOP, No. 994, ante.

1027. —.]—V. VANSOMMER (1782), 1 Bro. C. C. 149; 28 E. R. 1046.

Annotation:—Refd. King v. Hamlet (1835), 9 Bl. N. S. 575.

1028. What mortgagees will be allowed—Whether premiums on insuring mortgagor.]—PENNELL v. MILLAR, No. 1018, ante.

1029. —.]—BROMLEY v. SMITH, BOUSTEAD v. BROMLEY, SMITH v. BROMLEY, No. 1034, post.

1030. — Mortgage to secure advances on bills—Full amount of bills.]—(1) A mtge. of a reversionary interest stands in the same position as a & therefore to support the transaction the c. must show that he gave full value.

(2) A mtge. of a reversionary interest, depending on a gentleman dying without issue male, set aside for inadequacy of consideration, although the risk was such as not to be susceptible of accurate valuation.

(3) Loans were made to a young man on his bills at exorbitant interest, & when they were about to become due, he mortgaged his reversionary interest to secure the amount & a further advance. The mtge. being set aside for inadequacy:—Held: the mtgee. was entitled to the full amount of the bills & not simply to the money actually advanced on them.

(4) On setting aside the sale of a reversion for inadequacy after four years, the purchaser is not entitled to any allowance for the risk he has run in the meantime.

(5) On setting aside the purchase of a reversion for inadequacy, the deed stands as a security for the money actually due, & if it be not paid, the bill stands dismissed, which is equivalent to a foreclosure.—BENYON v. FITCH (1806), 35 Beav. 570; 55 E. R. 1018.

Annotation—Generally, Refd. Aylesford v. Morris (1872), 42 L. J. Ch. 146.

D. Burden of Proof.

See, now, Sales of Reversions Act, 1867 (c. 4).

1031. On whom onus lies—Of showing fairness of transaction—On purchaser.]—The rule, that the purchaser of a reversion must prove that he gave

a full price, has so long been considered as settled, that it can be altered only by the Ct. of Appeal.—HINCKSMAN v. SMITH, SMITH v. HINCKSMAN (1827), 3 Russ. 433; 38 E. R. 638.

Annotation:—Refd. Newton v. Hunt (1833), 5 Sim. 511.

1032. —.]—ALDBOROUGH (EARL) v. TRYE, No. 1044, post.

1033. —.]—A purchaser by private contract of a reversionary interest, or at all events the purchaser of an interest from an expectant heir, or some persons standing in the situation of an expectant heir, is bound, if the transaction is impeached within a reasonable time, to satisfy the ct. that he gave the fair market value for what he purchased:—Held: the purchaser not having shown that he gave an adequate consideration for a reversionary interest, the sale must be set aside.—EDWARDS v. BURT (1852), 2 De G. M. & G. 55; 22 L. J. Ch. 215; 20 L. T. O. S. 172; 42 E. R. 791, L. JJ.

Annotations:—Distd. Perfect v. Lane (1861), 3 De G. F. & J. 369. Foll. Jones v. Ricketts (1862), 31 Beav. 130. Refd. Salter v. Bradshaw, Bradshaw v. Salter (1858) 28, L. J. Ch. 426; St. Albyn v. Harding (1859), 27 Beav. 11; Foster v. Roberts (1861), 29 Beav. 467; Willoughby v. Bridgeoake, Bridgeoake v. Lees (1865), 6 New Rep. 395.

1034. — Or mortgagee.]—(1) Where a person deals with an expectant heir for his reversion, the burden of proof lies upon such person to prove the fairness of the transaction. The application of the rule is not prevented by the fact that the transaction was a charge & not a sale; nor that the expectant heir was a person of mature age; nor that he perfectly understood the nature & extent of the transaction; nor is it necessary for the heir to show that he was in pecuniary distress at the time.

(2) An expectant heir mortgaged his reversionary estate, & as a further security, he covenanted to keep up policies on his life, which, on his default, the mtgees. were empowered to do, & he covenanted to pay the amount & charged it on his reversion. On setting aside the transaction for inadequacy of consideration, the mtgees. were not allowed premiums paid by them under the security.—BROMLEY v. SMITH, BOUSTEAD v. BROMLEY, SMITH v. BROMLEY (1859), 26 Beav. 644; 29 L. J. Ch. 18; 33 L. T. O. S. 363; 5 Jur. N. S. 833; 7 W. R. 557; 53 E. R. 1047.

Annotations:—As to (1) Refd. Tynte v. Hodge, Tynte v. Beavan (1864), 2 Hem. & M. 287; Emmet v. Tottenham, Tottenham v. Emmet (1865), 12 L. T. 838. As to (2) Refd. Foster v. Roberts (1861), 29 Beav. 467; Fry v. Lane, Re Fry, Whittet v. Bush (1888), 40 Ch. D. 312.

1035. —.]—BENYON v. FITCH, No. 1030, ante.

1036. —.]—TYNTE v. HODGE, TYNTE v. BEAVAN, No. 945, ante.

1037. —.]—HANNAH v. HODGSON, No. 852, ante.

1038. —.]—AYLESFORD (EARL) v. MORRIS, No. 940, ante.

PART III. SECT. 3, SUB-SECT. 2.—D.

1031 i. On whom onus lies—Of showing fairness of transaction—On purchaser.]—In dealing with expectant heirs the onus of showing fairness is on purchaser, but a transaction will not be set aside on the ground of inadequacy of price, if the price given is the fair market value. The actual value of a reversion being no criterion of a fair price.—Re LEVY, Ex p. OFFICIAL GOLDRING (1894), 15 N. S.

W. B. 30.—AUS.

1031 ii. —.]—Purchaser, claiming title under conveyances from a Hindu female heir with a limited interest, & seeking to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyances, but the full comprehension by the limited owner of the nature of the alienations she was making, & that those alienations were justified by

necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity; & this burden lies the more heavily on one who comes into ct. with the case that he did not take from a limited owner, but from one, whose title he alleges to have been adverse to that owner.—BHAGWAT DAYAL SINGH v. DEBI DAYAL SAHU (1908), I. L. R. 35 Cal. 420; 13 C. W. N. 393; L. R. 35 Ind. App. 48.—IND.

1039. ———.]—O'RORKE v. BOLINGBROKE, No. 961, *ante*.

1040. ———.]—FRY v. FRY, WHITTET v. BUSH, No. 962, *ante*.

1041. Whether onus shifted—Where expectant heirs of mature age.]—BROMLEY v. SMITH, ROUSTEAD v. BROMLEY, SMITH v. BROMLEY, No. 1034, *ante*.

1042. — Where expectant heir understands transaction.]—BROMLEY v. SMITH, ROUSTEAD v. BROMLEY, SMITH v. BROMLEY, No. 1034, *ante*.

1043. — When heir not in pecuniary distress.]—BROMLEY v. SMITH, ROUSTEAD v. BROMLEY, SMITH v. BROMLEY, No. 1034, *ante*.

1044. Discharge of onus—Whether proof of substantial value sufficient.]—(1) A., being tenant in tail of large estates expectant on the death of his father, in consideration of £8,000 & £10,000 advanced to him by O., charged the estates with £12,000 & £20,000 to be paid only in the event of surviving his father, who was about eighty years of age, A. being about forty-three; & he granted to R., his agent in these transactions, in consideration of his services, an annuity charged on the same estates. R. assigned the annuity to O. for valuable consideration. O. filed a bill against A., after his father's death, to enforce these securities; & A. filed a cross bill to set them aside, charging that O. & R. took advantage of his distress, & that no adequate consideration was given him for the *post-obit* securities, & no consideration for the annuity; & at the hearing he gave evidence that the consideration for the two sums of £12,000 & £20,000 was not the full value according to the tables & calculations of actuaries. C. gave no evidence of value:—*Held*: the ct., in the absence of evidence to enable it to decide the question, exercised a proper discretion in directing the master to inquire what, at the time of the transaction, was the fair market price of the two sums so secured to be paid, regard being had to the ages of A. & of his father, & to the circumstances of the estates & A.'s interest in them.

(2) A person seeking the benefit of a dealing with an heir expectant for his expectancies, must show that he gave him an adequate consideration, which is the fair market price at the time of dealing, & not the value according to the calculations of actuaries on the tables.

(3) The rule that a fair price is to be given, is sufficient protection to heirs expectant or reversioners; but the rule of full value would not be any protection, as in that case they could not deal with their expectancies or sell their interest at all.

A sale by public auction is within the proper rule, on the plain principle that the sum which the thing will fetch is the sum which it is worth.—ALDBOROUGH (EARL) v. TRYE (1840), 7 Cl. & Fin. 436; West, 221; 4 Jur. 1149; 7 E. R. 1136, H. L.

Annotations:—*As to* (1) *Follid.* Boothby v. Boothby (1849), 2 H. & Tw. 214. *Reid.* Siree v. Kirwan (1843), 9 Cl. & Fin. 716. *As to* (2) *Reid.* Foster v. Roberts (1861), 29 Beav. 467; Perfect v. Lane (1861), 3 De G. F. & J. 369; Talbot v. Staniforth (1861), 1 John. & H. 484; Fry v. Lane, *Re* Fry, Whittet v. Bush (1888), 40 Ch. D. 312. *As to* (3) *Reid.* Edwards v. Burt (1852), 2 De G. M. & G. 54; Tynte v. Hodge, Tynte v. Beavan (1864), 2 Hem. & M. 287. *As to* (4) *Reid.* Borell v. Dann (1843), 2 Hare, 440. *Generally.* *Reid.* Tottenham v. Green (1863), 32 L. J. Ch. 201. *Mentd.* Judd v. Green (1875), 45 L. J. Ch. 108; Nant-y-Glo & Blaenau Ironworks Co. v. Tamplin (1876), 35 L. T. 125.

1045. ———.]—(1) The burden of showing that a fair price has been given for the interest of an expectant heir lies upon the purchaser & that burden is not displaced by showing that substantial value has been given.

(2) A bachelor, aged fifty-nine, tenant for life, with remainder to his first & other sons in tail, purchased from his nephew, who was first presumptive tenant in tail, & under considerable pressure from his creditors, his expectant interest in the estate at an undervalue; & the two then cut off the entail, & conveyed the estate to the use of the purchaser in fee:—*Held*: this could not be looked upon as a family arrangement, & the purchase was set aside.—TALBOT v. STANFORTH (1861), 1 John. & H. 484; 31 L. J. Ch. 197; 5 L. T. 47; 7 Jur. N. S. 961; 9 W. R. 827; 70 E. R. 837.

Annotations:—*Reid.* O'Rourke v. Bollingbroke (1877), 2 App. Cas. 814; Fry v. Lane, *Re* Fry, Whittet v. Bush (1888), 40 Ch. D. 312.

1046. — Sale by public auction.]—A sale of a reversion by public auction, held good, & the purchaser not bound to show he has given the full value.—SHELLEY v. NASH (1818), 3 Madd. 232; 56 E. R. 491.

Annotations:—*Reid.* Fox v. Wright (1821), 6 Madd. 111; Aldborough v. Trye (1840), 7 Cl. & Fin. 436; Ayloesford v. Morris (1873), 8 Ch. App. 484. *Mentd.* Tottenham v. Green (1863), 1 New Rep. 466.

1047. ———.]—ALDBOROUGH (EARL) v. TRYE, No.

1048. Pleading—Relief sought on ground of undervalue—Must be pleaded.]—A party filed a bill to set aside a conveyance of a reversionary property, on the ground, that an absolute conveyance of the estate was fraudulently obtained from him, instead of a mtge.:—*Held*: he could not at the hearing affirm that it was a sale, & obtain a decree to set it aside, on the ground of its being a sale of a reversionary interest at an undervalue.—SPENCER v. SUTCLIFFE (1836), 5 L. J. Ch. 113.

1049. Discovery - Liability of purchaser.]—Where the purchase of a reversionary interest was impeached, on the ground of fraud & inadequate consideration, the purchaser was held bound to produce the deeds by which that transaction was effected, & all subsequent documents relating to it, but not any of the other title deeds.—ADDIS v. CAMPBELL (1839), 1 Beav. 258; 8 L. J. Ch. 305; 18 E. R. 939.

SECT. 4.—CONFIRMATION BY GRANTOR.

SUB-SECT. 1.—IN GENERAL.

1050. Whether a bar—Original contract fraudulent.]—(1) A conveyance by an heir expectant in tail in necessitous circumstances to the family attorney in which the grantor covenanted that he was seised in fee:—*Held*: fraudulent upon the face of it.

(2) There is no instance where the original contract was fraudulent, that any subsequent act could purge it (*per Cur.*).—BAUGH v. PRICE (1752), 1 Wils. 320; 95 E. R. 640.

Sect. 4.—Confirmation by grantor: Sub-sects. 1, 2

1051. Sufficiency of confirmation—Necessity for full knowledge.]—SAY v. BARWICK, No. 819, *ante*.

1052. ———.]—There can be no confirmation of a fraudulent gift or bargain obtained through undue influence by a donee or bargainee standing in a confidential relationship towards the donor or bargainor unless there be full knowledge on the part of the latter of all the facts & the rights arising out of them, & an absolute release from the undue influence by means of which the fraud was practised.—*MOXON v. PAYNE* (1873), 8 Ch. App. 881; 43 L. J. Ch. 240, L. J.J.

*Annotation:—*Reid. *Barron v. Wille*, [1900] 2 Ch. 121.

1053. ——— Undue influence continuing.]—MACCABE v. HUSSEY, No. 881, *ante*.

1054. ———.]—MOXON v. PAYNE, No. 1052, *ante*.

1055. ———.]—A young lady, who was living with her mother & step-father in 1859, shortly after she came of age, at the solicitation of her step-father, executed a bond as surety to secure the repayment of a sum of money advanced by debt. payable at the end of six years. In 1866 debt. brought an action & recovered judgment against pltf.'s step-father on the bond, & to avoid an execution, pltf., who was then twenty-nine years of age, but who still resided principally with her step-father, was induced by him to execute a second bond as surety to secure the amount of the judgment & costs. Both bonds were prepared by the step-father's solr. & pltf. had no independent advice. In 1872 debt. brought an action against pltf. on the bonds & she then filed her bill to set them aside:—*Held*: the second bond must be taken as connected with the first, & as there was no proof that pltf. was aware of the invalidity of the first bond, the execution of the second bond was not a confirmation of the first; & both bonds were set aside against her.—*KEMPSON v. ASHBE* (1874), 10 Ch. App. 15; 44 L. J. Ch. 195; 31 L. T. 525; 39 J. P. 104; 23 W. R. 38, L. C. & L. J.J.

*Annotations:—*Reid. *Bainbridge v. Browne* (1881), 18 Ch. D. 188; *London & Westminster Loan & Discount Co. v. Bilton* (1911), 27 T. L. R. 184.

1056. ——— Party acting under legal advice.]—A trustee & exor., who had been land agent & receiver to his testator without settling accounts for several years, upon his death obtained from the *cestui que trust* & residuary legatee an agreement to continue him in the agency, & in case of removal without just cause, to allow him the same salary; & also a deed granting to him part of the trust estates. The agreement & the deed were prepared by the agent, who was an attorney, & executed by the principal & *cestui que trust* without legal advice; & the deed recited, untruly, that it was granted "by last request of testator, in considera-

tion of the agent's services, & also in full discharge of all accounts between them. The new agency terminated in a year & a half by mutual desire of the parties; & after a settlement of accounts to the satisfaction of the principal's legal advisers, he executed a deed approved by them confirming the former deed, & wrote letters subsequently to the agent, claiming the benefit of the latter deed, & expressing his satisfaction at having given the estate:—*Held*: although the deed of gift was voidable in its origin, & could not be sustained if it stood by itself & had been impeached in reasonable time, yet the subsequent deliberate acts of the party impeaching it, assisted by his legal advisers, made it valid & binding on him.—*DE MONTMORENCY v. DEVEREUX* (1840), 7 Cl. & Fin. 188; West, 64; 4 Jur. 403; 7 E. R. 1039, H. L.

1057. ——— Grantor joining in subsequent sale by grantee.]—B. purchased a reversionary interest of A. at a gross undervalue, & under circumstances which rendered the transaction void in equity. C. had notice of the invalidity of the contract, but ten years afterwards he purchased the reversion of B., paying to B. the full value; A. joined in the conveyance & confirmed the sale. The ct., being of opinion that C. had not taken proper steps to protect A. in the second transaction, set it aside, & decreed a reconveyance, on repayment of the consideration given by B. to A. in the first transaction.—*ADDIS v. CAMPBELL* (1841), 4 Beav. 401; 10 L. J. Ch. 284; 49 E. R. 394.

SUB-SECT. 2.—EFFECT OF CONFIRMATION.

1058. Express confirmation—With full knowledge.]—MASKEEN v. COLE (1733), 2 Madd. 421, n.; 56 E. R. 390, L. C.

1059. ———.]—A. having £500 given him by his uncle, in case he should survive testator's wife, sells it for £100 to be paid by £5 *per annum*; but that if testator's wife should die before A. & the legacy become due, in such case the rest of the money to be paid within a year then next. A. does survive testator's wife, & knows the legacy was become due to him, & being fully apprised of the whole fact, confirms the bargain; he shall be bound thereby.—*COLE v. GIBBONS, MARTIN v. COLE* (1734), 3 P. Wms. 290; 24 E. R. 1070, L. C.

*Annotations:—*Distd. *Baugh v. Price* (1752), 1 Wils. 320. Reid. *Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125; *Gwynne v. Heaton* (1778), 1 Bro. C. C. 1; *King v. Hamlet* (1834), 2 My. & K. 456.

1060. ———.]—DE MONTMORENCY v. DEVEREUX, No. 1056, *ante*.

1061. ———.]—An agreement confirmed, not impeached without clear proof of imposition.—*HALHED v. MARKE* (1742), 3 Swan. 444, n.; 30 E. R. 942, L. C.

PART III. SECT. 4, SUB-SECT. 1.

1051 i. Sufficiency of confirmation—Necessity for full knowledge.]—A farmer, 77 years old, conveyed his farm to two of his daughters, subject to maintenance of himself & his wife & of a money payment to another daughter. The evidence showed that he understood what he was doing & approved of it afterwards till his death, four years later. In an action by a son, after his death, to set aside the conveyance:—*Held*: the transaction was a

one; the conveyance, being executed voluntarily & deliberately, with knowledge of its nature & effect, should not be set aside; the advice of an independent solr. or other person was not a *sine qua non*, it appearing that the transaction was not promoted or obtained by undue influence, & was a reasonable one.—*EMPEY v. FICK* (1907), 10 O. W. R. 144; 15 O. L. R. 19.—CAN.

1053 i. ——— Undue influence continuing.]—Pltf. sought to set aside a trans-

fer of land which debt. had obtained from him by the exercise of what the judge held to have been both fraud & undue influence, but debt. contended that pltf. had, after the commencement of the action, compromised & settled it by signing the agreement referred to in the judgment:—*Held*: the alleged ratification as well as the original transfer had been obtained by fraud & undue influence & the transfer should be set aside.—*ATKINSON v. BORLAND* (1901), 14 Man. L. R. 205.—CAN.

1062. — Post-nuptial settlement by infant wife—Confirmed when of age.]—An infant *jeme covert* being entitled to property for her separate use, executed a post-nuptial settlement. Subsequently, when of age, she executed a deed confirming the settlement. She is precluded from attempting to set the settlement aside.—**MERRY-WEATHER v. JONES** (1864), 4 Giff. 509; 10 L. T. 62; 10 Jur. N. S. 290; 12 W. R. 524; 66 E. R. 807.

1063. — By will.]—Pltf. claimed as heir-at-law of A., who, as the bill alleged, when in very embarrassed circumstances, had executed a voidable conveyance to his solr. The bill, after stating a pretence on the part of defts., who claimed under the solr., that A. had confirmed the conveyance by his will, charged that he had died intestate as to the premises in question, & prayed that the conveyance & any testamentary disposition by him in confirmation thereof might be declared null & void. Plea, that A. by will, after reciting the probability of the conveyance being disputed, had ratified & confirmed it, allowed.—**STUMP v. GABY** (1852), 2 De G. M. & G. 623; 22 L. J. Ch. 352; 20 L. T. O. S. 213; 17 Jur. 5; 1 W. R. 85; 42 E. R. 1015, L. C.

*Annotations:—*Distd. **Waters v. Thorn** (1856), 22 Beav. 547. *Refd.* **Gresley v. Mousley** (1859), 4 De G. & J. 78. *Mentd.* **Hindson v. Weatherill** (1854), 5 De G. M. & G. 301.

1064. — —.]—A solr. purchased a property from his client, who, by a codicil, confirmed the sale & devised the property to the solr. The ct., having, on the evidence, held the sale invalid, also decided that the codicil was inoperative in equity.—**WATERS v. THORN** (1856), 22 Beav. 547; 52 E. R. 1219.

1065. — —.]—In 1854 A. went through the marriage ceremony, in Prussia, with C., his deceased wife's sister. After the marriage, & in consideration thereof, C. settled property upon certain trusts, reserving to herself, however, a power of appointment. Subsequently by her will C. confirmed the trusts of the settlement. On the death of C. both the will & settlement were admitted to probate:—*Held*: the settlement was valid.—**SEALE v. LOWNDES** (1868), 17 L. T. 500.

1066. Implied confirmation—Exercise of powers under voidable settlement.]—Pltf. in 1857, immediately after coming of age, executed a voluntary settlement of his property in strict entail on himself & his brother & sisters, under such circumstances that if he had filed a bill for that purpose at once the settlement would have been set aside. In 1859, by way of settlement on his marriage, he exercised certain powers contained in the deed of 1857, of charging a jointure & portions for his younger children. In 1868 he filed a bill to have the settlement declared void without prejudice to the jointure & portions:—*Held*: his acts in 1859 amounted to a complete confirmation of the settlement of 1857.—**JARRATT v. ALDAM** (1870),

L. R. 9 Eq. 463; 39 L. J. 18 W. R. 511.

L. T. 192;

*Annotation:—**Refd.* **Hoblyn v. Hoblyn** (1889), 60 L. T. 499.

SUB-SECT. 3.—EFFECT OF LAPSE OF TIME.

1067. Whether confirmation implied.]—**SMITH v. DOWNING**, No. 817, *ante*.

1068. —.]—Conveyance by a ward to her guardian under the circumstances set aside upon grounds of public justice, after a great lapse of time.

It is said the length of time makes a material difference; . . . I do not deny that length of time is of great consequence in all these cases of fraud, breach of the policy of the law, etc. But in all cases it is some evidence that the transaction was understood at the time not to be fraudulent (**LORD ELDON, C.**).—**HATCH v. HATCH** (1804), 9 Ves. 292; 1 Smith, K. B. 226; 32 E. R. 615, L. C.

*Annotations:—**Consd.* **Archer v. Hudson** (1846), 15 L. J. Ch. 211; **Tomson v. Judge** (1855), 3 Drew. 308. *Distd.* **Wright v. Vanderplank** (1856), 8 De G. M. & G. 133. *Consd.* **Davies v. Davies** (1863), 4 Giff. 417. *Distd.* **Turner v. Collins** (1871), 7 Ch. App. 329. *Consd.* **Wright v. Carter**, [1903] 1 Ch. 27. *Refd.* **Hunter v. Atkins** (1834), 3 My. & K. 113; **Cheslyn v. Dalby** (1836), 2 Y. & C. Ex. 170; **Edwards v. Meyrick** (1842), 2 Haro. 60; **Hindson v. Weatherill** (1853), 1 Sm. & G. 604; **Lyon v. Home** (1868), L. R. 6 Eq. 655; **Liles v. Torry**, [1895] 2 Q. B. 679.

1069. —.]—**GOWLAND v. DE FARIA**, No. 981, *ante*.

1070. —.]—**WHALLEY v. WHALLEY**, No. 950, *ante*.

See, generally, **EQUITY**, Vol. XX., pp. 524 *et seq.*; **ESTOPPEL**, Vol. XXI., pp. 347 *et seq.*

1071. —.]—Testator devised a farm to his son, to be valued by A., & one third of the valuation to be paid to pltf. In 1833 A. bought the farm for himself for £750, & paid one-third to pltf., who accepted it. In 1850, A. being dead, pltf. filed a bill to set aside the sale for inadequacy of consideration:—*Held*: considering the lapse of time, & the death of A., pltf. was too late, & the bill was dismissed.—**BAKER v. READ** (1854), 18 Beav. 398; 3 W. R. 118; 52 E. R. 157, L. JJ.

1072. — Grantor remaining ignorant of rights — & under influence.]—**PURCELL v. McNAMARA**, No. 832, *ante*.

1073. — Onus of proof not discharged.]—A transaction of many years' standing sought to be set aside, on the ground of inadequacy of consideration, the relation between the parties, & the incapacity of the vendor; relief refused, neither of the grounds having been sufficiently made out.

With regard to inadequacy of price, it is not to be measured by a little on one side or the other, by this or that excess, if so, where should we cast anchor? The rate is that unless of itself it

PART III. SECT. 4, SUB-SECT. 3.

*o. Whether confirmation implied—Grantor remaining ignorant of rights.]—*An annuity which was obtained at an inadequate price by a confidential attorney from his client, cognizant of all the facts, under no legal disability, & acquiescing thirty years was aside at the suit of the heir & under a family settlement, no evidence

having been lost, or facts thrown into obscurity by lapse of time & the client being ignorant of his power to resist.—**MOLONY v. L'ESTRANGE** (1829), Beav. 406.—**IR.**

1073 i. — Onus of proof not discharged.]—Where there was great inequality between the parties in their business capacity, & deft. failed to show that he had given pltf. all the

information he was entitled to, or that pltf. had made the assignment without pressure or influence:—*Held*: pltf. entitled to redeem on payment of deft.'s advance, although seven years had elapsed before pltf. filed his bill impeaching the transactions; the excuse assigned for the delay being his poverty.—**BRADY v. KEENAN** (1868), 14 Gr. 214.—**CAN.**

1073 ii. — —.]—**WOLFF v.**

Sect. 4.—Confirmation by grantor: Sub-sect. 3.
Sects. 5, 6, 7, 8 & 9. Parts IV. & V.]

proves fraud *ex evidentiâ Rerum*, by itself it has not the weight suggested (MACDONALD, C.B.).—EVANS v. BROWN (1810), Wight. 102; 145 E. R. 1190.

1074. Whether a bar in equity.]—Pltf., who was tenant for life of the premises sold under the contract now sought to be set aside by virtue of his marriage settlement, without impeachment of waste, having become involved in debt & greatly embarrassed in his pecuniary affairs, in May, 1801, conveyed all his estate, right, title, & interest, in the settled premises, to trustees for the purpose of sale, subject to a rentcharge of £150 *per annum* reserved to himself, for the benefit of such of his creditors as should execute the deed. Immediately after he had himself executed that deed he left the country & went to reside in the Isle of Man for the manifest & avowed purpose of personal protection from his still unsatisfied creditors. The trustees thereupon employed a land surveyor for the purpose of measuring & valuing pltf.'s interest in the premises preparatory to putting them up to sale. He, the surveyor, was assisted in the performance of that duty throughout by his son (deft. & purchaser), who had then very recently, been his father's partner in the business (himself also a land surveyor & auctioneer), so that he had had great share in making that valuation, by measuring & mapping the estate, etc. The result of that valuation, which was completed in Dec. 1801, was an estimate stating the annual value to be £232 3s. 5d. On Feb. 6 following the estate was put up to sale by public auction upon which occasion deft., the purchaser, was employed as the auctioneer. The estate not being then sold as no one had offered any bidding, deft., on the next day, proposed to the trustees to purchase the estate himself for £500. They immediately acceded to the proposal, & let deft. into possession on Apr. 15 but did not require of him to pay the purchase-money till Mar. 5, 1803, when the conveyance to him was executed & they then received it without taking or requiring interest. That conveyance was soon afterwards executed by pltf., who came from the Isle of Man for that purpose, upon receiving a letter from one of the trustees informing him, that if he did not execute the deed, the annuity of £150 would be no longer paid. At the time of the sale to deft. there was a quantity of valuable timber on the estate, said to be worth from £300 to £700 which had not been taken into consideration in making the above estimate of pltf.'s interest. That purchase was, in these circumstances, sought to be set aside on the several grounds of having been made by a person of skill in business employed confidentially on the part of pltf. to value & sell the estate for the vendor's advantage, knowledge in consequence acquired by him, fraudulent abuse of trust, inadequacy of price, & duress & coercion. The defence was, that the consideration money

was not inadequate, that the character in which the purchaser had stood, with relation to the parties was not one of trust or confidence, that he had acquired no knowledge which he had not fully communicated, & that as pltf. had himself by joining in the conveyance confirmed it, & as so great a length of time had been suffered to elapse since the purchase it amounted altogether to such complete & entire acquiescence without any complaint or protest on the part of pltf. as that it had operated to preclude him from all right to the relief which he sought:—*Held*: the purchase ought under the circumstances of the case to be set aside, deft. had no right to purchase by reason of the situation of relationship in which he stood to the parties selling, the inadequacy of price was sufficiently established under the circumstances of fraud disclosed, independently of those circumstances, the omission of the timber in the valuation would alone, although said to be a mistake, have been sufficient ground for setting the purchase aside, when made by a person in the character with which deft. was clothed, in the circumstances of duress in which pltf. was shown to have been & to have continued in this case, his execution of the deed was void, if necessary; & if unnecessary, nugatory, & the length of time which had elapsed between the original transaction & the institution of this suit to annul the contract was no bar to pltf.'s claim to relief in cts. of equity, where the jurisdiction to relieve is not subject to any limitation in point of intermediate lapse of time by analogy to the statute; but only to such as is usually for the sake of convenience prescribed by the discretion of the ct., in consideration of his having been from poverty & embarrassments, *non compos sui*.—OLIVER v. COURT (1820), 8 Price, 127; Dan. 301; 146 E. R. 1152.

Annotation:—*Refd.* Armstrong v. Jackson, [1917] 2 K. B.

5.—WHO MAY IMPEACH.

1075. Creditors—Under devise for payment of debts.]—One being in an undue manner drawn in to execute a conveyance of his estate, after makes his will, & thereby devises all his lands to be sold for payment of his debts; his creditors may set aside the conveyance, having a right in nature of an equity of redemption, as testator himself had, though urged, that it was but in nature of a chose in action, & not assignable.—BLAKE v. JOHNSON (1700), Prec. Ch. 142; 2 Eq. Cas. Abr. 86; 24 E. R.

Annotation:—*Refd.* Hawes v. Wyatt (1790), 2 Cox, Eq. Cas. 263.

1076. After death of grantor—Heir-at-law or parties claiming under grantor's will.]—ANDERSON v. ELSWORTH, No. 828, *ante*.

Estoppel by deed.]—*See, generally*, ESTOPPEL, Vol. XXI., pp. 242 *et seq.*

SOLOMON'S TRUSTEES (1895), S. C. 42; 5 C. T. R. 72.—S. AF.

1074 I. Whether a bar in
STONEHOUSE v. WALTON (1915), 35
O. L. R. 17; 9 O. W. N. 417.—CAN.

PART III. SECT. 5.

d. Grantor—Unsubstantiated charges of fraud.]—Pltf., an infirm man aged seventy-five, & nearly deaf,

conveyed without any power of revocation, all his property, worth about \$8,000, to a son, deft., with whom he went to live, pltf. receiving a bond in \$2,000 penalty, securing a maintenance, or \$125 a year if unable to continue to reside with deft., but not charged on realty. On a bill by the father to be relieved from the transaction:—*Held*: on the ground of the extreme improvidence of the bargain,

& that the instruments did not, as pltf. swore, carry out his real intention, transaction should be set aside; but the bill having improperly charged deft. with fraud & undue influence in procuring the deeds relief granted without costs.—WATSON v. WATSON (1876), 23 Gr. 70.—CAN.

e. ———.]—JANKI KUNWAR v. AJIT SINGH (1887), I. L. R. 15 Cal. L. R. 14 Ind. App. 148.—IND.

Relief on ground of mistake.]—See MISTAKE.

Relief on ground that bargain unconscionable, see Sect. 3, *ante*.

Relief on ground of undue influence, see Sect. 2, *ante*.

6.—POSITION OF PARTIES CLAIMING THROUGH GRANTEE.

Onus of proof that purchaser with notice.]

Pltfs. sought to set aside a conveyance made by their ancestor, as they alleged, while a lunatic, under undue influence, & for an inadequate consideration.

Deft., who claimed under a derivative title, admitted that he was a purchaser, but contended that he was a valuable consideration without notice. No notice, actual or constructive, having been proved, the ct. refused to interfere, & dismissed the bill with costs. The absence on a bill of a receipt for the consideration, though it is

52 E. R. 612.

SECT. 7.—PURCHASES BY AGENT FROM PRINCIPAL.

See, generally, AGENCY, Vol. I., pp. 471 *et seq.*

SECT. 8.—PURCHASES BY COMPANY FROM PROMOTER.

See, generally, COMPANIES, Vol. IX., pp. 37 *et seq.*

SECT. 9.—PRACTICE.

1078. What court has jurisdiction.]—PADWICK v. SCOTT (1876), Bitt. Prac. Cas. 135; 2 Char. Cham. Cas. 10.

1079. Interrogatories—Grounds for striking out.]—An action having been brought to set aside a deed of gift made by a lady a few days before her death, on the ground that the instructions for it were given while she was in a state of stupor produced by large doses of a narcotic drug, plff. exhibited interrogatories, following out in detail the statements of the claim, with a view of showing that deft., who was the grantee in the deed of gift, had procured the drug for her & encouraged her to take it, in order to avail himself of the stupor which it produced to obtain the execution of the deed of gift. Deft. moved to strike out the interrogatories as scandalous, irrelevant, & not put *bonâ fide* for the purposes of the action:—*Held*: supposing the matter inquired after to be an indictable offence, that was no reason for striking out an interlocutory, which, being relevant, was not scandalous; & the remedy of deft. was to decline to answer, on the ground that his answer might tend to criminate him.—FISHER v. OWEN (1878), 8 Ch. D. 645; 47 L. J. Ch. 681; 38 L. T. 577; 42 J. P. 758; 26 W. R. 581, C. A.

Annotations:—*Mentd.* Allhusen v. Labouchere (1878), 3 Q. B. D. 654; Webb v. East (1879), 41 J. P. 200; Lamb v. Munster (1882), 10 Q. B. D. 110; Hummings v. Williamson (1883), 10 Q. B. D. 459; Spokes v. Grosvenor Hotel Co., [1897] 2 Q. B. 124; National Assn. of Operative Plasterers v. Smithies (1906), 95 L. T. 71.

See, generally, DISCOVERY, Vol. XVIII., pp. 191 *et seq.*

1080. Costs—Apportionment between parties.]—THIBY v. BOOTHBY, No. 976, *ante*.

1081. —.]—ST. ALBYN v. HARDING, No. 977, *ante*.

See, generally, PRACTICE.

Part IV.—Conveyances Voidable for Misrepresentation or Fraud.

See MISREPRESENTATION & FRAUD.

Part V.—Conveyances Voidable for Mistake.

See MISTAKE.

Part VI.—Conveyances Voidable for Surprise.

1082. Principles of relief.]—EVANS *v.* LLEWEL-LIN, No. 915, *ante*.

1083. Coupled with misrepresentation.]—Conveyance by lease & release & fine set aside upon great inadequacy of consideration, combined with misrepresentation & surprise upon parties in extreme distress, ignorant of their interests, & not properly protected; though the transaction took place twelve years before the bill & a former bill having been dismissed, *pltf.* not appearing; that objection not being made either by plea or answer.

Qu: as to the effect of inadequacy alone.

The account limited to the time of the bill filed.

—PICKETT *v.* LOGGON (1807), 14 Ves. 215; 33 E. R. 503, L. C.

Annotations:—*Refd.* Hicks *v.* Sallitt (1854), 3 De G. M. & G. 782. *Mentd.* Houston *v.* Sligo (1885), 29 Ch. D. 448.

1084. Coupled with mistake.] —WILLAN *v.* WILLAN, No. 804, *ante*.

See, also, No. 806, *ante*.

1085. Allegation rebutted—Grantor executing under legal advice.]—The deed was not executed by a surprise, for the duke's counsel was present at the execution of the deed; & here is no fraud to set it aside (HOLT, C.J.).—ALBEMARLE (DUCHESS) *v.* BATH (EARL) (1693), Freem. Ch. 121, 193; Nels. 196; 2 Rep. Ch. 417; 22 E. R. 1099; *sub nom.* MONTAGUE (EARL) *v.* BATH (EARL), 3 Cas. in Ch. 55, 96.

Annotations:—*Mentd.* Falkland *v.* Bertie (1696), 2 Vern. 333; Bertie *v.* Faulkland (1698), 3 Cas. in Ch. 129; Piggott *v.* Penrice (1715), 1 Com. 250; Bagot *v.* Oughton (1726), Fortes. Rep. 332; Fitzgerald *v.* Fauconberge (1729), Fitz-G. 207; Hervey *v.* Hervey (1739), 1 Atk. 561; Bennet *v.* Vade (1742), 2 Atk. 324; Middleton *v.* Pryor (1760), Amb. 391; Chapman *v.* Gibson (1791), 3 Bro. C. C. 229; Griffin *v.* Nanson (1798), 4 Ves. 344; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Haynes *v.* Haynes (1861), 1 Drew. & Sm. 426.

Surprise as a ground for refusing specific performance.]—*See* SPECIFIC PERFORMANCE.

FRAUDULENT ASSIGNMENT.

See BANKRUPTCY AND INSOLVENCY; FRAUDULENT AND VOIDABLE CONVEYANCES.

FRAUDULENT DEBTOR.

See BANKRUPTCY AND INSOLVENCY.

FRAUDULENT DISTRESS.

See BANKRUPTCY AND INSOLVENCY; DISTRESS.

FRAUDULENT REMOVAL OF GOODS.

See DISTRESS.

FREEBENCH.

See COPYHOLDS.

FREEBOARD.

See SHIPPING AND NAVIGATION.

FREE CROPPING.

See AGRICULTURE.

FREEHOLD.

See PARTICULAR TITLES *passim*.

FREEHOLD LAND SOCIETIES.

See INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

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FRIENDLY SOCIETIES.

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<i>1, generally</i>	<i>See</i> CLUBS.	<i>Insurance Corporations</i>	<i>See</i> COMPANIES; IN-SURANCE.
<i>Companies, generally</i>	„ COMPANIES.		
<i>Incorporated Clubs.</i>	„ CLUBS; COM-PANIES.	<i>Loan Societies</i>	LOAN SOCIETIES.
<i>Industrial Assurance Companies</i>	„ COMPANIES; INSUR-ANCE.	<i>Partners</i>	PARTNERSHIP.
<i>Industrial Societies</i>	INDUSTRIAL, PRO-VIDENT AND SIMI-LAR SOCIETIES.	<i>Proprietary Clubs</i>	CLUBS.
		<i>Provident Societies.</i>	INDUSTRIAL, PRO-VIDENT AND SIMI-LAR SOCIETIES.
		<i>Trade Unions</i>	TRADE AND TRADE UNIONS.

to as 1896 Act, 1908 Act, & 1916 Act, respectively.

Part I.—Application and Construction of Statutes.

See 1896 Act, ss. 101–109, as amended by 1908 Act, ss. 12, 14, 1916 Act, s. 3.

1. Societies entitled to protection of Acts—How ascertained.]—FARRER v. CLOSE, No. 70, *post*.

2. Construction of Acts—Substance, not technicalities, considered.]—*Re SHEFFIELD ORDERLY SOCIETY*, No. 394, *post*.

Part II.—Nature and Objects of Friendly Societies.

See 1896 Act, s. 8; 1908 Act, s. 1.

Unregistered societies.]—See Part III., *post*.

Extension of objects on conversion into limited company.]—See Part XX., Sect. 2, *post*.

Clubs & other voluntary associations.]—See CLUBS, Vol. VIII., pp. 505 *et seq*.

3. Need not include all objects specified in statute.]—(1) A society is a friendly society under Friendly Societies Act, 1875 (c. 60), s. 8, although it may not include in its objects all the objects there stated provided its objects are substantially the same as those in the Act.

(2) In the case of an unregistered society under sect. 30 (10), of above Act (explained by 42 & 43 Vict. c. 9), the right of appeal to a county ct. or ct. of summary jurisdiction overrides any rules of the society to the contrary.—KNOWLES v. BOOTH (1883), 32 W. R. 432, D. C.

Annotation:—*As to* (1) *Expld.* Old v. Robson (1890), 59 L. J. M. C. 41.

4. Distinguished from loan societies.]—A society established for the purpose of lending the money raised by the contributions of its members to the members themselves, is not a friendly society within 10 Geo. 4, c. 56, & 4 & 5 Will. 4, c. 40.—R. v. SHORTRIDGE (1844), 1 Dow. & L. 855; 1 New Sess. Cas. 56; *sub nom.* R. v. SCOTT, 13 L. J. M. C. 70; 8 J. P. 410; 8 Jur. 473; *sub nom.* R. v. DURHAM JJ., 2 L. T. O. S. 353.

Annotations:—*Reid.* Burbidge v. Cotton (1851), 5 De G. & Sm. 17; Kelsall v. Tyler (1856), 11 Exch. 513.

As to loan societies, see LOAN SOCIETIES.

5. Distinguished from building societies.]—Benefit building societies are not within the provisions of the Acts regulating friendly societies

& industrial & provident societies.—*Re* No. 3 MIDLAND COUNTIES BENEFIT BUILDING SOCIETY (1864), 4 De G. J. & Sm. 408; 33 L. J. Ch. 730; 13 W. R. 399; 40 E. R. 1000; *sub nom.* *Re* MIDLAND COUNTIES BENEFIT BUILDING SOCIETY, 29 J. P. 613; 11 Jur. N. S. 229, L. J.

Annotations:—*Reid.* *Re* Chatham Co-op. Industrial Soc. (1864), 28 J. P. 532; *Re* London & Suburban Bank, [1892] 1 Ch. 604.

6. —.]—Friendly societies & benefit building societies do not stand on the same footing.—MULKERN v. LORD (1870), 4 App. Cas. 182; 48 L. J. Ch. 745; 40 L. T. 594; 43 J. P. 492; 27 W. R. 510, H. L.; *affg.* S. C. *sub nom.* LORD v. MULKERN (1878), 47 L. J. Ch. 228, U. A.

Annotations:—*Mentd.* Hack v. London Provident Bldg. Soc. (1883), 23 Ch. D. 103; Municipal Bldg. Soc. v. Kent (1884), 9 App. Cas. 260; Western, Suburban, & Notting Hill Permanent Bldg. Soc. v. Martin (1886), 55 L. J. Q. B. 382; Buckle v. Lordonny (1887), 56 L. J. Ch. 437; Municipal Permanent Investment Bldg. Soc. v. Richards (1888), 58 L. J. Ch. 8; Catt v. Wood, [1908] 2 K. B. 458; Winter v. Wilkinson, [1915] 1 Ch. 317.

For building societies, see BUILDING SOCIETIES, Vol. VII., pp. 454 *et seq*.

7. Distinguished from trade unions.]—HORNBY v. CLOSE, No. 69, *post*.

8. —.]—FARRER v. CLOSE, No. 70, *post*.

trade unions generally, see TRADE & TRADE UNIONS.

Validity of rules.]—See Part XI., Sect. 5, *post*.

9. In nature of private charity—Poverty necessary qualification for benefits.]—ANON. (1745), No. 354, *post*.

Whether friendly societies treated as charities, see CHARITIES, Vol. VIII., pp. 261–262, Nos. 240–246.

PART I.

a. Statutory powers of Governor—Grant of land.]—*Held*: the assistance & endowment of friendly societies was within the purposes contemplated by Land Act, 1898, s. 39 (15), & a grant of land to trustees representing the council of the friendly societies of a district, which the trustees proposed to sell, & apply the proceeds towards the building of a hall, for the purposes of the council, was within the Governor's authority.—A.-G.

WESTERN AUSTRALIA v. PILLING 15 W. A. L. R. 117.—AUS.

b. Act changing constitution of society—Validity.]—Notwithstanding B. N. A. Act, s. 91, by which exclusive jurisdiction is given to the Parliament of Canada in matters of insolvency, an act of Legislature of Quebec changing the constitution of an incorporated benefit society so as to compel a widow to receive from the society the sum of \$200, instead of a life rent of seven shillings & sixpence weekly, on the ground that the society is insolvent,

is constitutional & within the powers of the legislature.—UNION ST. JACQUES & BELISLE (1874), 20 L. C. J. 29.—CAN.

c. Wives & Children's Benefit Act.]—The Act to secure to wives & children the benefit of life insurance, 47 Vict. c. 20 (Ont.), applies to insurances in societies incorporated under Benevolent Societies Act, R. S. O. 1877, c. 167.—SWIFT v. PROVINCIAL PROVIDENT INSTITUTION (1890), 17 A. R. 66.—CAN.

Part III.—Unregistered Societies.

Clubs & other voluntary associations, *see* CLUBS, Vol. VIII., pp. 505 *et seq.*

10. Nature of.]—The trustees of an unregistered assocn. of more than twenty persons formed for mutual insurance against death & accident sued the late treasurer for moneys of the society which he had converted to his own use:—*Held*: the society was not rendered illegal by the Cos. Act, 1862 (c. 89), for want of registration, & plffs. were not precluded from maintaining the action by reason of non-registration under that Act or 1896 Act.

This is a friendly society for all intents & purposes, & it was intended to be a friendly society. I think that the Friendly Societies Acts do contemplate the existence of friendly societies which are not in fact registered. It is not necessary in order to form a friendly society that you should begin by incorporating it, as you have to do with a limited co. A friendly society is formed in the first instance & then it is registered, & the friendly societies that are not registered still continue to have an existence for some purposes (CHANNELL, J.).—*MAHRS v. THOMPSON* (1902), 86 L. T. 759; 18 T. L. R. 565, D. C.

— **Partnership with no corporate character.]**—Demurrer to a bill by some members of a lodge of Freemasons against others to have the dresses & decorations, books, papers, & other effects, of the society delivered up, & an injunction was allowed, on the ground, that they affected to sue in a corporate character; but leave was given to amend; the ct. holding jurisdiction for the delivery of a chattel; & where there is a joint interest permitting some to sue as individuals, representing the rest, in other instances than those of creditors & legatees; if inconvenient to justice, that all should be parties.

I am alarmed at the notion that these voluntary societies are to be permitted to state all their laws, forms & constitutions upon the record, & then to tell the ct. they are individuals. Then what sort of a partnership is this; for it is now admitted to be a partnership? The bill states that they subsist under a charter, granted by persons who are now dead, & therefore, if this charter cannot be produced, the society is gone. Upon principles of policy, the cts. of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant charters. I desire my ground to be understood distinctly. I do not think the ct. ought to permit persons, who can only sue as partners, to sue in a corporate character (LORD ELDON, C.).—*LOYD v. LOARING* (1802), 6 Ves. 773; 31 E. R. 1302, L. C.

Annotations:—*Expld. Re Lead Co.'s Workmen's Fund Soc., Lowes v. Smelting down Lead with Pit & Sea Coal, [1904] 2 Ch. 196. Reid. Neux v. Maltby (1818), 2 Swan. 277; v. Ratcliffe (1847), 1 De G. & Sm. 164.*

12. ———.]—Society for relief in sickness, etc., by means of a fund raised by subscription of the members, considered merely as a

partnership, having no corporate character. In a suit therefore against the trustees by some members, for an account, alleging a dissolution contrary to the articles, all other members must be parties.—*BEAUMONT v. MEREDITH* (1814), 3 Ves. & B. 180; 35 E. R. 447, L. C.

Annotations:—*Expld. Re Lead Co.'s Workmen's Fund Soc., Lowes v. Smelting down Lead with Pit & Sea Coal, [1904] 2 Ch. 196. Reid. Clough v. Ratcliffe (1847), 1 De G. & Sm. 164.*

— **Not a common law partnership.]**—At a meeting of an unregistered friendly society the officers & trustees were removed & the society was registered. A large number of members, including the trustees, retired from the meeting:—*Held*: the society remained the same, & the registered society was entitled to the funds in the hands of the trustees.

The only point taken was whether this is a common law partnership, which can do nothing but by the consent of all the members. I think it is not a common law partnership. It is an assocn. of people who agree to pay money into a common fund, which shall be paid out under certain conditions to such of them as are sick or to the representatives of those who are dead (LORD ESHER, M.R.).—*OLDHAM OUR LADY'S SICK & BURIAL SOCIETY v. TAYLOR* (1887), 3 T. L. R. 472, C. A.

14. ——— Not partnership within Partnership Act, 1890 (c. 39)—Or within general acceptance of term.]—*Re LEAD CO.'S WORKMEN'S FUND SOCIETY, LOWES v. SMELTING DOWN LEAD WITH PIT & SEA COAL (GOVERNOR & CO.), No. 419, post.*

— **Friendly societies generally.]**—*See* Part II., *ante*.

15. Legality of.]—(1) A bill filed by certain members of a lodge forming part of an assocn. called "The Independent Order of Odd Fellows," which consists of many corresponding lodges & many thousand members, against other members of the lodge, complaining of being excluded from the lodge, & praying for a declaration that such exclusion was illegal & void, & for an injunction to restrain defts. from applying a sum of £148 3s. 4d. otherwise than according to the rules of the lodge, & for an account, if necessary, of all the property & funds of the lodge, & a declaration of the rights & interests of the parties, & for all necessary directions for giving effect thereto, & for an injunction & receiver & general relief:—*Held*: on demurrer, not to be a case in which an injunction would be proper without other relief, or without view to other relief.

(2) *Qu.*: whether the above association is legal, & whether a ct. of equity will recognise a contract of assocn. which, although morally laudable, is, from the number of persons concerned in it or otherwise, of such a nature as not to enable any of the established judicatures of the realm to deal with it beneficially, or whether such assocns. must not be left to regulate themselves

PART III.

d. Capacity to sue—Society not a trade union.]—The Aberdeen Master

Masons' Incorporation, Ltd., was incorporated under Cos. Acta. In an action by the Incorporation against a member for payment of dues, the

defender averred that the assocn., being a trade union, were not validly registered as a co. & had no title to sue:—*Held*: as any act which would

by a moral rule, without judicial interference.—**CLOUGH v. RATCLIFFE** (1847), 1 De G. & Sm. 164; 16 L. J. Ch. 476; 9 L. T. O. S. 264; 11 Jur. 648; 63 E. R. 1016.

Annotations.—As to (1) *Reid*. **Jackson v. Turnley** (1853), 1 Drew. 617; **Rooke v. Kensington** (1856), 4 W. R. 829. As to (2) *Reid*. **Hodges v. Wale** (1853), 2 W. R. 65; **Hull v. M'Farlane** (1857), 2 C. B. N. S. 796.

Whether illegal under Companies Acts.]

—**MARRS v. THOMPSON**, No. 10, *ante*.

—.] — (1) Where an assocn. is formed of more than twenty persons who are to contribute sums of money to be applied in relieving cases of sickness, etc., amongst them, the balance being distributable among the members at the end of each year, the persons inviting & receiving the subscriptions & managing the affairs of the assocn. are trustees of the amounts received by them to the extent that they are liable to account but, *quære*, whether they are so liable on the footing on which trustees are ordinarily liable to account.

(2) Such an assocn. is not an illegal assocn. within Cos. Act, 1908 (c. 69), s. 1.

(3) *Qu.*: whether, even if the assocn. were illegal, the ct. could not interfere in the interests of the subscribers.

(4) A slate club is generally a small affair formed by placing subscribed money in the hands of some unpaid person who pays sums out of it for the benefit of subscribers, in case of sickness, & so on (**PARKER, J.**).—*Re ONE & ALL SICKNESS & ACCIDENT ASSURANCE ASSOCN.* (1909), 25 T. L. R. 674.

As to companies requiring registration, see COMPANIES, Vol. IX., pp. 72 *et seq.*

18. Capacity to sue—On bond given to treasurer—Rules not confirmed at sessions.]—Debt on a bond given to pltf. as treasurer of a friendly society. Plea, that the rules of the society had not been confirmed at the quarter sessions pursuant to 33 Geo. 3, c. 54:—*Held*: upon demurrer, the plea was bad, the bond being a good bond at common law.—**JONES v. WOOLLAM** (1822), 5 B. & Ald. 769; 2 Chit. 322; 1 Dow. & Ry. K. B. 393; 1 Dow. & Ry. M. O. 101; 106 E. R. 1372.

— **Defaulting treasurer.]—MARRS v. THOMPSON**, No. 10, *ante*.

20. Proceedings against members.]—R. v. WINFER (1878), *Diprose & Gammon*, 527.

21. Liability to be sued—For payments due to pauper lunatic members.]—MERTHYR TYDVIL GUARDIANS v. CAMBRIAN LODGE (1881), 45 J. P. Jo. 220.

Legal proceedings by & against friendly societies generally, see Part XIX., Sect. 3, *post*.

Right of members to benefits.]—See Part XIII., Sect. 3, sub-sect. 2, post.

Power of members to nominate—Payments on death.]—See Part XIII., Sect. 4, sub-sect. 2, B., post.

22. Disputes—Action against trustees by members—All members must be parties.]—BEAUMONT v. MEREDITH, No. 12, *ante*.

23. — Action by member against directors—

Whether illegality good defence—Right to shares.]

—(1) A mutual benefit society was established, & continued for a period of ten years, but it was not enrolled or registered pursuant to 7 & 8 Vict. c. 110. Upon the termination of the society, a dispute arose between pltf. & deft. as to certain shares & securities, & the directors, considering deft. to be entitled to them, handed the securities over to him. Upon a bill filed by pltf. to establish his right, the directors set up by way of defence the illegality of the society:—*Held*: the directors having set apart the securities for the person entitled thereto, the defence of illegality could not be sustained.

(2) *Qu.*: whether a member could have filed a bill against the directors for a general account.—**MASON v. WATKINS** (1864), 10 L. T. 453; 28 J. P. 744; 12 W. R. 735.

24. — Right of appeal—Notwithstanding rules to contrary.]—KNOWLES v. BOOTH, No. 3, *ante*.

See, now, 1896 Act, s. 68.

Disputes generally, see Part XVIII., *post*.

25. Removal of officers & trustees—Effect of subsequent registration.]—OLDHAM OUR LADY'S SICK & BURIAL SOCIETY v. TAYLOR, No. 13, *ante*.

26. Liability of persons receiving subscriptions—To account as trustees.]—Re ONE & ALL SICKNESS & ACCIDENT ASSURANCE ASSOCN., No. 17, *ante*.

27. Exemption from corporation duty—Mutual benefit society—Not a charity.]—The Linen & Woollen Drapers, etc., Institution was founded in 1832 by leading members of the several trades concerned, with the object & purpose of making provision for sick, infirm, & decayed members of the said trades & their widows & children. A body of rules for the government of the institution was then framed, under which it has ever since been carried on, by which rules any person of three years' standing in any of the said trades, residing within twelve miles of the General Post Office, may, on payment of the life or annual subscription therein mentioned, be elected a member. The rules also prescribe the terms & conditions under which relief & other pecuniary benefits are afforded to members or their families, either by payment of a lump sum, a weekly allowance during sickness or other necessity, or the grant of a life annuity. Medical advice & medicine are also provided free of charge to members or their families requiring the same; all relief being confined to members, & no member being entitled as of right to assistance, the board of directors having absolute discretion in every case to grant or refuse the same, & in no case can a member receive assistance unless in necessitous circumstances. The property of the institution consists of the accumulated subscriptions of members, & of considerable sums from time to time contributed as donations by benevolent persons other than members, but chiefly belonging to the trades concerned, & the cash value of the institution's invested funds amounted on Dec. 31, 1885 to £50,511 1s. 9d., the annual income whereof, amounting to £1670, after necessary outgoings, costs, & expenses, in the management of the said property, "is legally appropriated & applied for charitable purposes" connected

make the Incorporation a trade union would be null & void under the memorandum of association, the Incorporation

could not be a trade union, & plea of "no title of sue" repelled.—**ABERDEEN MASTER MASONS' INCOR.**

1077. LTD. v. SMITH. [1908] S. C. SCOT.

with the institution; but no precise or accurate calculation had been made, showing how much of such invested funds was derived from members' subscriptions, & how much from voluntary contributions & bequests within the thirty years immediately preceding. The Comrs. of Inland Revenue assessed the institution in £1,482 12s. 4d., & charged the same with £74 3s. 7d. duty, under Customs & Inland Revenue Act, 1885 (c. 51), s. 11:—*Held*: (1) the institution was not a charitable institution, but was in the nature of a mutual benefit society, the benefits afforded by which to the members could not be looked upon as charity, but were what the members were entitled to as of right, in return for their subscriptions, & therefore the portion of the funds derived from such subscriptions was not exempt from duty under sub-sect. 3 of above sect.; (2) the other portions of the funds, derived from voluntary contributions within the specified

period of thirty years, & from property acquired within the same period on which legacy duty had been paid were, if the amounts thereof could be ascertained, exempt from duty under sub-sects. 6 & 8 respectively; & subject therefore to the said amounts being so ascertained, judgment must be given for the Crown, but without costs.—*Re LINEN & WOOLLEN DRAPERS', ETC. INSTITUTION* (1887), 58 L. T. 949; 4 T. L. R. 345; 2 Tax Cas. 651, D. C.

Annotation:—As to (1) *Reid. Grand Lodge, etc. of Masons of Scotland v. I. R. Comrs.* (1912), 6 Tax Cas. 116.

Exemption from Assurance Companies Act, 1909 (c. 49)—Power of Board of Trade to order.—See Assurance Cos. Act, 1909 (c. 49), s. 35.

Exemption of registered societies from income tax, stamp duty, etc., see Part VIII., Sect. 1, *post*.

Dissolution of.—See Part XXII., Sect. 4, *post*.

Part IV.—Collecting Societies.

See, generally, Collecting Societies & Industrial Assurance Cos. Act, 1896 (c. 26); Assurance Cos. Act, 1909 (c. 49), s. 36.

28. Property in collecting books—Vested in society—Purchase from retiring collector.—The custom of a friendly society being to allow newly appointed collectors to purchase the collecting books of retiring collectors, *pltf.*, upon appointment as collector, purchased books from two retiring collectors, which were detained by the society upon his dismissal. Upon action brought for the loss sustained through the detention of the books, *pltf.* recovered £50 for his interest in the books. On appeal:—*Held*: *pltf.* was bound by the rule of the society to deliver up the books upon dismissal, the books being the property of the society, & *pltf.* obtained no interest in the books whatever, recognisable by law, upon purchasing them from the retiring collectors, or upon appointment as collector.—*ELLWOOD v. LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY* (1880), 42 L. T. 604; 44 J. P. 508.

29. Officers—Who is a “collector.”—*JOYCE v. NORTHUMBERLAND MINERS' FRIENDLY SOCIETY* (1888), 4 T. L. R. 525, D. C.

30. — Whether committee empowered to dismiss collectors arbitrarily—Construction of rules—Effect of agreement.—*TILLOTSON v. LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY* (1907), 124 L. T. Jo. 241.

— **Generally.**—See Part XII., *post*.

31. Disputes—Jurisdiction of court to determine—Where provision for settlement in rules.—*JOYCE v. NORTHUMBERLAND MINERS' FRIENDLY SOCIETY* (1888), 4 T. L. R. 525, D. C.

32. — — — — ——*BUSHELL v. SMITH* (1891), *Times*, June 12, D. C.

33. — — — — ——*FOWLER v. ROYAL LIVER FRIENDLY SOCIETY* (1897), 102 L. T. Jo. 394.

34. — — — Limited to policies originally granted for less than £20.—(1) By Collecting Societies & Industrial Assurance Cos. Act, 1896 (c. 26), s. 1 (b), that Act applies to industrial assurance cos. granting policies of life assurance for a less sum than £20, & receiving premiums by means of collectors at a greater distance than ten miles from the registered office or principal place of business of the co. at less periodical intervals than two months. By sect. 7 disputes between an industrial insurance co. & a member or person insured or a person claiming through him may be settled by the county ct. or by a ct. of summary jurisdiction:—*Held*: the jurisdiction of a county ct. or ct. of summary jurisdiction was limited to disputes arising with regard to policies originally granted for a less sum than £20.

(2) *Qu.*: whether an industrial assurance co. issuing policies for £20 & upwards, as well as policies for sums less than £20, comes within the provisions of sect. 7, so as to give any jurisdiction over disputes to a county ct. or ct. of summary

PART IV.

**Transfer of membership — Pre-
tion of regularity.**—Where the constitution of a benefit assocn. provides that members shall not be transferred from one lodge to another unless all dues & assessments have been paid, up to & including those for the month in which the application for affiliation is made, the fact that, upon such an application, a member was transferred from one lodge to another involves the presumption as against

the assocn. that the transfer was regularly made when the member was in good standing & in accordance with the regulations.—*ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC v. TURNER* (1910), 44 S. C. R. 145.—CAN.

1. Property in collecting books — Power of collector to nominate successor.—A society having dismissed a collector, & having refused to allow him to nominate a successor, he brought an action of damages against the society for having been deprived of the right of nomination:—*Held*:

as under the rules of the society a collector had no right of property in his collecting-book, & as his power to nominate a successor was subject to the discretion & approval of the board of management, defenders fell to be absolved.—*BATTY v. SCOTTISH LEGAL LIFE ASSURANCE SOCIETY* (1902), 4 F. (Ct. of Sess.) 954; 39 Sc. L. R. 747; 10 S. L. T. 76.—SCOT.

g. Statutory offence — Transfer of member.—An agent of a Friendly Society was charged with a contravention of the Friendly Societies Act

—**COWLING v. TOPPING**, [1906] 1 K. B. 466; 75 L. J. K. B. 176; 94 L. T. 209; 70 J. P. 95; 54 W. R. 423; 22 T. L. R. 219; 50 Sol. Jo. 191, D. C.

— **Generally.**]—See Part XVIII., *post*.

35. Transfer of membership—Effect of failure to give written notice.]—Resps., a collecting society within Collecting Societies & Industrial Assurance Cos. Act, 1896 (c. 26), were charged, under sect. 14 (1), with failing to give notice to applts., an industrial assurance co. within the same Act, of an application of a person insured with applts. for admission to resp. society contrary to sect. 4 (2). A collector who had collected for applts., asked the assured to transfer to resps. The assured signed a proposal form in resp. society & gave up to the collector his policies in applt. co., receiving policies in resp. society. The collector had left applts. & become collector to resps. No notice was given. The magistrate held that, as the policies in both societies were co-existent there could be no legal transfer within the Act & therefore no offence had been committed:—*Held*: the assured was a person sought to be transferred within sect. 4 (2) & sect. 14 (1) & therefore resps. had committed an offence under the Act.—**PEARL LIFE ASSURANCE CO. v. SCOTTISH LEGAL LIFE ASSURANCE SOCIETY**, [1901] 1 K. B. 528; 70 L. J. K. B. 360; 84 L. T. 153; 49 W. R. 493; 17 T. L. R. 238; 45 Sol. Jo. 260, D. C.

36. Adjournment of annual meeting—Notice by advertisement—Need not contain statement of business.]—The rules of a collecting society fixed the day, hour, & place of the annual meeting, & allowed its adjournment to London. Notice of the adjournment was to be given by advertisement, & copies of the advertisements containing a statement of the business to be transacted were to be exhibited in the offices of the society:—*Held*: these rules were not in conflict with

Collecting Societies & Industrial Assurance Cos. Act, 1896 (c. 26), & it was not essential that the published advertisements should contain a statement of business to be transacted, although the copies exhibited in the offices must contain such a statement.—**KIRSOPP v. HIGHTON** (1912), 28 T. L. R. 493; 56 Sol. Jo. 750, C. A.

37. Insurance for funeral expenses of parent—Amount expended must be reasonable.]—(1) By Assurance Cos. Act, 1909 (c. 49), s. 36 (1), among the purposes for which collecting societies may issue policies of assurance there is included insuring money to be paid for the funeral expenses of a parent:—*Held*: the funeral expenses must be reasonable, regard being had to all the circumstances of the case in question.

(2) Pltff. effected an insurance with defts. on the life of his mother for the purpose of providing money to be paid for her funeral expenses. Among the funeral expenses which he alleged he had incurred was a sum of £16 8s. 9d. for a tombstone. Part of these expenses having been paid by other societies, he claimed the balance of £14 16s. from defts.:—*Held*: funeral expenses could not be taken as matter of law to exclude the cost of a tombstone, & whether in a particular case they properly included such an item was a question of fact.—**GOLDSTEIN v. SALVATION ARMY ASSURANCE SOCIETY**, [1917] 2 K. B. 291; 86 L. J. K. B. 793; 117 L. T. 63, D. C.

38. — Liability of society for cost of tombstone.]—**GOLDSTEIN v. SALVATION ARMY ASSURANCE SOCIETY**, No. 37, *ante*.

Contents of rules.]—See Collecting Societies & Industrial Assurance Cos. Act, 1896 (c. 26), ss. 1–10.

Payment on death of children.]—See Part XIII., Sect. 4, sub-sect. 4, *post*.

Conversion of societies into limited company.]—See Part XX., Sect. 2, *post*.

Part V.—Slate Clubs.

For clubs generally, see CLUBS, Vol. VIII., pp. 505 *et seq*.

39. Nature of.]—*Re ONE & ALL SICKNESS & ACCIDENT ASSURANCE ASSOCN.*, No. 17, *ante*.

Whether Assurance Companies Act, 1909 (c. 49), applicable to—Power of Board of Trade to exempt.]—See Assurance Cos. Act, 1909 (c. 49), s. 35.

by "attempting to transfer" persons from another Society to one for which he canvassed without their written consent:—*Held*: a charge so labelled was relevant; & as the complaint did not set forth any *locus* this could not be added by amendment under Summary Procedure Act, s. 5.—**MACINTOSH v. METCALFE** (1886), 1 White, 218.—**SCOT**.

h. — — —]—**REFUGE ASSURANCE CO. v. HANNAN & M'GILL** (1889), 2 White, 373; 27 Sc. L. R. 200.—**SCOT**.

k. — — — Failure to give notice of transfer.]—F. who was insured with an industrial assurance co. (Co. A.) in Sept. 1906, applied for & obtained a policy of insurance from another industrial assurance co. (Co. B.). F. paid the weekly premium on both down to Dec. 10, 1906. F. thereafter applied for & obtained from the B. Co. a policy on the same terms as he got from the A. Co. The directors were not, but the agent who negotiated with F. was, aware that F. had been insured with A. Co. F.'s insurance with

A. Co. did not lapse for about two months after he had ceased paying his contributions. No notice was sent by Co. A. to Co. B.:—*Held*: the transaction was a transfer of F.'s insurance from Co. A. to Co. B. & Co. B. not having given notice in terms of Collecting Societies & Industrial Assurance Co.'s Act, 1896, s. 4 (2), had committed an offence.—**SALVATION ARMY ASSURANCE SOCIETY v. BRITISH LEGAL LIFE ASSURANCE CO.**, [1908] 8 C. 1138; 45 Sc. L. R. 843; 16 S. L. T. 276.—**SCOT**.

Part VI.—Shop Clubs.

See Shop Clubs Act, 1902 (c. 21).

40. Effect of Shop Clubs Act, 1902 (c. 21)—Unregistered club in existence at date of passing of Act—Whether rules abrogated.]—Shop Clubs Act, 1902 (c. 21), does not seem to prevent any great difficulty of construction. According to its title the Act is intended "to prohibit compulsory membership of unregistered shop clubs or thrift funds & to regulate such as are duly registered," & the operative sects. seem to carry that out tolerably plainly. The Act does not say that all

existing shop clubs or thrift funds shall at once come to an end, or that all existing rules shall be at once abrogated. It provides that in the future all shop clubs or thrift funds shall be registered if certain rules which have hitherto been insisted upon are retained (KEKEWICH, J.). —BALCHIN *v.* EBURY (LORD) (1903), 20 T. L. R. 60 ; 48 Sol. Jo. 83.

Clubs, generally, *see* CLUBS, Vol. VIII., pp. 505 *et seq.*

Part VII.—Registration.

The registry office.]—*See* 1896 Act, ss. 1–7.

Societies capable of registration.]—*See* 1896 Act, s. 8 ; Part II., *ante*.

Conditions of registration.]—*See* 1896 Act, s. 9.

Name of society.]—*See* Part IX., *post*.

Appeals from refusal to register.]—*See* 1896 Act, s. 12.

Rules.]—*See* Part XI., *post*.

Dividing societies.]—*See* 1896 Act, s. 15.

Societies assuring annuities.]—*See* 1896 Act, s. 16.

Societies with branches.]—*See* 1896 Act, ss. 17–22.

Consequences of registry.]—*See* 1896 Act, ss. 23–31.

Privileges of registered societies.]—*See* Part VIII., *post*.

Cancellation & suspension of registry.]—*See* Part XXI., *post*.

Registration under Companies Acts.]—*See* COMPANIES, Vol. IX., pp. 72 *et seq.*

41. Acknowledgment of registry — Conclusiveness of—As to character of society.]—HODGES *v.* WALE, No. 216, *post*.

42. — — — — —.]—PARE *v.* CLEGG, No. 202, *post*.

43. — — — — — Validity of secession.] —WILKINSON *v.* JAGGER, No. 393, *post*.

— — — — —.]—*See* 1896 Act, s. 11.

— — — — — Of rules.]—*See* Part XI., Sect. 2, *post*.

44. Necessity for proof of — When officer charged with embezzlement.]—R. *v.* KEW (1885), Diprose & Gammon, 242.

45. Registration by will of majority — Binding on minority.]—M'KENNY *v.* BARNSLEY CORPN. (1894), 10 T. L. R. 533, C. A.

*Annotation:—*Distd. Blake *v.* Smither (1906), 22 T. L. R. 698.

PART VII.

41 i. Acknowledgment of — — — — — of — — — — — as to character of
The certificate of registration of a society under Friendly Societies Act is not conclusive proof that the business of the society is conducted in furtherance of the objects for which it was registered. A society registered

for one object but conducting its business for another object, not being one of those mentioned in the Act, does not come within the provisions of the Act, & the shareholders in such a society may be held personally liable as co-partners.—MCKEWN *v.* BLAIR (1870), 1 V. R. (Law) 178.—AUS.

i. Necessity for—Primary purpose not gain.]—Where the substantial

purpose of an assocn. is not to carry on a business for gain, the fact that gain may accrue incidentally or may arise from merely subsidiary provisions does not make registration necessary.—KRAAL *v.* WHYMPER (1890), 1 L. R. 17 Calc. 786.—IND.

m. — — — — —.] —CAMPBELL *v.* CAMPBELL, [1917] 1 S. L. T. 339.—SCOT.

Part VIII.—Privileges of Registered Societies.

SECT. 1.—EXEMPTION FROM STAMP DUTY, INCOME TAX, ETC.

See 1896 Act, s. 33; Income Tax Act, 1918 (c. 40), s. 39; Customs & Inland Revenue Act, 1885 (c. 51), s. 11 (4).

46. Whether exempt from stamp duty—Bond for security of funds.]—A bond, conditioning for the production of a box, containing the subscriptions of a friendly society, need not be stamped.—*CARTER v. BOND* (1803), 4 Esp. 253, N. P.

Stamp duties on bonds generally, see BONDS, Vol. VII., pp. 256 *et seq.*

47. ——— Securities on which funds invested—Mortgages to society.]—A mortgage deed in which the trustees of a friendly society appear as mtgees. does not fall within the words of Friendly Societies Act, 1855 (c. 63), s. 37, "any bond to be given to or on account of any such society," nor, although the Act or the rules of the society authorise the investment of its funds on mtges. of real estate, is the deed itself to effect such mtge. a "document required or authorised by the Act or the rules of the society," so as to be exempt from stamp duty under that sect.—*Re ROYAL LIVER FRIENDLY SOCIETY* (1870), L. R. 5 Exch. 78; *sub nom.* *ROYAL LIVER FRIENDLY SOCIETY'S TRUSTEES v. INLAND REVENUE COMRS.* 39 L. J. Ex. 37; 21 L. T. 721; 18 W. R. 349.

Annotation:—Reid, A.-G. v. Phillips (1871), 24 L. T. 832.

Exemption of unregistered societies.]—See No. 27, *ante*.

SECT. 2.—PRIORITY ON DEATH, BANKRUPTCY, ETC., OF OFFICERS.

See 1896 Act, s. 35.

48. Upon bankruptcy—Priority of debts due to society.]—*LOYAL AGINCOURT LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS TRUSTEES v. WOODS* (1877), Diprose & Gammon, 84.

49. ———.]—*SHAKESPERE LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS TRUSTEES v. GRAHAM* (1877), Diprose & Gammon, 85.

———.].—*See, further, BANKRUPTCY, Vol. IV., pp. 471–473, Nos. 4250–4271.*

50. ——— Whether claims in winding up admitted—Bank acting as treasurers.]—*Re WEST OF ENGLAND & SOUTH WALES DISTRICT BANK, Ex p. SWANSEA FRIENDLY SOCIETY*, No. 104, *post*.

51. ——— Distress by landlord for rent—Right of landlord to retain proceeds.]—*Re THOMAS (A BANKRUPT)* (1876), Diprose & Gammon, 64.

———. **Proof by trustees on behalf of society.]**—*See BANKRUPTCY, Vol. IV., p. 247, No. 2343.*

Execution, attachment or other process against officer.]—*See 1896 Act, s. 35 (1) (b).*

Upon death of officer.]—*See 1896 Act, s. 35 (1) (a).*

SECT. 3.—EXEMPTION FROM ASSURANCE COMPANIES ACT, 1909.

See Assurance Cos. Act, 1909 (c. 49), ss. 1, 25.

Part IX.—Name.

See 1896 Act, ss. 10, 69, Sched. 1 (1); Collecting Societies & Industrial Assurance Cos. Act, 1896 (c. 26), s. 9.

PART VIII. SECT. 1.

n. Whether exempt from stamp duty—Receipt for payment of interest.]—A receipt for payment of interest due to a Friendly Society is chargeable with duty under Stamp Act, 1908.—*WILLIS v. ONGLEY* (1915), 34 N. Z. L. R. 967.—N.Z.

PART VIII. SECT. 2.

o. Upon bankruptcy—Society's money in hands of trustee.]—In July a trustee of a friendly society received money on behalf of the Society. In Nov. he executed a deed of assignment for creditors. In the following Feb. the trustees of the Society demanded the money of the trustees of the creditors' deed:—*Held*: the presumption was that the trustee had not been guilty of embezzlement, & he still had the Society's money when he executed the deed of assignment, & the trustees as his assignees must now pay it over.—*EASTWOOD v. SCOTT* (1871), 2 V. R. (Law) 101.—AUS.

p. Upon death of officer—Money embezzled—Claim against administrator.]—Where money comes to the secretary of a friendly society, not in the course of his official duty, but in an irregular way not in accordance with the constitution & bye-laws of his society, & he embezzles it, the society cannot maintain a preferential claim for it against his administrators under Friendly Societies Act, 1882, s. 13 (9); but when a specific trust fund can be followed into the hands of the administrator as still partly existing in specie it can be recovered preferentially from him.—*LOCKE v. PUBLIC TRUSTEE* (1886), 5 N. Z. L. R. 158 (S. C.).—N.Z.

PART IX.

q. Effect of legal incorporation.]—Up to 1904, *pltf.* Grand Lodge of the Ancient Order of United Workmen of Manitoba & the North-West Territories, which had been incorporated under that name in the year 1893, had been

carrying on the business of life insurance amongst its members, in subordination to & under a charter granted to it by *deft.* Supreme Lodge of the same order which had its headquarters in Texas. In that year *pltf.* Grand Lodge refused any longer to be subject to the jurisdiction of the Supreme Lodge. In 1905 the Supreme Lodge suspended *pltf.* Grand Lodge, & organised a new Grand Lodge for Manitoba, Saskatchewan, & Alberta:—*Held*: *deft.* Supreme Lodge was not entitled to an injunction forbidding *pltf.* to use the name "Ancient Order of United Workmen," as *pltf.* Grand Lodge had been legally incorporated in 1893, with the knowledge & consent of the Supreme Lodge, & had issued a great many beneficiary certificates for life insurance, a great proportion of which were still in force.—*GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN v. SUPREME LODGE OF ANCIENT ORDER OF UNITED WORKMEN* (1907), 6 W. L. R. 445; 17 Man. L. R. 360.—CAN.

Part X.—Offices.

See 1896 Act, s. 24 (1), Sched. 1 (1).

Part XI.—Rules.

SECT. 1.—IN GENERAL.

52. Contract between society & members.]—*ASHBY v. COSTIN*, No. 169, *post*.

53. —.]—*SOUTER v. DAVIES*, No. 88, *post*.

54. —.]—*SMITH v. GALLOWAY*, No. 83, *post*.

Compare *BUILDING SOCIETIES*, Vol. VII., p. 459, Nos. 28, 29.

55. Where improvident — Inquiry directed by court.]—Society for raising an annuity fund for the members: the rate of subscription being too low, though the subsisting fund was equal to the annuities then payable, & there being no adequate remedy by the articles, inquiries were directed to ascertain the state of the society, the defect of the plan, etc., & to provide a remedy, by additional subscription, adequate to the object, by paying the arrears, & providing for the present & future annuities.—*PEARCE v. PIPER* (1810), 17 Ves. 1; 34 E. R. 1.

—*Apld. Re Lead Co.'s Workmen's Fund Soc.*, *Lowes v. Smelting down Lead with Pit & Sea Coal*, [1904] 2 Ch. 190. *Reid. Beaumont v. Meredith* (1814), 3 Ves. & B. 180. *Mentd. Cockburn v. Thompson* (1809), 16 Ves. 321.

56. — Dealings with funds restrained.]—Injunction granted to restrain payments by a friendly society, founded on erroneous principles tending to exhaust its funds.—*REEVE v. PARKINS* (1820), 2 Jac. & W. 390; 37 E. R. 677, L. C.

57. Where conflict between rules of society & branch—Rules of society prevail.]—*LOACH v. COLEY* (1907), 122 L. T. Jo. 463.

58. Society ceasing to act on rules—Jurisdiction of court.]—*Ex p. NORRISH*, No. 408, *post*.

SECT. 2.—REGISTRATION.

See 1896 Act, ss. 9, 13, Sched. 1.

Registration generally.]—See Part VII., *ante*.

Registration of alterations & amendments in rules.]—See Part XI., Sect. 5, sub-sect. 7, *post*.

59. Effect of registration — Antecedent irregularities cured.]—*DEWHURST v. CLARKSON*, No. 87, *post*.

60. — —.]—*Re QUINN & NATIONAL*

CATHOLIC BENEFIT & THRIFT SOCIETY'S ARBITRATION, No. 68, *post*.

61. Evidence of registration — Recital in justices order.]—An order of justices requiring the stewards of a benefit society to readmit B., who had been expelled, recited that it had appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order:—*Held*: the recital was not evidence of the enrolment of the rules.—*R. v. GILKES* (1828), 8 B. & C. 439; 1 Man. & Ry. M. C. 487; 2 Man. & Ry. K. B. 454; 6 L. J. O. S. M. C. 118; 108 E. R. 1105.

Annotations:—*Reid. R. v. Wade* (1831), 9 L. J. O. S. M. C. 113. *Mentd. R. v. Stamper* (1841), 1 Q. B. 119.

SECT. 3.—ON WHOM BINDING.

Contract between society & members, see Nos. 83, 88, 169, *post*.

62. On committee — Power to settle & determine "any other matter" relating to society—Not in contravention of other rules.]—(1) By one of the rules of a benefit society, the committee were to meet "for the purpose of examining candidates for admission, & to settle & determine any matter relating to the breach or non-observance of the articles of the society by any of its members, & their exclusion in consequence thereof, & to settle & determine any other matter or thing relating to the society, subject nevertheless to the confirmation of the society at their next quarterly meeting."—*Held*: the latter words were to be considered in conjunction with, & as qualified by, the preceding portion of the rule; & they did not authorise the committee to enter into a contract which was in violation of the other rules of the society.

The other rules established a graduated scale of allowance to sick members, regulated by the state of the funds of the society, & by the period that the members continued a charge upon it, & prohibited them from working while they received such allowance; & also provided for the payment of certain sums on the death of a member, or of a member's wife:—*Held*: (2) the committee were not authorised in making a contract with a sick member (who had met with an accident which

PART XI. SECT. 3.

r. On subordinate council — Initiation of member—Condition precedent to claim for relief.]—A subordinate coun-

oil of a friendly society, incorporated under R. S. O. 1877, c. 167, has no authority to waive the requirements for initiation of members prescribed by the rules, where such initiation is a

condition precedent to a claim on the relief fund of the society.—*HOFNER v. CANADIAN ORDER OF CHOSEN FRIENDS* (1899), 29 O. R. 125.—CAN.

disabled him from working at his trade), allowing him a fixed weekly sum for life, with permission to attend to any business that he might be able to transact, in consideration of his giving up all further claim on the society during his life, & at his decease; (3) the society, which was established before 10 Geo. 4, c. 36, could not enter into any engagement, so as to bind the then members & also those who might afterwards become members of it.—*TYRRELL v. WOOLLEY* (1840), 1 Man. & G. 809; *Drinkwater*, 33; 2 Scott, N. R. 171; 10 L. J. C. P. 5; 5 J. P. 211; 133 E. R. 559.

Annotation:—*Generally*, *Mentd.* *Smith v. Goldsworthy* (1843), 4 Q. B. 430.

63. On all persons interested therein—Effect of registration.—*DEWHURST v. CLARKSON*, No. 87, *post*.

64. On administrator of member—Of un-registered society.—*ASHBY v. COSTIN*, No. 169, *post*.

65. On branch—As to application of funds.—*GRAND UNITED ORDER OF ODDFELLOWS v. VIL-LAGE PRIDE LODGE* (1894), *Diprose & Gammon*, 303.

66. — On registration of society.—*M'KENNY v. BARNESLEY CORPN.* (1894), 10 T. L. R. 533, C. A.

Annotation:—*Refd.* *Blake v. Smither* (1906), 22 T. L. R. 698.

67. — Conflict between rules of society & branch.—*LOACH v. COLEY* (1907), 122 L. T. Jo. 463.

SECT. 4.—CONTENTS OF RULES.

See 1896 Act, s. 9 (3), Sched. I.

Collecting societies.—*See* *Collecting Societies & Industrial Assurance Cos. Act*, 1896 (c. 26), ss. 1-10; Part IV., *ante*.

SECT. 5.—VALIDITY.

Validity of alterations in rules, *see* Sect. 6, sub-sects. 1-4, *post*.

Effect of registration—Antecedent irregularities in procedure cured.—*See* Nos. 68, 87, *post*.

68. Whether subject of arbitration—Under National Insurance Act, 1911 (c. 55), s. 67.—(1) The approval of the rules of a registered friendly society by the comrs., followed by their registration under 1896 Act, s. 13, cures every antecedent informality or irregularity in the procedure or at the meeting by or at which such rules were adopted. (2) No question as to the illegality of the rules of an approved friendly society can properly be made the subject of an arbn. under National Insurance Act, 1911 (c. 55), s. 67. It is not a matter of domestic administration.—*Re QUINN & NATIONAL CATHOLIC BENEFIT & THRIFT SOCIETY'S ARBITRATION*, [1921] 2 Ch. 318; 91 L. J. Ch. 237; 126 L. T. 179.

National Health Insurance, *see* WORK & LABOUR.

69. In restraint of trade.—By Friendly Societies Act, 1855 (c. 63), s. 44, *the sects. of the Act as to settling disputes between members & the punishment of defaulting officers are to apply*, "in the case of any friendly society established for any of the purposes mentioned in sect. 9 or for any purpose which is not illegal" though the rules have not been certified, provided a copy has been deposited with the registrar:—*Held*: a society of which one of the objects was the relief of sick, disabled, & aged members, & the burial of dead members, but of which one of the main objects was that of a trades' union & the support of members when on strike, was not within the sect., as this purpose was not analogous to those in sect. 9, & moreover was an illegal purpose in the sense of not being enforceable at law, as being in restraint of trade.—*HORNBY v. CLOSE* (1867), L. R. 2 Q. B. 153; 8 B. & S. 175; 36 L. J. M. C. 43; 15 L. T. 563; 31 J. P. 148; 15 W. R. 336; 10 Cox, C. C. 393.

18:—*Consd.* *R. v. Dodd* (1868), 18 L. T. 89. *Expld. & Apld.* *Farrer v. Close* (1869), L. R. 4 Q. B. 602. *Consd.* *Swaine v. Wilson* (1889), 24 Q. B. D. 252. *Refd.* *R. v. Stainer* (1870), L. R. 1 C. C. R. 230; *R. v. Friendly Socys' Registrar* (1872), 41 L. J. Q. B. 306. *Mentd.* *Cowan v. Milbourn* (1867), 16 L. T. 290; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *Russell v. Carpenters & Joiners Amalgamated Soc.*, [1912] A. C. 421; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

70. ——(1) Information under Friendly Societies Act, 1855 (c. 63), ss. 24, 41, against an officer of a friendly society at Bradford, charging him with having misappropriated £40 of the money of the society. Most of the rules of the society were legitimate rules of a friendly society; but rule 18, s. 6, was: "Any officer being discharged from employment for holding office, if he sign the vacant book each day, shall be paid at the rate of wages he was receiving when discharged, such remuneration to continue till he receive employment;" s. 7: "Any free or non-free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council shall be entitled to the sum of 15s. per week;" s. 9: "Any member refusing work from private objections, unless he can show sufficient reason to a committee of a majority of the members at the next branch meeting, shall be suspended from donation until after he has been employed;" rule 25, s. 2: "In the event of an application to the executive committee from other trades for assistance, the general society shall obtain information respecting the same, & on the executive committee being satisfied as to the genuineness of the case, shall grant such assistance as the state of the funds warrants, or the case may, in their opinion, deserve;" rule 31, s. 1: "There shall be an equalisation every twelve months, ending with the last meeting night in Dec., of that portion of the funds of the society which has not been personally invested, such equalisation to be in proportion to the number of members in each branch." It was stated in evidence by one of the members: "In case of sickness 12s. per week is allowed; when drawn out of shop, or turned off for being member of society, full wages or 15s. is allowed. In case of long strike at a particular place, & funds exhausted, the members would not contribute, except annually to an equalisation fund. We

PART XI. SECT. 5.

s. Where contravening statute—Sale of medicine—Purchasing mem-

bers.—A rule authorising the of medicine to "purchasing members" is not authorised by Friendly Societies

Acts, & are a violation of Medical Act, 1890, s. 97.—*CARROLL v. SHILLINGLAW* (1906), 3 C. L. R. 1099.—*AUS.*

Sect. 5.—Validity. Sect. 6: Sub-sects. 1, 2, 3,

have monthly reports. Strikes are reported. Members of our society would not be allowed to go to places where there are strikes if we can prevent them. We would give a member £2 or £3 to send him somewhere else. If he were out of work at Bradford, rather than a man should go to Keighley, if a strike was on, we would grant money to send him a thousand miles another way. We can pay this money at our discretion. We would send men to Halifax or Leeds, pay their railway fares, & keep them on, if it should be a case satisfactory to the branch. The executive council can give money to strikes on any trade. Any sensible man can see from our monthly report where there are strikes, & where to avoid. If I am on strike, or we draw men out, & money is paid to me or them by the society all such payments are trade privileges, & justified by the rules. Our society has nothing to do with ordering work to be done by the piece." The justices dismissed the information on the ground that the rules of the society as shown by the evidence were illegal, & in restraint of trade, & that the society was not within 18 & 19 Vict. (c. 63), s. 44:—*Held*: (COCKBURN, C.J., & MELLOR, J.) the evidence showed that the rules, in practice, are applied so as to render the funds of the society available for the purpose of supporting strikes, by allowing sums of money to workmen wanting employ, in order to prevent them from seeking work in districts where men are on strike, & also by giving assistance to other branch assocns. in whose districts strikes are going on; these purposes are not of a friendly society, but of a trade union, & such as are illegal as being in restraint of trade, according to *Hornby v. Close*, No. 60, *ante*, & the justices were right; (HANNEN & HAYES, JJ.) strikes are not necessarily illegal; & there was nothing in the evidence to show that the funds of the society had ever been applied to the support of illegal strikes; no obligations in restraint of trade were imposed by the rules, & the society was not shown to be established for an illegal purpose; & the decision of the justices was wrong.

(2) In determining the question whether a society is entitled to the protection of Friendly Societies Act, 1855 (c. 63), ss. 24, 44, the ct. is bound to look not only to the rules themselves, but also to the conduct & operations of the society & must treat it not according to what it professes to be, but according to what it practically is.—*FARRER v. CLOSE* (1869), L. R. 4 Q. B. 602; 10 B. & S. 553; 38 L. J. M. C. 132; 20 L. T. 802; 33 J. P. 517; 17 W. R. 1129.

—*As to* (1) *Consd.* *Swaine v. Wilson* (1889), 24 Q. B. D. 252; *Russell v. Carpenters & Joiners Amalgamated Soc.*, [1910] 1 K. B. 506. *Refd.* *R. v. Stainer* (1870), 39 L. J. M. C. 54; *Gozney v. Bristol Trade & Provident Soc.*, [1900] 1 K. B. 901. *As to* (2) *Refd.* *Old v. Robson* (1890), 6 T. L. R. 151; *Russell v. Carpenters & Joiners Amalgamated Soc.*, [1910] 1 K. B. 506. *Generally.* *Mentd.* *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598.

71. — Other rules legal.] — Where the general objects of a society are legal, as in the case of a provident society the object of which is the relief of members when disabled by age or accident or when out of employment, the fact that some of its rules are illegal as being in restraint of trade does not constitute the society an illegal society, or prevent a member from

recovering a sum of money payable to him under a rule of the society which is not illegal.

Rules made for the *bond fide* purpose of protecting the funds of such a society from claims, which may be avoided, are not illegal because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable & necessary for that purpose.—*SWAINE v. WILSON* (1889), 24 Q. B. D. 252; 59 L. J. Q. B. 76; 62 L. T. 309; 54 J. P. 484; 38 W. R. 261; 6 T. L. R. 121, C. A.

Annotations:—*Consd.* *Cullen v. Elwin* (1904), 90 L. T. 840. *Apld.* *Gozney v. Bristol Trade & Provident Soc.*, [1909] 1 K. B. 901. *Distd.* *Russell v. Carpenters & Joiners Amalgamated Soc.*, [1910] 1 K. B. 506. *Refd.* *Chamberlain's Wharf v. Smith*, [1900] 2 Ch. 605; *Sayer v. Carpenters & Joiners Amalgamated Soc.* (1902), 19 T. L. R. 122; *Burke v. Amalgamated Soc. of Dyers*, [1906] 2 K. B. 583. *Mentd.* *Howden v. Yorkshire Miners' Assocn.*, [1903] 1 K. B. 308; *Osborne v. Amalgamated Soc. of Ry. Servants*, [1911] 1 Ch. 540; *Kelly v. National Soc. of Operative Printers* (1915), 113 L. T. 1055; *Evans v. Heathcote*, [1918] 1 K. B. 418.

Societies registered under Trade Union Acts, see TRADE & TRADE UNIONS.

72. Provision against claims by members leaving of own accord—Not contrary to public policy—Enlistment in Royal Forces.]—*JOYCE v. EBURY (LORD)*, No. 140, *post*.

SECT. 6.—ALTERATIONS.**SUB-SECT. 1.—IN GENERAL.**

Validity of rules.]—See Sect. 5, *ante*.

Necessity for registration of alterations.]—See Sub-sect. 7, *post*.

Consent of members to.]—See Sub-sect. 4, *post*.

73. Must be in accordance with law—Alteration in place of meeting.]—A friendly society was established in 1832 under the Acts then in force relating to friendly societies. In 1858 its rules were amended, & were certified by the registrar under 18 & 19 Vict. c. 63. Rule 1 mentioned its name & place of business at L. By rule 92, no new rule shall be made nor any of the rules "amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting of the society specially called for that purpose." By rule 93, in case of any alteration in the place of meeting, written notice shall be sent to the Registrar of Friendly Societies, etc. In 1865 the annual general meeting of the society was held in M., & on the same day & at the same place a special general meeting was held for the purpose of rescinding the existing rules & making new ones. These meetings were convened by the president & secretary. Resolutions were passed at the special general meeting rescinding the existing rules & making new rules, by one of which the committee were empowered to change the principal office of the society, either occasionally or permanently, should the interest of the society seem to require it. Upon application for a rule for a *mandamus* to the Registrar of Friendly Societies to certify the new rules, he stated that he refused because he was of opinion that, until the place of meeting of the society was by a resolution of the society at a proper meeting called for that purpose changed from L., no meeting of the society elsewhere than in L. could, conformably to law, make new or alter the existing rules of the society, & that in the notice

convening the meeting & the rules passed there divers matters seemed to him in point of law objectionable, & he referred to them:—*Held*: an alteration in the place of meeting could only be made at a meeting of the society legally convened, & therefore the rules made at the meeting summoned by the president & secretary at M. were void.—*R. v. TIDD PRATT (OR PRATT) (1865)*, 6 B. & S. 672; 29 J. P. Jo. 388; 122 E. R. 1343.

Special resolutions & meetings.]—See Part XIV., post.

SUB-SECT. 2.—MUST BE IN ACCORDANCE WITH RULES.

Alterations must be within powers of society.]—See Sub-sect. 3, post.

74. Notice of proposed alteration—Sufficiency of.]—BAWDEN v. TEPPER (1843), 1 L. T. O. S. 407.

75. ——— Omission to give calendar month's notice.]—Pltf. was a member of a branch of a friendly society, & by the rules of 1906 he was entitled to certain benefits. The rules provided that they could only be altered by a resolution of the annual meeting or conference, & that notice of a proposition must be sent to every local secretary one month before the meeting. In 1914 the central committee gave notice of a proposed alteration, which would have prevented pltf. from being entitled to the benefits in question, but this notice was less than a calendar month by a few days. In an action by pltf. for a declaration that he was entitled to the benefits fixed by the rules of 1906 defts. relied on a resolution passed in pursuance of the above notice, & contended that the rule as to a month's notice did not apply to propositions put forward by the central committee, but only applied to those put forward by a local meeting:—*Held*: the rule as to notice applied to propositions emanating from the central committee as a provision for reasonable notice could not be implied & it could not have been the intention that with regard to such propositions no notice at all should be necessary, & as the required notice had not been given, pltf. was entitled to the benefits in question.—*ORTON v. BRISTOW (1916)*, 32 T. L. R. 129, 352, C. A.

SUB-SECT. 3.—MUST BE WITHIN POWERS OF SOCIETY.

Alterations must be in accordance with rules.]—See Sub-sect. 2, ante.

76. Rules not providing for alterations—No power to alter to member's disadvantage—Without consent.]—SOUTER v. DAVIES, No. 88, post.

77. Power to alter with consent of majority—Independent of statute.]—SMITH v. GALLOWAY, No. 83, post.

78. Variations as to deductions & contributions due.]—BIRMINGHAM & MIDLAND MONEY SOCIETY, LTD. v. KING (1907), 124 L. T. Jo. 181.

79. Transfer of sum to pension fund—Pensions within objects of society.]—A friendly society, at a general meeting specially called, altered its rules for the purpose of authorising a transfer of money from the actuarial surplus to a pension fund, & passed a resolution that £50,000 should be so transferred. There was nothing in the unaltered rules which prohibited what was done at the meeting. It was necessary under the rules of the society, that a new or altered rule should be registered before it was acted upon. The above alteration was not registered till after the resolution transferring the funds had been passed:—*Held*: (1) there being nothing in the rules to prevent the society from altering the rules as it had done, & the provision of pensions being within the objects & statutory constitution of the society, such alteration of the rules was good; (2) a failure to comply with a formality such as registering the alteration of the rules before acting upon the rules as altered, was a matter of which the ct. would only take notice at the instance of a clear majority of the members of the society.—*KIRSOPP v. HIGHTON (1911)*, 28 T. L. R. 129; *sub nom. KIRKSOPP v. HEIGHTON*, 56 Sol. Jo. 161; *affd. sub nom. KIRSOPP v. HIGHTON (1912)*, 28 T. L. R. 493, C. A.

SUB-SECT. 4.—CONSENT OF ALL MEMBERS.

80. Whether essential.]—MERIDEN UNION GUARDIANS v. BROWN (1892), Diprose & Gaimon, 353.

——— No provision for alteration in rules.] SOUTER v. DAVIES, No. 88, post.

82. ——— Rule authorising voluntary winding up—On resolution passed by majority.]—Where by its original rules a friendly society was unable to pass a resolution for a voluntary winding up, but where at a subsequent meeting it was purported by the unanimous vote of those present to create a new rule that a resolution for voluntary winding up could be carried if passed by a majority of two-thirds, & where subsequently such a resolution was passed by such a majority under the alleged new rule:—*Held*: in the absence of evidence that the new rule was ratified by the acquiescence of all the members of the society, such new rule was *ultra vires*, & an order for compulsory winding up was accordingly made.—*Re TEAN FRIENDLY SOCIETY (1913)*, 58 Sol. Jo. 234.

PART XI. SECT. 6, SUB-SECT. 2.

t. Amendment at variance with—Irregularity of vote.]—Motion to continue until trial an injunction restraining deft. society from putting into force an amendment to deft.'s constitution passed by Grand Lodge of deft. providing for an increased tariff of insurance rates:—*Held*: the amendment purporting to be passed by Grand Lodge was too great a variation of the notices sent to the subordinate lodges to be valid, & as the

vote taken thereon was not taken in accordance with the requirements of the constitution, it was a nullity.—*CORDNER v. ANCIENT ORDER OF UNITED WORKMEN (1912)*, 23 O. W. R. 863; 4 O. W. N. 549; 6 D. L. R. 491.—CAN.

PART XI. SECT. 6, SUB-SECT. 3.

u. Transfer of branch moneys to central fund.]—The Grand Lodge of O. & S. (New Zealand) of the Ancient Order of Druids, registered under

Friendly Societies Act, 1900, resolved to make amendments to their rules the main purpose of which was to effect the consolidation into one fund of the Sick & Funeral Funds of the several lodges which were branches of Grand Lodge, & to place the consolidated fund under the management & control of Grand Lodge:—*Held*: the proposed amendment was prohibited by s. 40 (2) of the Act.—*CLIFF v. BRYANT (1914)*, 33 N. Z. L. R. 1307.—N.Z.

Sect. 6.—Alterations: Sub-sects. 4, 5, 6, 7 & 8.]

Dissolution of societies.]—See Part XXII.,

—Alteration affecting rights of members to benefits.]—See Part XIII., Sect. 3, sub-sect. 2, B., post.

SUB-SECT. 5.—ON WHOM BINDING.

83. Members—When passed by majority—According to rules of society.]—(1) A rule of a friendly society made at a time when Friendly Societies Act, 1855 (c. 63), was in force provided that "No new rule shall be made, nor any of the rules herein contained or hereafter to be made shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting":—*Held*: that rule of itself conferred an independent power of altering the rules of the society, which power survived notwithstanding the repeal of the Act.

(2) A person became a member of a friendly society at a time when the rules of the society contained a general provision that the rules might be altered. After he had become entitled under the rules to a benefit from the funds of the society in the nature of a superannuation allowance, & whilst he was in actual receipt of it, the rules of the society were so altered as to have the effect of depriving him of that benefit in case of a breach by him of the altered rules. To such alteration of the rules he did not assent except in so far as the fact of joining the society which had a general power of alteration constituted an assent:—*Held*: he was bound by the alteration.

Where the only contract between the society & the member is the original contract under which he became a member, & that, as is the case here, provides for alteration of the rules, he is bound by any subsequent alteration that may be made within the power of alteration, whatever the extent of that alteration may be (WRIGHT, J.).—SMITH v. GALLOWAY, [1898] 1 Q. B. 71; 77 L. T. 409; 46 W. R. 204; *sub nom.* *Re SMITH & GALLOWAY*, 67 L. J. Q. B. 15, D. C.

Annotation:—As to (2) Reid. McEllistim v. Ballymacolligott Co-operative Agricultural & Dairy Soc., [1919] A. C. 648.

Whether consent essential.]—See Sub-sect. 4, ante.

PART XI. SECT. 6, SUB-SECT. 5.

a. Members.]—Action on a beneficiary certificate dated Oct. 19, 1896, issued by defts., incorporated under Benevolent Societies Act, R. S. O. 1877, c. 167, to plff., conditioned that he should comply with the constitution, rules, or orders governing, "or that might thereafter be enacted by defts. to govern, the Order & its benefit funds," & by which defts. agreed that, on plff. attaining the age of 70, which he had done, they would pay out of the total disability fund, "in accordance with the laws governing such fund," sums not exceeding a certain amount:—*Held*: the constitution of defts. having been duly altered in 1900 in respect to a beneficiary claiming on the ground of having attained the age of 70 years, from what it was in when plff.'s certificate was issued, in such way as to diminish the amount plff. was entitled to, he was nevertheless bound by the alteration, & could only recover in accord-

with it.—DOIDGE v. DOMINION COUNCIL OF ROYAL TEMPLARS OF TEMPERANCE (1902), 22 C. L. T. 321; 4 O. L. R. 423; 1 O. W. R. 485.—CAN.

b. Nominees.]—FALLE v. MACEWEN (1881), 1 L. R. 7 Cal. 1; 8 C. L. R. 577.—IND.

c. —.]—STEVENS v. BEDFORD (1898), 1 L. R. 22 Bom. 451.—IND.

PART XI. SECT. 6, SUB-SECT. 7.

87 i. Acknowledgment of registry—Whether conclusive as to validity of alterations.]—The Full Ct. expressed a unanimous opinion that the Certificate of the Registrar of Friendly Societies under Friendly Societies Act, s. 8, is conclusive as to the regularity of the proceedings of the order in making an alteration in a rule; & that such certificate need merely certify that the specified alteration "is in conformity with law."—MONTGOMERY v. FOX (1900), 21 N. S. W. Eq. 127; 17 N. S. W. W. N. 108.—AUS.

84. Surety of member—Whether liability discharged.]—BIRMINGHAM & MIDLAND MONEY SOCIETY, LTD. v. KING (1907), 124 L. T. Jo. 181.

85. On branch—Alteration after notice of secession—Before expiry of notice.]—GUTBERLET v. WOOLGAR (1898), Report of Chief Registrar of Friendly Societies (Parliamentary Papers, Vol. 91), 32.

Secession generally, *see* Part XX., Sect. 3, *post*.

SUB-SECT. 6.—TEMPORARY AMENDMENTS.

See 1916 Act, s. 2.

SUB-SECT. 7.—REGISTRATION OF ALTERATIONS.

See 1896 Act, s. 13.

Registration of rules, *see* Part XI., Sect. 2, *ante*.

86. Power to refuse registration—New rules showing illegal objects.]—*Re* MIDDLE AGE PENSION FRIENDLY SOCIETY, No. 405, *post*.

87. Acknowledgment of registry—Whether conclusive as to validity of alterations.]—(1) The certificate of the barrister pursuant to 4 & 5 Will. 4, c. 40, s. 4, that the rules of a friendly society are in conformity to law, renders the certified rules absolutely binding upon all persons interested therein, & precludes such persons from afterwards raising any question as to the regularity of the mode in which they were made.

(2) Where an amendment of the rules of a friendly society has received the barrister's certificate, under above Act, such amendment is valid, though there has been no resolution of the society in compliance with the enactment of 10 Geo. 4, c. 56, s. 9, or with the rules of the society incorporating that sect.

(3) By the altered rules of a friendly society, three trustees were to be chosen, of whom one was to be the treasurer, & the property of the society was vested in them. The society appointed three persons to be trustees, & a fourth person to be treasurer:—*Held*: this was a violation of the rules, which precluded the three trustees from suing a former treasurer appointed under the old

87 ii. —.]—BROSNAN v. TRAIT (1903), 29 V. L. R. 280.—AUS.

87 iii. —.]—Acknowledgment of registry is only conclusive that the things which might lawfully be done have been done, & has not the effect of declaring that a thing which could not be lawfully done has been lawfully done; the ct. can examine into the validity of a rule made by a friendly society, notwithstanding the acknowledgment of registry.—CARROLL v. SHILLINGLAW (1906), 3 C. L. R. 1099.—AUS.

87 iv. —.]—BUTLER v. SPRINGMOUNT DAIRY SOCIETY, [1906] 2 I. R. 193.—IR.

87 v. —.]—A friendly society passed a resolution whereby the probationary period of entrants was reduced from three years to one year, & this alteration of the society's rules was certified by the Registrar of Friendly Societies to be in conformity with law. In an action of

rules for money of the society in his hands.—*DEWHURST v. CLARKSON* (1854), 3 E. & B. 194; 2 C. L. R. 1143; 23 L. J. Q. B. 247; 23 L. T. O. S. 109; 18 J. P. 535; 18 Jur. 693; 2 W. R. 199; 118 E. R. 1114.

Annotations:—As to (1) *Apld.* *Rosenberg v. Northumberland Bldg. Soc.* (1889), 22 Q. B. D. 373. *Consd.* *Osborne v. Amalgamated Soc. of Ry. Servants*, [1909] 1 Ch. 163. *Apld.* *Re Quinn & National Catholic Benefit & Thrift Soc.*, [1921] 2 Ch. 318. *Reid.* *R. v. Tidd Pratt* (1865), 6 B. & S. 672; *Laing v. Reed* (1869), 39 L. J. Ch. 3, n.; *Re Durham County Permanent Benefit Bldg. Soc.*; *Davis's Case*, *Wilson's Case* (1871), 41 L. J. Ch. 124; *Souter v. Davies* (1895), 39 Sol. Jo. 264.

88. ———.] — (1) Friendly Societies Act 1875 (c. 60), s. 6, does not impliedly re-enact Friendly Societies Act, 1855 (c. 63), s. 27, & thus empower societies formed prior to 1850 to alter their rules. Unless, therefore, the rules make provision for their alteration they cannot be altered except by consent of all the members.

(2) The mere fact that amended rules have been registered does not preclude the ct. from inquiring into the power of a society to make such amendments.

(3) The basis of these societies is a contract between the members; &, apart from any Act of Parliament, if they contract together, & if their rules contain no power of alteration, those rules are binding on each member, & each member is entitled to the benefits which they give him, unless he agrees to an alteration (*WILLS, J.*).

(4) Whatever power of alteration there may be, it cannot enable the society to repudiate an existing debt vested in a member unless he has agreed to be bound by the alteration (*WRIGHT, J.*).—*SOUTER v. DAVIES* (1895), 39 Sol. Jo. 264; 15 R. 261, D. C.

Annotation:—As to (1) *Distd.* *Smith v. Galloway*, [1898] 1 Q. B. 71.

— Whether conclusive as to nature of society.] — See Nos. 202, 216, *post*.

89. Effect of omission to register.—Whether old rules remain in force.]—A friendly society enrolled its rules in 1794, under 33 Geo. 3, c. 54. In 1804 alterations were made in them, but, by a neglect for which the society was not to blame, the altered rules were never enrolled. They were, however, acted upon, & the original ones disused, till 1835, when the omission to enrol was for the first time discovered. On motion for a *mandamus* to justices to hear the complaint of a member who had been expelled in 1836:—*Held*: (1) the rules as altered could not legally be acted upon; (2) it was at least doubtful whether the original rules

continued in force, &, consequently, the ct. could not issue a *mandamus* to the justices, but must leave appct. to his remedy in equity.—*R. v. GOROPHIN (LORD)* (1838), 8 Ad. & El. 338; 3 Nev. & P. K. B. 488; 1 Will. Woll. & H. 451; 7 L. J. M. C. 104; 112 E. R. 865; *sub nom.* *R. v. CAMBRIDGE JJ.*, 2 J. P. 501; 2 Jur. 613.

Annotation:—As to (2) *Distd.* *R. v. Cotton* (1850), 15 Q. B. 569.

90. ———.] — The rules of a friendly society, established in 1817, were duly made & confirmed at quarter sessions under 33 Geo. 3, c. 54. Afterwards some new rules were made, but they were neither made nor confirmed in the manner required by sect. 3 of the statute. One of such new rules altered the amount of entrance money, & another the amount of weekly allowance to sick members. A sick member, who had entered the society since the making of the new rules, & had occasionally received relief under them, summoned the stewards to petty sessions for non-payment of a weekly allowance under the new rules. The justices dismissed the complaint on the ground that the old rules had been abandoned, & that the new rules were void, & that the society, therefore, was no longer within the statute so as to give the justices jurisdiction:—*Held*: (1) the new rules being void, the old rules were not affected by them; (2) the justices had jurisdiction to order payment of a weekly allowance under the old rules, & this, though the specific claim made by the summons was under the new rules; & the ct. made a rule absolute, under Justices Protection Act, 1848 (c. 44), s. 5, requiring them to hear & determine the case.—*R. v. COTTON* (1850), 15 Q. B. 569; 4 New Mag. Cas. 108; 4 New Sess. Cas. 291; 19 L. J. M. C. 233; 15 L. T. O. S. 276; 14 J. P. 543; 14 Jur. 788; 117 E. R. 575.

91. ———.] — *Re MEREDITH & WHITTINGHAM*, No. 295, *post*.

92. ——— Action by trustees under new rules.—Not maintainable.]—*BATTEY v. TOWNROW*, No. 100, *post*.

93. ——— Alterations acted upon before registration.] — *KIRSOPP v. HIGHTON*, No. 79, *ante*.

8.—EFFECT OF, ON MEMBERS' TO BENEFITS.

See Part XIII., Sect. 3, sub-sect. 2, B.,

reduction of the minute of meeting & of the certificate, brought by a minority of the society:—*Held*: the Registrar's certificate, though essential to the validity of the society's rules, was no bar to challenge of them in a court of competent jurisdiction.—*DAVIE v. COLINTON FRIENDLY SOCIETY* (1870), 43 Sc. Jur. 54.—SCOT.

d. Refusal of Registrar to register

—*Mandamus*.]—The correct procedure for bringing before the ct. of appeal the refusal of the Registrar of Friendly Societies to register rules of a district of a friendly society is by an application for a rule in the nature of a *mandamus*, according to the English practice.—*Re FRIENDLY SOCIETIES ACT, 1882, OTAGO, ETC. ODD FELLOWS v. FRIENDLY SOCIETIES REGISTRAR* (1898), 17 N. Z. L. R. 6.—N.Z.

PART XI. SECT. 6, SUB-SECT. 8.

e. Effect on widow's rights.—Whether retrospective.]—Alterations under 10 Geo. IV. of rules & rates of previously existing friendly societies do not affect widows whose rights have emerged prior to such alterations.—*CAITHNESS HIGHLAND FRIENDLY SOCIETY v. M'MILLAN* (1834), 13 Sh. (Ct. of Sess.) 135; 10 Fac. Coll. 97. SCOT.

Part XII.—Officers.

SECT. 1.—TRUSTEES.

See 1890 Act, ss. 25, 34, 44, 47, 49-51, 53-55, 87, 94, & Sched. 1.

94. Powers of trustees—When not members—To control society in alteration of rule.]—HULL v. M'FARLANE, No. 297, *post*.

As to alteration of rules, see Part XI., Sect. 6, *ante*.

95. ——— To preserve property of juvenile branch.]—RUDD v. JAMES, No. 409, *post*.

96. Liabilities of trustees — For improperly dividing funds.]—COX v. JAMES (1882), Diprose & Gammon, 282.

Annotation :—REID. Winter v. Wilkinson, [1915] 1 Ch. 317.

97. ———.]—HOLMES v. TAYLOR (1889), Diprose & Gammon, 285.

98. ———.]—SCOTT v. EVANS (1895), Diprose & Gammon, 560.

99. ——— As sureties—On a promissory note.]—BIRMINGHAM & MIDLAND MONEY SOCIETY, LTD. v. KING (1907), 124 L. T. Jo. 181.

100. Appointment of new trustees—Under new rules—Not duly registered.]—An action cannot be maintained by the trustees of a benefit society elected under new regulations agreed to by the members unless these regulations have been confirmed by the quarter sessions, although the original rules of the society were enrolled in pursuance of 33 Geo. 3, c. 54.—BATTEY v. TOWNROW (1814), 4 Camp. 5, N. P.

101. ——— Transfer of funds.]—*Re* FRIENDLY SOCIETY, No. 215, *post*.

102. ———.]—HODGES v. WALE, No. 216, *post*.

Statutory offences by officers.]—See Part XIX., Sect. 1, *post*.

Legal proceedings by & against.]—See Part XIX., Sect. 3, *post*.

Vesting of property in.]—See Part XV., Sect. 4,

Liability of persons receiving subscriptions —& managing affairs of unregistered society—To account as trustees.]—See No. 17, *ante*.

SECT. 2.—TREASURER, SECRETARY AND OTHER OFFICERS.

Act, ss. 25, 35, 54, 55, 100, & Sched. I.

Priority of societies on bankruptcy of officers, see Part VIII., Sect. 2, *ante*.

PART XII. SECT. 1.

of
A copy of resolutions appointing trustees of a society registered under Friendly Societies Statute, 1865, s. 16, is *prima facie*, but not conclusive evidence of the appointment.—KING v. FULTON (1876), 2 V. L. R. 100.—AUS.

PART XII. SECT. 2.

of secretary (f)

branch—Power of district committee to order delivery of books of branch.]—The Glasgow District Committee of the Ancient Foresters, in the exercise of its jurisdiction, under the rules of the Society, pronounced an award removing A., a branch secretary, from office, expelling him from the society, & calling upon him to deliver the books of the Order in his possession to the district secretary :—*Held* : the District Arbitration Committee having jurisdiction to deprive A. of office had, as incidental

103. Who may be treasurer — Appointment of two persons.]—SHARP v. WARREN, No. 364, *post*.

104. ——— Appointment of banking company.]—(1) An incorporated banking co. cannot be the treasurer of a friendly society within Friendly Societies Act, 1875 (c. 60).

(2) A banking co. acted as treasurers of a friendly society. A claim for priority in the winding up of the bank in respect of money of the society lodged in the bank was rejected. A winding up is not an insolvency within sect. 15 (7) of above Act.

(3) *Semble* : if a friendly society omit to take from its treasurer security in accordance with the Act & its rules, the right to priority given by above sub-sect. is lost.—*Re* WEST OF ENGLAND & SOUTH WALES DISTRICT BANK, *Ex p.* SWANSEA FRIENDLY SOCIETY (1879), 11 Ch. D. 768 ; 48 L. J. Ch. 577 ; 40 L. T. 551 ; 43 J. P. 637 ; 27 W. R. 596.

Annotation :—As to (3) *Apld.* John O'Gaunt Lodge of Odd-fellows v. Bell (1883), Diprose & Gammon, 67.

105. Appointment of new treasurer—Liability of old treasurer.]—*Re* LORD HILL FRIENDLY SOCIETY OF ODD FELLOWS (1838), 2 J. P. 84.

106. ——— Validity of.] — By the rules of a friendly society, enrolled under the 10 Geo. 4, c. 56, the power of electing a treasurer & other officers, was vested in a committee of eleven. At a meeting of the committee, at which ten of the members only were present, the eleventh not having received notice, *deft.*, the former treasurer, was removed, & *pltf.* appointed in his stead, by a majority of votes :—*Held* : the election was void, although the absent committee-man had, for a considerable period, ceased to attend the meetings, & had intimated an intention not to attend any more, & although *deft.* himself had demanded a poll.—ROBERTS v. PRICE (1847), 4 C. B. 231 ; 16 L. J. C. P. 169 ; 9 L. T. O. S. 54 ; 11 Jur. 352 ; 136 E. R. 494.

Moneys held by treasurer as “ballee.”]—See BUILDING SOCIETIES, Vol. VII., p. 463, No. 53.

107. Removal of secretary—Whether court will reinstate by mandamus—Office not of permanent nature.]—As a *mandamus* to reinstate a person in an office only lies where the office, & its tenure, are of a permanent nature :—*Held* : it was not an available remedy for the secretary of a benefit society, who had been dismissed, by a resolution of a meeting of the society.—EVANS v. HEART OF OAK BENEFIT SOCIETY (1866), 12 Jur. N. S. 163.

See CROWN PRACTICE, Vol. XVI., p. 314, Nos. 1254-1256.

thereto, jurisdiction to order delivery of the books to the district secretary although the books might be the property of the branch.—GLASGOW DISTRICT OF ANCIENT ORDER OF FORESTERS v. STEVENSON (1899), 2 F. (Ct. of Sess.) 14.—SCOT.

b. Agent — Power to give list of members to rival society—After severance of connection.]—*Held* : a person who had been the agent of a friendly society was not entitled after he had left the society's service to give written lists

108. Position of steward—Extent of control of committee.]—*GARNER v. SHELLEY*, No. 253, *post*.

109. ——— Whether a male servant—Workmen's club.]—*SOLOMON v. CROPPER* (1898), 79 L. T. 301; 62 J. P. 758; 15 T. L. R. 2; 42 Sol. Jo. 851.

Annotation:—*Held*. *Whiteley v. Burns*, [1908] 1 K. B. 705.

Medical officer—Whether society liable for negligence of.]—*See* No. 114, *post*.

Legal proceedings by & against.]—*See* Part XIX., Sect. 3, *post*.

Offences by officers.]—*See* Part XIX., Sect. 1, *post*.

Duty to call meeting—When served with requisition duly signed by members.]—*See* Nos. 194, 195, *post*.

AND SECURITIES TO SECURE RENDERING OF ACCOUNTS AND PAYMENTS DUE.

See 1896 Act, s. 54.

110. Effect of failure to take security—Loss of right of priority on bankruptcy of officer.]—*Re* WEST OF ENGLAND & SOUTH WALES DISTRICT BANK, *Ex p.* SWANSEA FRIENDLY SOCIETY, No. 104, *ante*.

———.]—*See, further*, BANKRUPTCY, Vol. IV., p. 473, Nos 4268–4270.

“Officers in receipt or charge of money.”]—*See* BANKRUPTCY, Vol. IV., pp. 471–472, Nos. 4251–4263.

Part XIII.—Membership.

SECT. 1.—NUMBER OF MEMBERS ESSENTIAL.

“Seven persons at least.”]—*See* 1896 Act, s. 9 (1).

SECT. 2.—CAPACITY.

Married woman.]—*See* 1896 Act, s. 8 (1) (a), (b).

See, generally, HUSBAND & WIFE.

Minors.]—*See* 1896 Act, s. 36; 1908 Act, s. 2.

See, generally, INFANTS.

SECT. 3.—RIGHTS OF MEMBERS.

SUB-SECT. 1.—IN GENERAL.

111. Right to recover back deposits—Purposes of society changed—Dissentient member.]—Where a co. or benefit co. is formed, & afterwards it is agreed that the purposes of the co. shall be changed from their original objects, that will not entitle a dissentient member to recover back his deposits in an action.—*MILNER v. RHODEN* (1851), Cox, M. & H. 532; 18 L. T. O. S. 98; 15 J. P. 772; *sub nom.* *Re MILNER v. RHODEN*, *Ex p.* MILNER, 15 Jur. 1037.

Annotations:—*Mentd.* *R. v. City of London Court Judge & Steamer Michigan* (1890), 6 T. L. R. 364; *R. v. Southampton County Court Judge & Fisher* (1891), 65 L. T. 320; *R. v. London JJ.* (1895), 64 L. J. M. C. 100.

112. Right to vote—Sufficiency of interest in

land—Annuity charged on property of society.]—A., being a member of a benefit society, was entitled to an annuity of more than £10 a year “out of the funds of the society,” if the property were sufficient to admit of it. The income of the society arose partly from real property vested in trustees, & partly from contributions & fines paid by the members. The funds of the society were sufficient to pay all the annuities in the current year, & if each annuity were apportioned between the income derived from the real property & from other sources, the part payable out of income derived from real property would be more than £5:—*Held*: claimant had no direct interest, legal or equitable, in the lands belonging to the society, & was not entitled to a county vote, as a freeholder for life under Representation of the People Act, 1867 (c. 102), s. 5 (1).—*ROBINSON v. AINGE* (1869), L. R. 4 C. P. 429; 1 Hop. & Colt. 193; 19 L. T. 644; 33 J. P. 360; 17 W. R. 317.

113. Right to inspect books of society.]—*MOFFATT v. TAUNTON* (1891), Diprose & Gammon, 307.

See 1896 Act, s. 40.

114. Right to medical attendance—Whether society liable for neglect of medical officer.]—*BARNES v. LINCOLN ODDFELLOWS' MEDICAL ASSOCN.* (1895), 99 L. T. Jo. 217.

115. Attachment of debt due by society to member—Failure to give notice of withdrawal—In accordance with rules.]—(*COWLEY v. TAYLOR, ACKERS, GARNISHEES* (1908), 124 L. T. Jo. 569, D. C.

of the members of the society to officials of a rival society.—*LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY v. HOUSTON* (1900), 3 F. (Ct. of Sess.) 42.—SCOT.

PART XII. SECT. 3.

k. Liability of surety.]—Mere negligence, even if gross, on the part of a creditor, unaccompanied by positive acts of concurrence in the defalcation of the debtor, will not discharge the surety, & is no ground of

equitable defence.—*MADDEN v. M'MULLEN* (1860), 13 I. C. L. R. 305.—IR.

PART XIII. SECT. 3, SUB-SECT. 1.

l. Right to pension—Member forced to resign.]—The rules of resp. police pension society provided that every appln. for a pension should be fully gone into by the board of directors, & that any member entitled thereto, who is dismissed from the police force or is obliged to resign, shall have his case considered by the

board & his right thereto determined by a majority. On an application for a pension by applt., who had been obliged to resign, the board, without any judicial inquiry into the circumstances, resolved to refuse the claim, “seeing that he was obliged to tender his resignation”:—*Held*: this resolution was void & of no effect.—*LAPOINTE v. L'ASSOCIATION DE BIENFAISANCE ET DE RETRAITE DE LA POLICE DE MONTREAL*, [1906] A. C. 535.—CAN.

m. Right to recover damages from

Sect. 3.—Rights of members: Sub-sects. 1 & 2, A., B., C. & D.]

Loans to members.]—See Nos. 205—208, post.

Withdrawal of deposits—Necessity for notice—Garnishee proceedings against society.]—See No. 376, post.

Right to supply of copies of the rules.]—See 1896 Act, s. 38.

Right to supply of copies of annual return.]—See 1896 Act, s. 39.

Accumulation of surplus of contributions.]—See 1896 Act, s. 42.

Rights of militiamen & volunteers.]—See 1896 Act, s. 43.

Limitation of benefits.]—See Sub-sect. 2, E., post.

Alienation of right to payments on death—Whether nomination essential.]—See Sect. 4, sub-sect. 2, A., post.

SUB-SECT. 2.—RIGHT TO BENEFITS.

A. When Right arises.

116. During "sickness"—Member becoming insane.]—By the rules of a friendly society, after payment of a year's subscription, "any member shall receive 8s. per week during any sickness or accident that may befall him, unless by rioting or drunkenness":—Held: insanity was "sickness" within the society's rules.—BURTON v. EYDEN (1873), L. R. 8 Q. B. 295; 42 L. J. M. C. 115; 28 L. T. 408; 37 J. P. 693; 21 W. R. 593.

Annotation:—Mentd. Yorke v. Yorkshire Insee., [1918] 1 K. B. 662.

Violation of rules by office-bearer.]—Held: the funds of a friendly society were liable in damages to a member for a wrong done to him through violation of the society's rules by its office-bearers.—BLUE v. WEST KILBRIDE FREE GARDENERS SOCIETY (1886), 4 Macph. (Ct. of Sess.) 1042.—SCOT.

PART XIII. SECT. 3, SUB-SECT. 2.—A.

a. During "sickness"—Majority vote a condition precedent.]—HUGHES v. BENEVOLENT IRISH SOCIETY, 21 C. L. T. 516. CAN.

b. Result of an assault—Member provoking assault.]—Pltf. having been disabled from doing work for twelve days by sickness claimed sick pay from deft. society, to which all fees due by him as member had been duly paid. The sickness was caused by an assault committed upon him for which he had given some provocation:—Held: the mere fact of his having given such provocation did not debar him from receiving his sick pay.—AARONS v. EXCELSIOR BENEFIT SOCIETY (1893), 10 S. C. 164.—S. AF.

c. On taking certain All steps towards attaining essential.]—Where the constitution of a benevolent society provides that beneficiary certificates may be granted to persons who take a certain degree, all the steps laid down in the constitution in connection with the taking of that degree must be complied with before any beneficiary certificates can be legally issued.—DEVINS v. ROYAL TEMPLARS OF (1892), 20 A. R. 259.—CAN.

d. On

In 1889 the Police Force of

Hamilton established a benefit fund, to provide for a gratuity to any member resigning or being incapacitated from length of service or injury, & to the family of any member dying in the service. Each member of the force contributed a percentage of his pay for the purposes of the fund, & one of the rules provided as follows: "No money to be drawn from the fund for any purpose whatever until it reach the sum of eight thousand (\$8,000) dollars":—Held: in case of a member of the force dying before the fund reached the said sum, the gratuity to his family was merely suspended, & was payable as soon as that amount was realised.—MILLER v. HAMILTON POLICE BENEFIT FUND (1898), 28 S. C. R. 475.—CAN.

e. On total disability—Or attaining age of seventy years.]—A benevolent society's certificate provided for payment to pltf., upon his total disability or upon his attaining the age of seventy years, out of the total disability fund, in accordance with the laws governing the fund, sums not exceeding in the \$1,000. In his application, upon which the certificate was founded, pltf. gave his age as fifty-four, when it was in fact fifty-five, the latter age being within the age allowed for entrance, & the assessments & fees chargeable being the same for both ages. Pltf. attained the age of seventy on Dec. 10, 1898, & brought this action on May 15, 1900, asking for payment of \$1,000:—Held: the certificate was binding, & pltf. was entitled to payment thereunder upon in fact attaining the age of seventy, but the "laws governing the fund" applied though not set out, & under them pltf. was entitled at the time of action brought only to a benefit of —HARGROVE v. ROYAL TEMPLARS

—CHURCH v. GREAT SOUTHERN SICK & BURIAL SOCIETY (1890), Diprose & Gammon, 306.

118. On "disablement from work"—Natural decay.]—Resp., over eighty years of age, belonged to a friendly society, one of the rules of which provided that every member, after paying a certain amount of contributions, falling sick, lame, or blind, or otherwise disabled from work, should be entitled to receive a certain weekly amount from the funds of the society for sixteen weeks, if his illness continued so long, & half pay for the remainder; & another provided that where a member fell sick, lame, or blind, he was to give notice to the stewards with a certificate from the surgeon of the society, stating the cause of his indisposition. The surgeon of the society certified to appts., stewards of the society, that resp. "continued unable to work by reason of natural decay." Resp. drew sick pay for some weeks; then appts. refused to allow him any more, holding that the certificate did not entitle him to receive it:—Held: incapacity to work arising from natural decay, as the result of old age, did not entitle resp. to sick pay under the society's rules.—DUNKLEY v. HARRISON (1887), 56 L. T. 660; 51 J. P. 788.

119. On inability to follow "customary employment"—Law clerk serving as collector.]—MANCHESTER LAW CLERKS' SOCIETY v. WILSON (1888), 4 T. L. R. 465; 52 J. P. Jo. 276, D. C.

B. How affected by Alterations in Rules.

Alteration in rules generally.]—See Part XI., Sect. 6, ante.

Whether consent of members necessary—To

OF TEMPERANCE (1901), 22 C. L. T. 1; 31 S. C. R. 385.—CAN.

s. Sustained in execution of duty.]—By rule 32 of the rules & regulations of a police benefit fund, it was provided that where a member "in the execution of duty" received such injury as "in the opinion of the police comrs." permanently incapacitated him from service in the police force, he should receive a pension. Pltf., a policeman, while vaulting over a wooden horse in a gymnasium, this being part of a manual exercise prescribed, received an injury whereby he was permanently incapacitated from further service in the force:—Held: the injury was one sustained by the policeman in the execution of duty, but whether the permanent incapacity was the result of such injury was a matter for the consideration of the police comrs., & the action was not maintainable.—GUMMERSON v. TORONTO POLICE BENEFIT FUND (1905), 11 O. L. R. 194; 5 O. W. R. 581; 6 O. W. R. 517.—CAN.

t. "Two months after date of first payment."]—The 12th rule or bye-law of the relief society established in connection with the mines of the Dominion Coal Co., provided that, "No member shall participate in the benefits of the society until two full months after the date of his first payment":—Held: a member was absolutely excluded from any participation in the benefits of the society in case of illness or accident happening within the period of two months, & that the right to participate only arose in cases where the inability to work was due to causes arising after the lapse of the two months.—MCDONALD v. DOMINION COAL CO. RELIEF (1903), 36 N. S. R. 15.—CAN.

alterations in rules.]—See Part XI., Sect. 6, subsect. 4, *ante*.

120. When member has not consented—Right to sick pay.]—DAVIS v. BIRD (1881), Diprose & Gammon, 537.

121. ———.]—PRINCE OF WALES LODGE, INDEPENDENT ORDER OF ODDFELLOWS, KINGSTON UNITY v. SHIELDS DISTRICT, INDEPENDENT ORDER OF ODDFELLOWS, KINGSTON UNITY OFFICERS (1883), Diprose & Gammon, 538.

122. ——— No power of alteration in rules.]—SOUTER v. DAVIES, No. 88, *ante*.

123. ——— Where rules stipulate for notice.]—POWELL v. TOKELEY (1906), Report of Chief Registrar of Friendly Societies (Parliamentary Papers, Vol. 112), 134, D. C.

124. Where member has agreed to be bound—Rule excluding him from benefits.]—DIXON v. THOMPSON (1891), Diprose & Gammon, 46, D. C.

125. ———.]—STOOKE v. MUTUAL PROVIDENT ALLIANCE (1891), Diprose & Gammon, 195, D. C.

Annotation:—Consd. Smith v. Galloway (1897), 77 L. T. 469.

126. ——— Rule diminishing benefits.]—SMITH v. GALLOWAY, No. 83, *ante*.

127. Where right has become vested—Not affected by alterations.]—CAUNDLE v. BINGHAM (1879), Diprose & Gammon, 537.

128. ———.]—RITSON v. DOBSON, No. 291, *post*.

129. Where alteration not made in accordance with rules—Insufficiency of notice.]—ORTON v. BRISTOW, No. 75, *ante*.

C. When in Receipt of Poor Law Relief.

See Divided Parishes & Poor Law Amendment Act, 1876 (c. 61); Poor Law Amendment Act, 1879 (c. 12); Outdoor Relief (Friendly Societies) Acts, 1894 (c. 25), 1904 (c. 32)

130. Whether society liable to contribute.]—ATCHAM UNION GUARDIANS v. PRINCE OF WALES LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS (1877), Diprose & Gammon, 347.

131. Rules must be regarded—Omission to give notice.]—ST LEONARD'S, SHOREDITCH, GUARDIANS v. MARSHALL (1892), Diprose & Gammon, 316.

132. ——— Lunatics excluded from benefits.]—DEWSBURY POOR LAW UNION GUARDIANS v. THORNTON (1878), Diprose & Gammon, 351.

133. ———.]—A member of a friendly society became insane & chargeable to the union,

& was sent to the county lunatic asylum. The guardians applied to justices under Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), s. 23, for an order on the trustees to pay out of the arrears of his annuity the cost of his maintenance in relief of the union. The trustees opposed the order on the ground that the rules forbade them to so apply these funds, & the annuity was needed for the member's family. The justices made the order, but refused to issue distress warrant:—*Held*: the justices were bound to issue the warrant, for the trustees ought to have appealed or applied to quash the order; & it was now no defence that the order was invalid or made without jurisdiction. —R. v. SWINDON JJ. (1878), 42 J. P. 407.

134. ——— Although rules made to evade the statute.]—The rules of the L. Friendly Society provided that when a member was entitled to sick pay, he should cease to be so entitled when he became an inmate of a workhouse or a lunatic asylum. The guardians of C. Union having relieved a member as a pauper lunatic:—*Held*: the guardians' claim under Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), s. 23, had been excluded effectually by the rule of the society, though such rule had been made to evade the statute.—CAISTON UNION v. CLEAVER (1891), 56 J. P. 503.

135. ——— Jurisdiction of justices.]—R. v. RICHARDSON, No. 231, *post*.

Disputes, see Part XVIII., *post*.

136. Benefits due on death of member—Right of guardians to Only sums due in member's lifetime.]—MERTHYR UNION GUARDIANS v. PHILLIPS (1892), Diprose & Gammon, 354.

137. ——— As against person nominated.]—CARDIFF UNION v. BANKS & NEELS, No. 163, *post*.

Payments on death generally, see Sect. 4, *post*.

138. Application of Divided Parishes & Poor Law Amendment Act, 1876 (c. 61)—Registered or unregistered societies.]—MERTHYR TYDVIL GUARDIANS v. CAMBRIAN LODGE (1881) 45 J. P. Jo. 220.

Unregistered societies generally, see Part III., *ante*.

D. Forfeiture of Rights.

139. Non-compliance with rules—Full period of payments not completed—Failure of collector to call on change of member's address.]—C., the husband of resp., was a subscriber in applt. friendly society. By the rules of the society a subscription for a period of twenty-six weeks entitled the subscriber to a "half benefit" & it was the

PART XIII. SECT. 3, SUB-SECT. 2.—D.

a. Non-compliance with rules—Member joining another order.]—O. was a member of Ct. Maple of defts.' order, & was insured under the endowment provisions thereof for \$1,000. This ct. left the order in a body, & joined another order of Foresters, & it was in consequence suspended. On joining the new order it was that O., who was in ill-health & gone to California, should be taken insured with the others. By the of defts.' order members of ota. in good standing at were, on application within thirty

to receive a card of membership & be entitled to the endowment, provided they paid all assessments as they fell due, & affiliated with another lodge of the order. On his return from California, O. was prevented from affiliating with another ct. By the endowment certificate the \$1,000 was payable to the widow, orphans, or of O., & by indorsement thereon O. directed the amount to be paid to plff., the widow:—*Held*: the widow was entitled to recover the amount & the fact of O. being a member of another order did not *ipso facto* deprive him of his rights & membership of defts.' order. —OATKES

v. INDEPENDENT ORDER OF (1881), 4 O. R. 535.—CAN.

b. ——— of right of forfeiture by ——— HORTON v. PROVINCIAL PROVIDENT 17 O. R. 361.—CAN.

c. ——— Waiver must be pleaded.]—A member of a benefit assocn. died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was claimed that the forfeiture was waived:—*Held*: the waiver not having been pleaded it could not be relied on as an answer to the plea of non-

Sect. 3.—Rights of members: Sub-sect. 2, D. & E.
Sect. 4: Sub-sect. 1 & 2, A., B., C. & D.]

duty of the collecting agent of the society to collect subscriptions from the members. C. subscribed for eleven weeks from Jan. 17, 1881, & then changed his residence, & the collector did not call for his weekly payments. No further sums were ever paid by C. down to Sept. 29, 1881, when he died. His widow, resp., claimed £11 5s. as "half benefit," & on the society refusing to pay it, preferred a complaint to a police magistrate for the metropolitan district, who made an order upon the society to pay the amount claimed. The society appealed:—*Held*: the magistrate was wrong, & the non-compliance with the rules of the society on the part of the person represented by resp. was a bar to the recovery of the sum claimed, & the alleged default on the part of applt. society could not cure the defect in the title of claimant.—**TAYLOR v. COLLINS** (1882), 46 L. T. 168, D. C.

140. — Person leaving society of own accord—Enlistment in Royal Forces.]—Pltf.'s husband had been an employee of a co-operative society & a member of a provident fund in connection with it. The rules of the fund provided that in case of the death of a member his nominee or legal personal representative was to be entitled to a sum of money, but that no person leaving the society's employment of his own accord should have any claim upon the fund. In Sept. 1911, pltf.'s husband enlisted in the army on the terms of a notice issued by the society that on his return from military service he would be re-employed by the society, or if he was not fit for the society's service he would be allowed to go upon the provident fund. In Oct. 1915, he was killed on active service. In an action by his widow against the trustees of the fund to recover benefits in accordance with the rules:—*Held*: though pltf. would have been entitled to recover the benefits

payment. — **KNIGHTS OF MACABEES OF THE WORLD v. HILLAKER** (1898), 29 S. C. R. 307. — **CAN.**

d. Notice of assessments:— "Fixed dates"—Statutory requirements.]—By the constitution & rules of the society, the amount & frequency of the assessments depended on the discretion of the governing board. Notice of assessments was given to the members merely by insertion in the official journal of the society, sent by post to the last known address of each member. The rules provided that the assessments were to be levied on the first day of the month, & were to be paid within thirty-one days thereafter:—*Held*: the assessments could not be regarded as "payable at fixed dates"; & as, in the case of the member whose status was in question, the notices to three assessments levied, in the way upon the first days of months, was less than thirty days, R. S. O. 1897, s. 165, had not been complied with, & no forfeiture or suspension had incurred.—**Re SUPREME LEON KNIGHTS OF CANADA**, CUN-29 O. R. 708.—**CAN.**

e. — Payment to agent of
 In an action by the beneficiary in a life insurance certificate issued by defts., a friendly society to recover insurance moneys & funeral benefits, defts. pleaded that, by reason of the amount of a monthly assessment not having been paid, the assured was not in good standing as a member of the society at the time of his death, & that the certificate

not then in force. W., the financial secretary, was the person designated by the society to receive payments; but for a great number of years members in a certain locality had made their monthly payments to K., who had a book in which the names of the members were entered, & when a payment was made gave a receipt signed by him (K.) as financial secretary. W. called regularly & received the moneys that had been paid to K.:—*Held*: payment to K. was, in the circumstances, payment to W.; & pltf. was entitled to recover.—**GREENFIELD v. CANADIAN ORDER OF FORESTERS** (1919), 45 O. L. R. 136; 15 O. W. N. 392.—**CAN.**

f. Notice of default—Service of.]—Notice of default before forfeiture of an insurance policy, as required by Collecting Societies & Industrial Assurance Companies Act, 1896, s. 3, is well served if sent by post, addressed to the assured at his last known place of abode.—**MORGAN v. M'CLURE**, [1899] 2 L. R. 209.—**IR.**

g. — Non-compliance with.]—
1. T.

b. Membership of Faculty a condition precedent to admission to Society—Expulsion from Faculty—Effect on right to benefits of Society.]—By 3 Will. IV. c. 64 (1883), the contributors to the defender society were incorporated into a society, & every person under 50 years of age becoming a member of the Faculty of Procurators of Glasgow was required to become a contributor & to continue to subscribe "so long as he lives." Only members

claimed if her husband had remained in the service of the society & had remained a member of the fund until his death, yet his contract of service did not continue after his enlistment, & as the provision with regard to the loss of benefits on leaving the society's employment could not be held to be contrary to public policy merely because pltf.'s husband had left the society's employment in order to enlist, pltf. was not entitled to recover.—**JOYCE v. EBURY (LORD)** (1916), 33 T. L. R. 145, D. C.

Annotation:—Reid. Stretch v. Scout Motor Co. (1918), 62 Sol. Jo. 451.

E. Limitation of Benefits.

See 1896 Act, s. 41, as amended by 1908 Act, s. 3.

SECT. 4.—PAYMENTS ON DEATH.

SUB-SECT. 1.—VALIDITY OF POLICIES.

Life insurance generally.]—See INSURANCE.

Whether policies assignable without nomination.]—See Sub-sect. 2, A., *post*.

141. Whether ordinary life insurance business—Within Friendly Society Acts.]—**KELSALL v. TYLER**, No. 255, *post*.

See, now, 1896 Act, s. 8 (1) (b).

142. Necessity for insurable interest.]—**BROWN v. FREEMAN**, No. 153, *post*.

143. Premiums paid by person with no insurable interest—False declaration as to relationship with deceased—Suspicious conduct.]—**ROBINSON & PATE v. LOYAL PHILANTHROPIC FRIENDLY SOCIETY'S TRUSTEES, ROBINSON & POLLARD v. LOYAL PHILANTHROPIC FRIENDLY SOCIETY'S TRUSTEES** (1905), 119 L. T. Jo. 414.

of the Faculty were entitled to become contributors.

By 38 Vict. c. 6, s. 3, it was enacted that after the passing of the Act "No person shall be obliged or be entitled to become a member of the Society or a contributor to the fund."

In 1901, C., a Glasgow procurator, who had become a contributor to the Widows' Fund in 1870, was struck off the roll of the Faculty, & subsequently the Widows' Fund Society declined to receive his contributions:—*Held*: while it was a condition of a person being admitted as a member of the Society that he should be a member of the Faculty, it was not a condition of the contract of insurance that he should continue to be a member of that Faculty during his life, & C. was still a contributor.—**COLQUHOUN v. SOCIETY OF CONTRIBUTORS TO WIDOWS' FUND OF FACULTY OF PROCURATORS IN GLASGOW**, [1908] S. C. (H. L.) 10; 45 Sc. L. R. 454; 15 S. L. T. 1049.—**SCOT.**

PART XIII. SECT. 4, SUB-SECT. 1.

k. Misrepresentation as to age.] Ontario Insurance Amendment Act, 1889, s. 6, does not apply to benevolent societies having an age limit for admission to membership, & where a man who was older than the age limited was, owing to his innocent misrepresentation as to his age, admitted as a member & given an endowment certificate:—*Held*: the beneficiary named therein could not recover.—**CERRI v. ANCIENT ORDER OF FORESTERS** (1898), 25 A. R. 22.—**CAN.**

l. — Statutory limit.]—Friendly

144. — Innocent misrepresentation by collector of society — Recovery back of premiums paid.]—A policy of insurance was effected with a friendly society on the life of a person in whom the person effecting the policy had no insurable interest, & a number of premiums were paid thereon. Subsequently, it became known that the policy was illegal & void for want of insurable interest, & an action for the return of the premiums was brought in which it was alleged that fraudulent misrepresentations as to the validity of the policy were made by the collector of the society. It having been held that there was no evidence of fraud on the part of the collector:—*Held*: fraud not having been proved, the premiums paid under the policy could not be recovered back, either on the ground of money had & received, or on the ground that the premiums were paid for a consideration which had wholly failed.—*EVANSON v. CROOKS* (1911), 106 L. T. 264; 28 T. L. R. 123.

Annotation:—*Reid. Hughes v. Liverpool Victoria Legal Friendly Soc.*, [1916] 2 K. B. 482.

145. Whether society estopped from denying validity—Representations made by agent—As to assignability & validity.]—*ROBINSON & PATE v. LOYAL PHILANTHROPIC FRIENDLY SOCIETY'S TRUSTEES, ROBINSON & POLLARD v. LOYAL PHILANTHROPIC FRIENDLY SOCIETY'S TRUSTEES* (1905), 119 L. T. Jo. 414.

SUB-SECT. 2.—NOMINATION.

A. Necessity for—Assignability of Policies.

See 1896 Act, s. 56 (1).

146. Whether nomination necessary.]—(1) Life policies in friendly societies are not assignable by deed, but may be the subject of nomination.

(2) Where the nomination has never been revoked & the nominee has died in the lifetime of the nominator, the legal personal representative of the nominee is entitled to stand in the position of the nominee, & upon the death of the nominator to receive the policy moneys from the society. *CADDICK v. HIGHTON*, [1901] 2 Q. B. 476, n.; 68 L. J. Q. B. 281; 80 L. T. 527; 47 W. R. 668; 15 T. L. R. 182; 43 Sol. Jo. 246.

Annotations:—*As to* (1) *Fold. Re Redman, Warton v. Redman*, [1901] 2 Ch. 471. *Overd. Re Griffin, Griffin v. Griffin*, [1902] 1 Ch. 135. *Consd. Cardiff Union v. Banks & Neels* (1908), 72 J. P. 319. *Generally, Mend. Laurie v. West Hartlepool Thirds Indemnity Assocn. & David* (1899), 4 Com. Cas. 322.

147. —.]—Policies effected under Friendly Societies Act, 1875 (c. 60), & under 1896 Act, are not assignable otherwise than by nomination under the Acts.—*Re REDMAN, WARTON v. REDMAN*, [1901] 2 Ch. 471; 70 L. J. Ch. 669; 85

L. T. 13; 65 J. P. 536; 50 W. R. 19; *sub nom. Re REDMAN, WARTON v. REDMAN*, 17 T. L. R. 618; 45 Sol. Jo. 639.

Annotation:—*Consd. Cardiff Union v. Banks & Neels* (1908), 72 J. P. 319.

148. —.]—Policies effected under the Friendly Societies Act, 1875 (c. 60), & *semble*, under 1896 Act, are assignable in the ordinary way as well as by nomination under the Acts. *Re Redman, Warton v. Redman*, No. 147, *ante*, *overd.*—*Re GRIFFIN, GRIFFIN v. GRIFFIN*, [1902] 1 Ch. 135; 71 L. J. Ch. 112; 86 L. T. 38; 50 W. R. 250; 18 T. L. R. 142; 46 Sol. Jo. 122, C. A.

Annotations:—*Consd. Cardiff Union v. Banks & Neels* (1908), 72 J. P. 319; *Griffiths v. Keeles Provident, Industrial, Co-op. Soc.*, [1911] 2 K. B. 275.

B. Power to nominate.

See 1896 Act, s. 56 (1).

149. Member of unregistered society—Payments out of contributions by members—Not out of society's funds.]—*HARRIS v. UNITED KINGDOM POSTAL & TELEGRAPH SERVICE BENEVOLENT SOCIETY* (1889), 87 L. T. Jo. 272.

Unregistered societies generally, *see* Part III., *ante*.

C. Who may be nominated.

See 1896 Act, s. 56 (3).

D. To what Sum Nomination may be made.

See 1896 Act, s. 56 (1).

150. Nomination to £100.—Sum due in excess of £100.]—(1) A nomination made by a member of a friendly society under Friendly Societies Act, 1875 (c. 60), s. 15 (3), to an amount not exceeding £100 is valid, although the total amount payable by the society on the death of the nominator exceeds that sum.

(2) Such a nomination is not revocable in any manner other than that prescribed by the sub-sect., & therefore is not revocable by a subsequent will of the nominator.—*BENNETT v. SLATER*, [1899] 1 Q. B. 45; 68 L. J. Q. B. 45; 79 L. T. 324; 47 W. R. 82; 15 T. L. R. 25; 43 Sol. Jo. 26, C. A.

As to (1) *Reid. Re Redman, Warton v. Redman*, [1901] 2 Ch. 471. *As to* (2) *Consd. Caddick v. Highton*, [1901] 2 Ch. 476, n.; *Re Griffin, Griffin v. Griffin*, [1902] 1 Ch. 135; *Union v. Banks & Neels* (1908), 72 J. P. 319.

151. —.]—Industrial & Provident Societies Act, 1893 (c. 39), s. 25 (1), empowers a member of a society registered under that Act to nominate any person to whom his property in the society shall be transferred at his decease "provided the amount credited to him in the books of the society does not then exceed £100 sterling":

Societies Act, 1896, s. 6, forbids insurance for payment on the death of any child under 5 years of any sum exceeding £6. The agent of an insurance co. made out a form of insurance with respect to a child under years of age for £16 10s., stating that the child was 12 years of age. There were provisions in the policy limiting the powers of agents to bind the co.:—*Held*: the policy is wholly null & void.—*CONKORS v. LONDON & PROVINCIAL ASSURANCE CO.* (1913), 6 B. W. C. C. N. 146.—*IR.*

m. Widows' Fund scheme—Absence of provision in event of widow's death.]—Held: a provision made

for widows under a widows' fund scheme by a friendly society, without any notice being taken of what should be done in the event of a widow marrying again, does not cease on that event.—*BURGESS v. CUTHBERTSON* (1813), 17 Fac. Coll. 137.—*SCOT.*

PART XIII. SECT. 4, SUB-SECT. 2.—C.

n. *My children as directed by my will—Absence in will of reference to benefit certificate—Statutory limitation to infants.]—*A benefit society issued a beneficiary certificate payable to the wife of the assured at his death; she died & he then endorsed on the certificate a direction that payment was

to be made "to my children as directed by my will." The day before his death the assured made a will by which he directed that the whole of his estate should be divided amongst his children—there being both adult & infant children—in equal shares, but made no reference whatever to the benefit certificate, or to the moneys payable thereunder:—*Held*: the infant children of the assured were entitled to the whole of the moneys, by virtue of the amendment made to Insurance Act, 1897, by 1 Edw. VII. c. 21, s. 2 (7).—*Re SNYDER*, [1902] 22 C. L. T. 299; 4 O. L. R. 120; 1 O. W. R. 461.—*CAN.*

Sect. 4.—Payments on death: Sub-sect. 2, D., E., F., G. & H.]

—*Held*: the word "then" referred to the date of the nomination & not to the date of the nominator's decease, & the power of nomination related only to property in the society existing at the time of the nomination; therefore, a nomination made by a member in respect of all his property in the society at a time when the amount credited to him in the books of the society did not exceed £100 was good as to the amount then standing to his credit, notwithstanding that the amount so credited to him at his decease exceeded £100.—*ECCLES PROVIDENT INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. GRIFFITHS*, [1912] A. C. 483; 81 L. J. K. B. 594; 106 L. T. 465; 56 Sol. Jo. 359; 28 T. L. R. 299, H. L.

152. Nomination to sum exceeding £100—Society established before 1850—Effect of Friendly Societies Act, 1850 (c. 115), s. 2.]—Above sect. prohibits assurances in friendly societies beyond £100. The former Acts contained no such prohibition:—*Held*: an assurance for £199 effected subsequently (1852), in a society established under the former Friendly Societies Act was valid.

Testator under Friendly Societies Acts, 1829 (c. 56), & 1834 (c. 40), effected a policy of assurance on his life in a sum of £499 19s., payable on his decease to his widow; & if none, to his exors., administrators or assigns. All previous Acts relating to friendly societies were repealed & consolidated by Friendly Societies Act, 1850 (c. 115), & assurances in favour of relations were limited to the sum of £100, but the rights of parties under former Acts were preserved. Testator paid the premiums till his decease, & died indebted, leaving his widow surviving:—*Held*: in a suit by creditors, the policy was good, though it exceeded the sum of £100, & the widow was entitled to the sum assured; but the money must be paid into ct., as the wife, as administratrix, was found indebted to the estate of testator.—*CLAYTON v. OWEN* (1862), 31 Beav. 285; 6 L. T. 802; 8 Jur. N. S. 1117; 51 E. R. 1148; *sub nom. Re OWEN*, *CLAYTON v. OWEN*, 31 L. J. Ch. 825; 10 W. R. 770.

E. Amount payable to Nominee.

153. Nomination of creditor—Debt reduced in nominator's lifetime—Nominee entitled to entire benefit.]—(1) A debtor, at the request & expense of his creditor, insured his life for £400, being less than he then owed the creditor, in a benefit insurance society, & nominated his creditor as the person to receive the amount. The debt was reduced to £314; the debtor died, & the creditor received the £400:—*Held*: the debtor's administrator was not entitled to recover the balance beyond the £314 from the creditor. A claim for this purpose was dismissed, & on an undertaking by debt. not to enforce his debt against the debtor's estate, with costs.

(2) *Qu.*: whether 14 Geo. 3, c. 48, prohibiting insurances by persons having no interest, applies to benefit insurance societies constituted under the Friendly Societies Acts.—*BROWN v. FREEMAN* (1851), 4 De G. & Sm. 444; 64 E. R. 906.

Annotation:—*As to* (1) *Held*. *Bruce v. Garden* (1869), 5 Ch. App. 32.

F. Formalities of Nomination.

See 1896 Act, s. 56 (1).

154. Delivery of nomination—To society's secretary.]—*HUGHES v. HARDY* (1885), Diprose & Gammon, 402.

155. Requirements of society's rules—Admission of nominee in member's lifetime.]—By 56 Geo. 3, c. lxxiii., the Customs Annuity & Benevolent Fund was directed to be raised for the conditional benefit & relief of widows, children, & other relatives of the officers & other persons employed in the department of Customs in England; & it was provided that rules & regulations should be made for the formation of such fund, & directors & other officers appointed who were to have the management of the same. The code of rules, etc., which was in force at the time of the execution of the following instrument was dated July 28, 1836. The rules then made provided (*inter alia*) that the admission by the directors of a nominee of a subscriber should take place during the lifetime of such subscriber; & that the subscriber should have power to direct by any instrument in writing, etc., to be deposited with the directors, or by his will, that the whole capital money insured or forthcoming at his death should be paid, in any manner he might think proper, for the benefit of his widow, children, or relatives, or of his nominee who should have been duly admitted. J. P. was in July, 1826, admitted as a subscriber to the fund for the sum of £1,200. In Mar. 1840, a letter was sent from the "fund office" to J. P., in which his attention was drawn to the rules of July, 1836, & acquainting him that if he gave directions by will as to the manner in which the sum insured was to be appropriated at his death, he must make specific mention of his insurance in the Customs Fund; that "relatives," used in the rules, included only relations by blood, & not sons-in-law or daughters-in-law; & if he had disposed of his insurance to a son-in-law, or to any other party who was not a relation by blood, the directors must at his instance, during his lifetime, admit him his nominee, to entitle him to receive the sum set apart for his benefit. On Oct. 6, 1845, J. P., in pursuance of the rules, duly signed an instrument in writing, in which he directed that the whole of the capital money forthcoming at his death should be invested in the purchase of 3 per cent. stock, & the interest applied for the benefit of his wife during her life, if she should survive him, & at her death the stock should be divided between his two daughters B. & C. in equal proportions; & in the event of either of them marrying & leaving

PART XIII. SECT. 4, SUB-SECT. 2.—F.

o. Requirements of

—*Beneficiary to be named in*
—A certificate issued by a benevolent society in favour of an unmarried man, declared the sum therein mentioned to be payable to his exors. The rules of the society required the beneficiary to be named in the certificate, & in default provided for payment to certain named relations of the member,

or his next of kin, or to the beneficiary fund of the society:—*Held*: this was not a legal appointment or declaration of the fund under the statute & rules of the society, that the fund did not pass to the member's exors. under his will, & neither creditors nor legatees could claim it, but the case must be looked upon as one of default of appointment & the money applied as directed by the rules.—*JOHNSTON v. CATHOLIC MUTUAL*

BENEVOLENT ASSOCN. (1897), 24 A. R. 88.—*CAN.*

p. — Waiver by society.]

—The rules of a friendly society directed that on the death of a member a levy of 1s. should be made on all the members, to be paid to the nominee of the deceased, whose name should be submitted to the secretary before a card of membership was supplied. The card of membership & rule book

issue, then her or their respective shares to her or their children respectively; & in case both his daughters should die without issue, then over to his son C. P. J. P. directed, that if he survived his wife, the whole sum forthcoming should be paid to his daughters B. & C. or their children, or, to his son C. P. This instrument was in Oct. 1845, deposited by J. P. with the directors of the fund, & he died in Dec. 1855. In May, 1852, J. P. by will bequeathed all his estate & effects unto his daughters B. & C., & appointed them extrices, but he made no specific mention of the fund, which at his death amounted to nearly £5,000. The wife of J. P. died in 1847, & C. P. died intestate & unmarried in 1851. B. & C. applied to the directors for payment to them of the fund, but were informed that C. G., who in Nov. 1826, intermarried with L. P., another daughter of J. P., had given notice to the directors not to pay it to them. C. G. alleged that by an indenture of Aug. 13, 1832 (after reciting that on his marriage no settlement was made, but that upon the treaty for such marriage it was agreed that upon the decease of J. P., C. G. & L. his wife should take a share, equal with J. P.'s other daughters who should be living at his decease, of & in all his property), J. P. covenanted with C. G. & L. his wife, that they, or such of them as should be living at his decease, should immediately after his decease take a share equal to his other daughters of all the property which he might be seised or possessed of, or in any manner entitled unto or interested in, at the time of his death; & also

that he would forthwith make his last will in writing, whereby he would give, devise, & bequeath all his property in such manner as to effectuate the intentions thereinbefore expressed, & would not revoke or alter such will. L. G., the wife of C. G. died in 1852. The capital money was, under 10 & 11 Vict. c. 96, paid by the directors of the fund into ct. On petition presented by B. & C.:—*Held*: the covenant of J. P. did not affect the particular fund in question, as it was not a part of his general estate, & therefore the claim of C. G. must be rejected; &, under the instrument of nomination, B. & C. were, in the events which had happened, entitled to take the fund absolutely.—*Re POWELL'S TRUSTS OF INSURANCE IN THE CUSTOMS ANNUITY & BENEVOLENT FUND* (1856), 2 Jur. N. S. 799.

156. ———.]—*Re PHILLIPS' INSURANCE*, No. 172, *post*.

157. ——— **Technical irregularity in nomination—Discretion of governing body.**]—*HANNAY v. HORNER*, No. 171, *post*.

G. Persons entitled on Death of Nominee.

158. Nominee's legal representative.]—*CADDICK v. HIGHTON*, No. 146, *ante*.

H. Revocation or Variation of Nomination.

See 1896 Act, s. 56 (4) & (5).

159. Revocation by will—Must be communi-

had been supplied to Q. without his furnishing the name of his nominee. In both of these he nominated pltf., but the nominations were not signed, dated or witnessed. A document was also found on the death of Q., signed but neither dated, nor witnessed, addressed to the secretary nominating pltf.:—*Held*: by supplying the card of membership the assocn. had waived any obligation to furnish the name of a nominee.—*BRIMACOMBE v. C.G.R. MUTUAL AID ASSOCN., WESTERN SYSTEM* (1910), 20 C. T. R. 117.—S. AF.

q. **Statutory requirement—Nomination must be signed by member—Whether "mark" sufficient.**]—*Held*: a nomination authenticated by a member's mark only & by the signatures of two instrumentary witnesses was not a writing under hand within Friendly Societies Act, 1896, s. 56 (1), & being of a testamentary character & unsigned it was of no force or effect in law.—*MORTON v. FRENCH*, [1908] S. C. 171; 45 Sc. L. R. 126; 15 S. L. T. 517.—SCOT.

PART XIII. SECT. 4, SUB-SECT. 2.—G.

r. **Assignee for value—Priority over children of nominee.**]—Interpleader issue to determine the ownership of insurance money on the life of Rhoder paid into ct. by Royal Arcanum & claimed by pltf. as administrator of R.'s estate or as next friend of the infant children of L. & by deft. as assignee for value by endorsement on policy. L., an adopted daughter, was the original beneficiary named in the certificate & on her death in 1909 it had been assigned to deft.:—*Held*: while under the rules of the Royal Arcanum the infant children of the beneficiary named in the policy would take the benefit thereunder, yet under Ontario Insurance Act, s. 151 (3), which was of paramount authority, deft. was entitled.—*FIDELITY TRUST CO. v. BUCHNER* (1912), 22 O. W. R. 72; 3 O. W. N. 1208; 26 O. L. R. 367; 5 D. L. R. 282.—CAN.

PART XIII. SECT. 4, SUB-SECT. 2.—H.

s. **Expression of intention to vary—Accompanied by delivery of certificate.**]—An endowment certificate issued by a benevolent society to a member, & payable on his death, half to his father & half to his mother, contained a provision that should there be any change in the name of the payee, the secretary should be notified, & an indorsement thereof made on the certificate. The member subsequently married, when he informed his wife that he would have the certificate changed, as he intended it for her, giving her the certificate which she deposited in a trunk used by both in common, he continuing to pay the premium:—*Held*: this was not sufficient to displace the terms of the contract as manifested on the face of the certificate.—*SIMMONS v. SIMMONS* (1893), 24 O. R. 662.—CAN.

t. **Revocation by will—Must be in accordance with society's regulations.**]—Pltf. were exors. of the will of M., a member of the Order of Scottish Clans, who had held a certificate of membership entitling the beneficiary named therein to the sum of \$2,000, payable on M.'s death. By the rules of the society no member could assign his "bequeathment certificate" nor would any assignment be recognised by the society. The name of M.'s father, deft., had been inserted in the certificate by his request. After the date of the certificate & during the lifetime of M., the bequeathment laws of the society were amended, so as to provide that at the death of a member in good standing the amount of the bequeathment should be paid to the wife, affianced wife, or relative of, or person dependent upon, such member, as designated in his bequeathment certificate. By his last will M. appointed pltf. as his executors & trustees, & directed that his life insurance money should be paid to them for the purpose of carrying out the trusts of the will; & about the

same time he indorsed a memorandum on the bequeathment certificate revoking the former direction as to the payment of the insurance due at his death, & authorising & directing such payment to be made to pltf.:—*Held*: in a case of a society having objects & a constitution similar to those of the society in question, the member has no interest in the fund raised or to be raised, but merely a power to appoint an object to receive the same, which power must be exercised in accordance with the regulations of the society; & deft., the beneficiary named in the certificate, was entitled to the money, as against the exors. of deceased's estate.—*LEADLEY v. MCGREGOR* (1890), 11 Man. L. R. 9.—CAN.

u. ———.]—The proceeds of a life insurance certificate insured had made payable to his wife, but by his will insured made other provision for her, & directed that the money in question should fall into & form part of his general estate:—*Held*: the will did not operate as a good appointment of the fund under the rules of the society, which did not allow such appropriation; that the direction of the will could not operate so as to make the money part of the general estate; & that the widow was entitled to it.—*Re ANDERSON'S ESTATE* (1906), 3 W. L. R. 127; 16 Man. L. R. 177.—CAN.

Testator's beneficiary certificate in the Canadian Order of Chosen Friends was expressed to be payable to his wife in the manner & subject to the conditions set forth in the laws governing the life insurance fund. Those laws prevented a member diverting the benefit to any one not related to or dependent upon him unless there were no such person, & provided that, in case of the prior death of the beneficiary, " & no further or other disposition be made thereof," the benefit should go to the surviving children of deceased member in equal

Sect. 4.—Payments on death: Sub-sect. 2, H. & I.; 160.
Sub-sect. 3, A. & B.] 150, ante.

cated to society.]—LAVIN v. HOWLEY (1897), 102
L. T. Jo. 500.

161. Letter purporting to revoke—Inadequate.]

shares:—Held: it was not competent to testator to divert by his will the benefit to his exors. as part of his estate, although they were to take it in trust for the children, & that the proceeds should go to the children free from the claims of creditors of deceased.—Re DRYSDALE'S ESTATE (1909), 18 Man. L. R. 644; 10 W. L. R. 642.—CAN.

*e. — Validity of.]—By the rules of a benefit society the money secured by certificate was payable upon the death of a member to his widow & children, but in this case the member, by a codicil to his will, directed that the moneys payable upon his certificate should be used by his widow to pay off the mtge. upon his farm. The money was paid to the widow, & she used it as directed, giving plff., a daughter of deceased, the benefit of maintenance on the farm, until she married, at the age of nineteen. Plff. claimed her share alleging a trust in her favour which could not be revoked by the codicil:—*Held: the provision made by the codicil was a reapportionment of the fund, which the deceased had power to make.—RACHER v. PEW (1899), 30 O. R. 483.—CAN.**

*d. — Modification of rules by statute.]—A certificate of life insurance stated that it was subject to the provisions of the bye-laws, rules, & regulations of the society. One of the bye-laws provided for the payment of the insurance money to any person nominated by indorsement, which indorsement might be revoked. The member, by indorsement on the certificate, directed that all money accruing upon it should be paid to his wife, upon his death; but, subsequently, by will directed that only a portion of it should be paid to her, & the balance to his half-brothers & sisters:—*Held: the insurance was subject to Ontario Insurance Act, R. S. O. c. 203, which provided that when the indorsement was in favour of the wife of the member, he could not revoke it, & the bye-law was in this respect modified & controlled by the statute.—Re HARRISON (1899), 20 O. L. T. 38; 31 O. R. 314.—CAN.**

*e. —]—"The Catholic Order of Foresters" were incorporated in Illinois, & had branches in Ontario, & in 1892 became registered as a friendly society in Ontario under Insurance Corporations Act, 1892, & had since kept their registry in force as a friendly society, & had not at any time been registered as an insurance company. A member of one of the Ontario branches was the holder of a certificate of the society, whereby they promised to pay to deft., a brother of the holder, \$1,000, upon satisfactory proof of his death. The holder made a will whereby he bequeathed the certificate to the wife of one of the plffs., naming plff.'s exors.:—*Held: the rules of the Order, so far as they were inconsistent with Ontario Insurance Act, R. S. O. c. 203, were modified & controlled by that Act; & the benefits of the certificate passed, by virtue of the will to the legatee, although the rules of the Order provided that no will should be permitted to control.—GILLIS v. YOUNG (1901), 21 O. L. T. 165; 1 O. L. R. 368.—CAN.**

f. — Preferred class—Right of testator to transfer within class.]—When a policy of insurance is payable to a beneficiary for value, not so named on the face of the policy, who is also one

of the preferred class of beneficiaries, the assured cannot by his will transfer the benefit of the insurance to another beneficiary of the preferred class.—Book v. Book (1901), 21 C. L. T. 111; 1 O. L. R. 86.—CAN.

designa- tion of a beneficiary in an Ontario contract of insurance can be revoked & the benefit diverted to another only within the limits laid down by Ontario Insurance Act, R. S. O. 1897, c. 203, s. 151, even though the original designation of the beneficiary be expressly made subject to power of revocation & substitution reversed, & to the bye-laws of the insurers, which permit the desired change. Thus, in such a case, the attempted diversion of the benefit from a beneficiary of the privileged class, to a beneficiary not of that class, was held invalid by reason of s. 151 (3) of the Act.—LINTS v. LINTS (1903), 23 C. L. T. 242; 6 O. L. R. 100.—CAN.

*h. — Whether "legal heirs" included.]—Appeal by J. A. F. from order, declaring M. L. F. entitled to the proceeds of an insurance policy in the friendly society called "The Royal Templars of Temperance." The policy in question, dated Sept. 12, 1901, was upon the life of deceased, the father-in-law of M. L. F. The insured had, when the policy issued, designated the beneficiaries in these terms:—"H. E. P., C. R. S. D., & W. W. F., exors., in trust for legal heirs." At that time his son W. W. F. was alive, as was also his grandson J. A. F. No other descendants of deceased were living in Sept. 1901. His son William predeceased him; his grandson John Arthur survived. In Nov. 1903, the insured executed a memorandum directing payment to his daughter-in-law M. L. F. for her own use & benefit." The question for determination was the efficacy of this memorandum:—*Held: regarding & applying R. S. O. c. 203, s. 2 (36), & reading it with s. 35, the phrase "legal heirs" means "those entitled to take under the Statute of Distributions," & "legal heirs," so interpreted, cannot be deemed a designation of preferred beneficiaries under s. 150.—Re FARLEY (1905), 6 O. W. R. 78; 10 O. L. R. 540.—CAN.**

*k. Endorsement on certificate—In favour of "dependent."]—Plff. was the wife of Philip Crosby, deceased, having been married in 1860. In 1886 deceased went through a second ceremony of marriage with deft., who did not know that she was marrying a man whose wife was living. In 1900 deceased made an endorsement on his certificate of insurance in a benevolent society, revoking his former direction as to payment, & directed payment to be made to "Mary Hall, otherwise known as Mary Crosby." Deft. was the holder of the certificate, & claimed the money as a "dependent" of deceased:—*Held: deft., having lived with the deceased, believing herself to be his wife, & being supported by him, was, under one of the rules of the society entitled to the fund as a "dependent" of deceased.—CROSBY v. BALL (1902), 22 C. L. T. 324; 4 O. L. R. 496; 1 O. W. R. 545.—CAN.**

l. Attempt to vary—Necessity for consent of beneficiary.]—CARTWRIGHT v. CARTWRIGHT (1906), 12 O. L. R. 109.—CAN.

m. of nomination—As- sured—purported re-marriage

—.]—BENNETT v. SLATER, No.

*—Claim of second wife.]—Deceased insured in a fraternal society for \$2,000, which by the certificate was made payable to his wife M., & was so continued until 1896, when he endorsed on the certificate a revocation of the payment to M., who had divorced him, & procured a duplicate certificate to be issued, stating that M. was dead, & having the amount made payable to C. with whom he lived as his wife, & an adopted daughter, & the insurance so continued until his death, C. for several years before his death paying the premiums:—*Held: C. & the adopted daughter were entitled to the moneys.—Re WILLIAMS & ANCIENT ORDER OF UNITED WORKMEN (1907), 10 O. W. R. 50, 215; 14 O. L. R. 482.—CAN.**

*n. — Premium paid by new nominee—Resulting trust.]—Deceased made his fiancée the beneficiary in a life policy. They disagreed & he said he would make his mother the beneficiary, & the premium was paid on that understanding. No change, however, was made in the beneficiary. The insured died intestate:—*Held: there is a resulting trust in favour of the mother, & it should go to her in her own right.—ALLEN v. WENTZELL (1909), 7 E. L. R. 575.—CAN.**

o. — Agreement not to vary.]—CLARK v. LOPTON (1912), 21 O. W. R. 705; 3 O. W. N. 1027; 26 O. L. R. 204; 4 D. L. R. 39.—CAN.

*p. Ineffectual variation by invalid will.]—A will invalidly executed is not an "instrument in writing" effectual to vary the benefit of an insurance certificate, under R. S. O., 1897, c. 203, s. 160 (1).—*Re JANSEN (1906), 12 O. L. R. 63; 8 O. W. R. 17.—CAN.**

*q. — A declaration in writing sufficient to identify new nominees.]—L., who died Mar. 1918, was then & had for many years before been a member of a benefit assocn., & by the terms of his membership a mortuary benefit was payable to his estate. In 1915 he signed a document in the form of a will by which he appointed S. "sole executor, to pay debts & sell ranch & collect all accounts & insurances. The proceeds to be divided between his children & the children of F. T." The document was not witnessed. L. had no other insurance. His membership in the assocn. was renewed annually; & Jan. 1918, the assocn. received from him a renewal application in writing signed by him, containing the words, "Benefit in case of death payable to my estate":—*Held: that the document signed by L., though ineffective as a will, was an instrument in writing sufficiently identifying the mortuary benefit payable by the assocn. to constitute it a declaration designating the children referred to in it as beneficiaries.—LEAVITT v. SPAIDAL (1919), 45 O. L. R. 611; 49 D. L. R. 245; 16 O. W. N. 271.—CAN.**

Extrinsic proof of permissible.]—S. 160 of the Ontario Insurance Act, 1897, c. 203, provides that the assured may vary a policy previously made so as to restrict, extend, etc., the benefits, or alter the apportionment, inter alia, by a will identifying the policy by a number or otherwise. The assured, in being the holder of a beneficiary certificate in a benevolent society made payable to his wife, by his will bequeathed "out of my life insurance

—WRIGHT v. DARKHOUSE FRIENDLY SOCIETY (1890), Diprose & Gammon, 407

Revocation of nomination—By subsequent will.]
—See Nos. 150, 159, ante.

I. Other Cases.

162. Whether nomination operates as gift — Friendly Societies Act, 1875 (c. 60), s. 15 (3)—Effect of.]—BIGGS v. LEWIS (1890), 89 L. T. Jo. 47.

163. Nominator chargeable to guardians — After nomination—Right of guardians to recover—Priority of nominee.]—In June, 1902, the R. Friendly Society issued to N., a member of the society, a policy of assurance on his own life for the sum of £100. In Oct. 1903, N., in pursuance of the power given by 1896 Act, s. 56, nominated B. to receive the money payable by the society on the death of N. In Dec. 1907, N. died, all premiums on the policy having been paid by B. In May, 1906, N. had become chargeable to the guardians of the C. Union as a pauper lunatic, & the expenses incurred by the guardians in his relief up to the time of his death amounted to £51. In accordance with their rules the society had paid the funeral expenses of N. out of the policy moneys. Upon the guardians of the C. Union claiming, under Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), s. 23, that, after the payment to B. of the amount of the premiums, there should be repaid to the guardians out of the policy moneys the said sum of £51:—Held: the claim of the guardians could not be sustained, & B. was entitled to the whole of the residue of the policy moneys in the hands of the society, subject to any claim for costs which the society might have. —CARDIFF UNION v. BANKS & NEELS (1908), 72 J. P. 310.

164. Effect of prior disposition by will.] — HUGHES v. PARRY (1892), 93 L. T. Jo. 131.

funds the sum of \$200 to my sister," & "all the rest, residue, & remainder of my insurance funds . . . to my daughter":—Held: this did not sufficiently identify the beneficiary certificate above mentioned, nor was it permissible to prove by extrinsic evidence that the testator must have referred to it, as he held no other policies.—*Re COCHRANE & ANCIENT ORDER OF UNITED WORKMEN* (1908), 16 O. L. R. 328; 11 O. W. R. 956.—CAN.

a. — Consent of nominee.]—By a "life insurance certificate," issued in 1903, a "mortuary benefit" was payable "to the beneficiary or beneficiaries designated hereon." The insured, by indorsement, named his wife as beneficiary. In 1906, the insured, by a writing indorsed on the policy, changed the beneficiary to his stepson; his wife signed a memorandum agreeing to the change; the certificate was then delivered to the society, and a new certificate was issued, payable to the stepson, who undertook to pay the premiums. The new certificate was on a different plan. The wife died in 1913, & the insured in 1919:—Held: what was done amounted to an assignment or a surrender of the certificate, within Ontario Insurance Act, R. S. O. c. 183, s. 181 (2), & the stepson was entitled to the insurance moneys.—*Re KNIBBS & ROYAL TEMPLARS OF TEMPERANCE* (1920), 46 O. L. R. 410; 17 O. W. N. 272.—CAN.

t. Wife & children nominated—Variation in favour of child who was a creditor—Variation valid.]—*Re KEMP, JOHNSON v. ANCIENT ORDER OF UNITED WORKMEN* (1908), 11 O. W. R. 91; 15 O. L. R. 339.—CAN.

PART XIII. SECT. 4, SUB-SECT. 2.—I.

a. Legal heirs.]—In a life insurance certificate of the Canadian Order of Foresters the money secured was expressed to be payable at the death of the insured to his "legal heirs":—Held: the money was payable to the widow & each of the eight children of the insured in equal shares, & not to his exors. to be disposed of as part of his estate.—*Re HAMILTON & CANADIAN ORDER OF FORESTERS* (1909), 18 O. L. R. 121; 13 O. W. R. 410.—CAN.

b. Whether creditors.]—In his appln. for membership in a benevolent society apppt. directed that the amount to which he should be entitled should be paid "subject to my will" & the certificate issued, provided that at the death of beneficiary, if then in good standing, "his heirs & legal representatives shall be entitled to receive the amount collected upon an assessment not exceeding \$3,000 & he now directs that in case of his death the said sum be paid subject to his will." The insured died, having made his will, by which he directed his debts to be paid & gave "all the rest & residue" of his estate to his wife, who survived him. At the time of the issue of the certificate the rules of the society provided that moneys payable under a beneficiary certificate should be paid to such person as the member while living might have directed, but there was no provision as to payment in the event of an invalid appointment or of want of appointment. Prior to deceased's death new rules were passed limiting the persons who could take as beneficiaries & excluding expressly creditors & persons designated only by will:—Held: the new

rules did not affect certificates then existing & the insured's exors. were entitled to the amount for distribution among the insured's creditors.—*FAWCETT v. FAWCETT* (1890), 26 A. R. 335.—CAN.

PART XIII. SECT. 4, SUB-SECT. 3.—A.

a. Policy in favour of wife—Death of wife before member—Rights of children.]—*Re KENNIE, INFANTM* (1913), 6 O. W. N. 459; 30 O. L. R. 6.—CAN.

d. Whether widow or administrator entitled—Funeral money.]—A question having been raised whether the administrator or the widow was entitled to the funeral money allowed by the rules of a club on the decease of a member:—Held: the administrator was entitled & not the widow, although the widow had actually ordered the funeral & paid the balance of the expenses & recovered from the administrators.—*COWLEY v. ONCHAN SOCIETY & KARRAN* (1843), Bluet, 266.—I. of M.

e. — Club money.]—On a question being raised whether the widow or the administrator was the person entitled to the club money of a deceased member of a friendly society, it was directed that £4 10s. out of the £10 due should be paid to the administrator for funeral expenses paid by him & that the widow should be paid the balance of £5 10s.—*HAIDCLIFFE v. FRIENDLY SOCIETY &* (1846), Bluet, 311.—I. of M.

PART XIII. SECT. 4, SUB-SECT. 3.—B.

f. Payment to member's widow.]—A testator by his will disposed of his property in the following terms: "I give & bequeath all my real &

SUB-SECT. 3.—PAYMENTS APART FROM NOMINATION.

A. Member dying Intestate.

See 1896 Act, s. 58.

165. Right of distribution — In society's discretion.]—By Industrial & Provident Societies Act, 1893 (c. 39), s. 27, if any member of a society entitled to property therein dies intestate without having made any nomination thereof then subsisting the committee may without letters of administration distribute the same among such persons as appear to them on such evidence as they deem satisfactory to be entitled by law to receive the same:—Held: the power of the committee to distribute the property was entirely discretionary, & they could not be compelled by action to exercise their discretion.—*ESCRITT v. TODMORDEN CO-OPERATIVE SOCIETY*, [1890] 1 Q. B. 461; 65 L. J. Q. B. 358; 74 L. T. 350; 44 W. R. 544; 40 Sol. Jo. 298, D. C.

166. Policy in favour of wife—Wife as administratrix—Member's creditors' claim to insurance benefits.]—CLAYTON v. OWEN, No. 152, ante.

B. Member dying Testate.

167. Payment to member's widow — Where no claim by executors—Friendly Societies Act, 1875 (c. 60), s. 15 (5).]—NELSON v. ROYAL LONDON FRIENDLY SOCIETY (1896), Diprose & Gammon, 544, D. C.

Sect. 4.—Payments on death: Sub-sect. 3, B., C. D.; sub-sect. 4. Sects. 5 & 6: Sub-sect. 1.]

168. Payment to next of kin — Under society's rules—Right of legatee to recover.]—GARRATT v. LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY (1897), Diprose & Gammon, 554.

C. To Relatives specified in Rules.

169. Money paid to specified relative—Claim by administrator against payee—For payment of member's debts.]—Deceased, a member of an unregistered friendly society, had, upon making his application for admission to the society, signed a declaration agreeing to be bound by the rules of the society, & authorising the deduction from his wages of the sum specified in the rules for securing to himself, or to his representatives in case of his death, the benefits of the society. The rule relating to the payment of death allowances empowered & authorised the committee to pay the allowance to such person or persons as in their discretion they might think fit; & it further provided that the allowance should be paid to certain specified relatives in such proportions as the committee should determine, unless otherwise bequeathed by will, when it was to be paid to the person to whom it had been bequeathed; that, where there was no surviving relatives & no special bequest, only the funeral expenses should be defrayed by the society, & that where the allowance had once been paid neither the committee nor the society should be liable to any further claim in respect of it. Upon the death of the member intestate the society paid the amount of the death allowance to the deft., his sister. Pltf., as administrator of deceased, having brought an action against deft. to recover the money so paid to her:—*Held*: (1) the rule constituted the contract between the member & the society as to the payment of the money; (2) the death allowance was not the property of the member during his life, & in the absence of a bequest by will was not assets for the payment of his debts, & therefore pltf. could not recover.—ASHBY v. COSTIN (1888), 21 Q. B. D. 401; 57 L. J. Q. B. 491; 59 L. T. 224; 53 J. P. 69; 37 W. R. 140, D. C.

Annotations:—As to (2) Consd. Re Davies, Davies v. Davies, [1892] 3 Ch. 63; Bennett v. Slater, [1899] 1 Q. B. 45. Held. Re Griffin, Griffin v. Griffin (1901), 71 L. J. Ch. 112.

170. Where no disposition of policy in will.]—A policy of insurance was effected with a society the rules of which provided, that the assurer might nominate any person to receive the sum assured, & that, if no nomination should be existing when the sum assured should become due, that sum should be paid to the assigns (if any) of the assurer, so far as the claim of such assigns should extend, in every case where such claim should have arisen under any disposition or charge made by the assurer specifically affecting such

sum, or any part thereof, either by reference thereto, or by reference generally to sums due upon assurances, whether such disposition or charge should have been made by deed, will, or other instrument or writing. In case there should not be any nomination, nor any such disposition or charge existing in respect of the sum assured when due, such sum should be paid to the widow of the assurer, or, if he should not leave a widow, to his children living at his death in equal shares. The assured never made any nomination, disposition, or charge affecting the policy, except so far as the gift of the residue of his estate contained in his will operated as a disposition affecting the policy. By his will he appointed his three daughters to be the trustees & extrices thereof, & he devised & bequeathed the residue of his real & personal estate to his trustees, upon trust for sale & conversion, & to hold the proceeds upon trust for division into four equal parts, three of which were to be paid to the three daughters respectively, & the fourth of which was to be invested for the benefit of the widow & children of a deceased son of testator. The will did not refer either expressly to the policy, or generally to sums due upon assurances. The three daughters survived testator:—*Held*: the provisions of the policy were valid; the power of disposition by will had not been exercised; & the three daughters were entitled to the policy money in equal shares.—*Re DAVIES, DAVIES v. DAVIES*, [1892] 3 Ch. 63; 61 L. J. Ch. 595; 67 L. T. 548; 41 W. R. 13; 8 T. L. R. 673; 36 Sol. Jo. 627.

171. — & nomination invalid.]—Testatrix had been a member of an unregistered friendly society & had become insured under the rules for a benefit payable on her death to the person mentioned in a nomination form. She nominated her mother, & on her mother's death nominated her cousin on a form which was not attested. Testatrix paid all her contributions & on her death the trustees of the society decided that the cousin was the proper person to receive the benefit although the nomination of the cousin was not effective. In an action by the exor. of testatrix against the trustees for an order that the amount of the benefits should be paid to him:—*Held*: although the nomination of the cousin was not in accordance with the rules, & was therefore invalid, yet the money was not the property of testatrix, but could be disposed of by the governing body of the society in accordance with the rules, in the absence of the exercise by testatrix of her power of disposition over it, & therefore the action failed.—*HANNAY v. HORNER* (1916), 32 T. L. R. 240.

172. Disposition to stranger in blood — Prior claim of specified relatives.]—The Customs Annuity & Benevolent Fund was established for the benefit of the widows, children, or other relatives of officers of the Customs, by Act of Parliament, which gave power to frame rules for its

estate & effects whatsoever & wherever situate including moneys payable to my estate by virtue of any policies of insurance on my life upon trust after payment of my debts & funeral & testamentary expenses for my wife." Deceased was a member of a lodge registered under Friendly Societies Act, 1909, under the rules of which a sum of £20 was payable out of the funeral fund to the nominee or legal representative of the deceased, & a further sum of £100 was payable

out of the special fund to the nominee or next-of-kin of the deceased. The deceased had made no nomination:—*Held*: (1) as deceased had made no nomination the moneys passed under the bequest of all his personal property, & his wife was not entitled to them independently of the will; (2) the moneys were not available for the payment of testator's debts, for, although there was an express direction in the will within Friendly Societies Act, 1909, s. 99, there was no

specific direction within that section.—*Re JOHNSON'S WILL* (1912), 32 N. Z. L. R. 166.—N.Z.

*g. Payment to "legal heirs designated by will.]—*GRiffin v. HOWES (1903), 23 C. L. T. 169; 5 O. L. R. 439; 2 O. W. R. 293.—CAN.

PART XIII. SECT. 4, SUB-SECT. 3.—C.

*h. Money paid to specified relatives —Claim by executors.]—*BANE v.

management. By the rules it was provided that the fund should be raised by subscriptions on the principle of life insurance, & should form a fund for the benefit of widows, children, relatives, & nominees of the subscribers. It was provided that the admission of a nominee by the directors should take place during the life of the subscriber; that the capital money forthcoming at a subscriber's death under his insurance should, subject to the regulations thereafter contained, be appropriated according to the directions contained in his will or in any instrument deposited with the directors as therein mentioned; that the widow's share should not be less than one-third, or a life interest in two-thirds, & that the remainder should be applied according to the directions of the subscriber for the benefit of his widow, children, blood relations, or any of them, or his nominee or nominees who had been duly admitted by the directors; that if the widow was otherwise provided for as therein mentioned the whole money should be subject to the directions of the subscriber "in favour of his widow, children, blood relations, or nominees, or any of them, as aforesaid"; that if the widow received the income of two-thirds the capital of the two-thirds should be held, subject to the directions of the subscriber, to take effect at the death of the widow, & the remaining capital, subject to the directions of the subscriber, to take effect at his own death; that if the widow was provided for as thereinbefore mentioned, or if there was no widow, then the whole capital should be "subject to the directions of the subscriber as aforesaid"; that if a subscriber died leaving issue without having by will or such other instrument as aforesaid directed the application of the capital placed at his disposal, it should go to his children & the issue of deceased children as therein mentioned, & if none, to his next of kin. A subscriber died a widower, leaving children. No nominee had been accepted by the directors in his lifetime. By his will he bequeathed the fund coming from the insurance to a stranger in blood:—*Held*: the subscriber had no property in the fund, but only a limited power of appointment over it, & this power could only be exercised in favour of his widow, children, blood relations, & nominees admitted by the directors in his lifetime; he had therefore no power to bequeath the fund to a stranger in blood, who had not in his lifetime been accepted by the directors as a nominee, & the fund therefore belonged to the children.—*Re PHILLIPS' INSURANCE* (1883), 23 Ch. D. 235; 52 L. J. Ch. 441; 48 L. T. 81; 31 W. R. 511, C. A.

Annotations:—*Consd.* Urquhart v. Butterfield (1887), 36 W. R. 376. *Refd.* Caddick v. Highton (1899), 68 L. J. Q. B. 281.

173. Benefit payable to widow — Member party to instrument of dissolution.]—*FORTUNE v. ORR* (1894), Diprose & Gammon, 539.

174. — Policy effected in first wife's life—

Right of second wife.]—*Re ATKINSON, ATKINSON v. ATKINSON* (1895), 39 Sol. Jo. 655.

D. Persons domiciled in Channel Islands and Isle of Man.

See 1896 Act, s. 105.

SUB-SECT. 4.—PAYMENTS ON DEATH OF CHILDREN.

See 1896 Act, ss. 62–67, 84 (g).

175. "Child under ten years of age" — Payment without production of death certificate—*Society registered under Companies Acts—Not registered under Friendly Societies Acts.*—A society registered under Cos. Acts, but which had ceased to be registered under Friendly Societies Acts, received by means of collectors fortnightly contributions from its members, which were entered upon collecting cards. The society were liable to pay the money for the funeral expenses of members, but did not issue policies of assurance. The society having been convicted under Friendly Societies Act, 1875 (c. 60), s. 28 (2), of paying a sum of money on the death of a child under ten years of age without the production of a certificate of death:—*Held*: the words Life Assurance Cos. Act, 1870 (c. 61), s. 2, "who issue or are liable under policies of assurance," must be rejected altogether as being inconsistent with the context, & the society were therefore properly convicted.—*NEWBOLD FRIENDLY SOCIETY v. BARLOW*, [1893] 2 Q. B. 128; 62 L. J. M. C. 124; 68 L. T. 798; 57 J. P. 565; 41 W. R. 513; 9 T. L. R. 474; 37 Sol. Jo. 510; 5 R. 435, D. C.

SECT. 5.—LIABILITIES OF MEMBERS.

176. To repay money improperly paid to them.]—*JAMES v. BARRETT* (1882), Diprose & Gammon,

Legal proceedings against members.—Part XIX., Sect. 3, sub-sect. 2, B., *post*.

Offences.—See Part XIX., Sect. 1, *post*.

Whether liable to be sued for subscriptions.—See 1896 Act, ss. 31 (2), 23.

SECT. 6.—TERMINATION AND TRANSFER OF MEMBERSHIP.

SUB-SECT. 1.—WITHDRAWAL.

See 1896 Act, ss. 70, 71.

177. Sufficiency of notice — Parol notice to agent.]—By the rules of a mutual guarantee

OF TRADE OF TORONTO (1899), 30 O. R. 69.—CAN.

PART XIII. SECT. 5.

k. *For contributions.*—Pltf. in becoming a member of a friendly society, signed a declaration whereby he undertook to abide by all the rules of the society. The rules, though contemplating a member's contribution & a management fund contribution, did not fix the amount of such contributions. The amounts were fixed

by resolution before pltf. became a member of the society:—*Held*: pltf. was, in the circumstances, bound to pay both contributions.—*DUNNISON v. CALEDON BENEFIT SOCIETY* (1920), C. P. D. 391.—S. AF.

l. *On contracts made by trustees—& on judgments against trustees.*—The members of a friendly society registered under the Friendly Societies Act, 1862, which is established not for the purpose of trading or sharing profits, but only of dispensing to the

members in certain events the funds derived from their joint contributions, are not individually liable on contracts made by the trustees of the society, in the absence of express proof of agency; nor on judgments against the trustees of such society.—*BELL v. FITZGERALD* (1889), 11 N. Z. L. R. 372.—N.Z.

PART XIII. SECT. 6, SUB-SECT. 1.

m. *Enforced resignation—Whether affecting rights.*—Pltf., formerly Chief

Sect. 6.—Termination and transfer of membership:
Sub-sects. 1 & 2, A., B., C. & D.; sub-sect. 3.]

society notice of the withdrawal of any of the members was required to be given, but no particular form of notice was required nor was it stated to whom the notice should be given:—*Held*: parol notice of withdrawal given by a member to the agent through whom the original contract with the society was made was sufficient. — *Re SOLVENCY MUTUAL GUARANTEE SOCIETY, HAWTHORNE'S CASE* (1862), 31 L. J. Ch. 625; 6 L. T. 574; 8 Jur. N. S. 934; 10 W. R. 572.

SUB-SECT. 2.—EXPULSION.

A. In General.

See 1896 Act, s. 43.

Expulsion & suspension of societies, *see* Part XX., Sect. 4, *post*.

178. Must be in accordance with rules—Joining other society—Abortive attempt.]—By a rule of the S. Benefit Society, should any member enter any other benefit society, he should immediately be expelled the S. Society & forfeit all claims. J., a member, tried with other members of the society to amalgamate with another society, but had not paid any subscription, & the whole attempt proved abortive:—*Held*: the officers of the S. Society had no power under the above rule to expel J., & he had a remedy before justices for sums due according to the rules.—*PEARCE v. JONES* (1867), 31 J. P. 583.

179. Member ceasing to be qualified—Condition that members should belong to another institution.]—The rules of a friendly society provided that the society should be called the Cranmer Loyal Orange Lodge Friendly Society, & that "it shall be exclusively composed of members of the Loyal Orange Institution of England." The rules provided for the expulsion of a member on conviction for felony, & that if a member entered the army or navy he should cease to be a member, but there was no rule empowering the expulsion of a member upon his ceasing to be a member of the Loyal Orange Institution of England. Pltf., who was a member of the society, was expelled from the

of Police of Ottawa, sued to recover retiring allowance under bye-laws governing their pension fund. The Board had forced pltf. to resign. One of the draft bye-laws of the assocn. provided that no member should be entitled to retire who was in good health & capable of performing his duties:—*Held*: the bye-law had no appln. to a case of involuntary resignation.—*DE LA RONDE v. OTTAWA POLICE BENEFIT FUND ASSOCN.* (1912), 22 O. W. R. 123; 3 O. W. N. 6 D. L. R. 850.—CAN.

PART XIII. SECT. 6, SUB-SECT. 2. B.

181. Where opportunity not to member to be heard.]—Pltf. expelled by the committee from the deft. club upon the ground that he was a bookmaker. No opportunity was given him of showing cause against the expulsion, & no charge of any kind was formulated against him:—*Held*: in expelling pltf. without any previous hearing the committee had violated the principles of natural justice, & had departed from the procedure which the

rules intended should be followed in of expulsion, & that the expulsion inoperative on this ground.—*LAW v. WELLINGTON WORKING-MEN'S CLUB & LITERARY INSTITUTE* (1911), 30 N. Z. L. R. 1198.—N.Z.

181 H. —.]—(GRAVEL *v.* L'UNION ST. THOMAS (1893), 24 O. R. 1.—CAN.

b. — No notice of intention to move for expulsion.]—RELAND *v.* L'UNION ST. THOMAS (1890), 19 O. R. 747.—CAN.

c. Where tribunal improperly constituted.]—DICKSON *v.* EDWARDS (1910), 10 C. L. R. 243.—AUS.

p. Failure to observe amended & illegal bye-law.]—Pltf. a musician & a member of the Active Militia of Canada & of the band of a militia regiment, became a member of deft. assocn., a incorporated under Friendly & Insurance Corporations Act, whose object was "to unite the instrumental portion of the musical profession for the better protection of its interests in general & the establishment of a minimum rate of prices to

Loyal Orange Institution of England for having voted at a Parliamentary election for a certain candidate. The friendly society thereupon passed a resolution expelling him from the society. In an action by pltf. claiming to be reinstated a member of the society:—*Held*: under the rules of the friendly society it was a condition that a member should be & continue to be a member of the Loyal Orange Institution of England, & when he ceased to be a member of that institution he also ceased to be a member of the society, & therefore pltf. was not entitled to succeed.—*SERGEANT v. BUTTERWORTH* (1907), 23 T. L. R. 450; 51 Sol. Jo. 429, D. C.

180. Effect of expulsion—Member not entitled to benefits.]—TINSLEY *v.* FARMERS' GLORY LODGE OF ODDFELLOWS (1884), Diprose & Gammon, 252.

B. Validity of Expulsion.

181. Where opportunity not given to member to be heard.]—(1) Rule 16 of a friendly society provided that a dispute of any kind whatsoever arising under the rules should be referred to a committee. By rule 22, any member in the receipt of the gifts of the society being found imposing on the society was to be expelled. A member of the society in the receipt of pay was charged with receiving full pay when he was only entitled to half pay, & the matter being referred to a committee under rule 16, he was expelled, but without being heard before the committee. Upon application for a *mandamus* to reinstate him as a member of the society:—*Held*: the county ct. had jurisdiction, under 18 & 19 Vict. c. 63, ss. 41, 42, to order him to be reinstated, if he had been improperly expelled.

(2) *Qu.*: whether this was a dispute within rule 16; but, if it was, the county ct. might order the society to hear appct.—*Ex p.* WOOLDRIDGE (1862), 1 B. & S. 814; 31 L. J. Q. B. 122; 5 L. T. 609; 26 J. P. 469; 8 Jur. N. S. 696; 10 W. R. 250; 121 E. R. 927.

182. —.]—TILLOTSON *v.* LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY (1907), 124 L. T. Jo. 241.

183. Where no charge preferred against member.]—WHITE *v.* HUSSEY (1885), Diprose & Gammon, 415.

be charged by members of the said association for their professional services, & the enforcement of good faith & fair dealing between its members, & to assist members in sickness & death." After pltf. had become a member, defts. adopted & added as part of one of their articles of association the following: "No member of this association shall play on any engagement with any person who is playing an instrument, unless such person can show the card of this association in good standing. This bye-law shall not apply to oratorio or symphony concerts, bands doing military duty, or amateurs." After the passing of this bye-law, pltf. & the other members of the regimental band to which he belonged played at a concert in uniform, under the direction of the bandmaster, & with the permission of the commandant & officers of the regiment. For so playing, some of the band not being members of the association, a fine was imposed on pltf. by the executive committee of defts., & in consequence of its not being paid within the time prescribed, he was

184. —.]—ANDREWS v. MITCHELL, No. 266, *post*.

185. —.]—WAYMAN v. PERSEVERANCE LODGE OF CAMBRIDGESHIRE ORDER OF UNITED BRETHREN FRIENDLY SOCIETY, No. 294, *post*.

C. Expulsion of Branch.

See, generally, Part XX., Sect. 4, post.

186. Members of branch excluded.]—SMITH v. BRAILSFORD (1895), 40 Sol. Jo. 13, D. C.; *sub nom.* FISHER v. BRAILSFORD, Diprose & Gammon, 256.

D. Reinstatement.

187. Jurisdiction of court to order—Member improperly expelled.]—*Ex p.* WOOLDRIDGE, No. 181, *ante*.

188. Where reinstatement ordered by court—Personal liability of officers to obey—Though ceasing to hold office.]—(1) A friendly society whose rules had been allowed by the magistrates, & registered in London, afterwards held their meetings in Middlesex:—*Held*: the justices of Middlesex had jurisdiction to decide upon complaints made by members of the society.

(2) Upon a complaint made by an excluded member, A. & B., the then stewards, were duly summoned, & an order was made by two justices that such stewards & other members of the society should forthwith reinstate complainant. The order was served upon A. & B. after they had ceased to be stewards:—*Held*: it was still obligatory upon them, as members of the society

to attempt to reinstate complainant, & their having ceased to be stewards was no justification of entire neglect on their part.—*R. v. GASH* (1810), 1 Stark. 441.

189. —.]—Though power vested in committee.]—Indictment lies against the president & stewards of a friendly society for disobeying an order of justices addressed to them to readmit a member, though it be sworn that the power of doing so is not in the president & stewards, but in a committee.—*R. v. WADE* (1831), 1 B. & Ad. 861; 9 L. J. O. S. M. C. 113; 109 E. R. 1006.

Annotations:—*Mentd.* Garlick v. Sangster (1832), 9 Blug. 46; *R. v. Bidwell* (1847), 2 Car. & Kir. 564.

190. Power of society to reinstate—Whether member must show.]—*Semble*: upon an indictment for not obeying an order of the justices, under 33 Geo. III. c. 54, s. 15, commanding defts., as stewards & principal officers of a friendly society to restore B. as a member, it must be shown, that, by the constitution of the society, defts. have the power to restore him.—*R. v. INGE* (1804), 2 Smith, K. B. 56.

Annotation:—*Refd.* *R. v. Wade* (1831), 1 B. & Ad. 861.

191. Offence condoned by society—False declaration as to health—Subscriptions received after discovery.]—PAGE v. THOMAS (1892), Diprose & Gammon, 215.

SUB-SECT. 3.—TRANSFER.

Collecting societies.]—*See Part IV., ante*.

expelled from membership:—*Held*: at the time pltf. joined the assocn., it was a legal society, its objects being of a friendly & provident nature; but the amendment was unreasonable & in restraint of trade, & for that reason, & also because contrary to the Queen's Regulations & the Militia Act of Canada, was illegal, & pltf.'s expulsion was invalid.—PARKER v. TORONTO MUSICAL PROTECTIVE ASSOCN. (1900), 32 O. R. 305.—CAN.

PART XIII. SECT. 6, SUB-SECT. 2.—D.

q. Offence condoned by society.]—If by the bye-laws of a benevolent society a member neglecting to pay the calls in due time is excluded therefrom, the acceptance of subsequent payments by him, without any reserve or

protest on the part of the assocn. is a tacit re-admission of such person as a member, & reintegrates the latter in all the rights deriving from active membership in such assocn.—MOISAN v. LA SOCIÉTÉ BIENVEILLANTE ST. ROCH (1897), Q. R. 12 N. C. 189.—CAN.

r. Failure to comply with rules respecting reinstatement.]—W., who was a member of a subordinate ct. of the deft. society, died. He had not paid his monthly assessment due previously, & by his failure to pay had become at once suspended by virtue of one of the bye-laws of the society, & his name appeared upon the list of suspended members in the minutes of a

Shortly before his death a sum

to pay his assessments due was paid on his behalf to the financial secretary of the subordinate ct. The conditions to be performed by a suspended member desirous of being reinstated after a suspension has been in force for thirty days were according to the bye-laws payment of arrears, passing medical examination, & being approved of by two-thirds vote of the subordinate ct. It was not possible for W. to have complied with the second condition, & he did not attempt to do so:—*Held*: the bye-laws were binding upon W. & he not having been reinstated in accordance therewith, was not a member in good standing at the time of his death.—WELLS v. INDEPENDENT ORDER OF FORESTERS (1889), 17 O. R. CAN.

Part XIV.—Special Resolutions and Meetings.

See 1896 Act, ss. 69–75 & s. 106, sched. 1 (3); 1908 Act, s. 7; Collecting Societies & Industrial Assurance Cos. Act, 1896 (c. 26), s. 5.

192. Validity of special resolution—Where rules not complied with—As to notice.]—*BAWDEN v. TEPPER* (1843), 1 L. T. O. S. 407.

193. ———.]—*ROBERTS v. PRICE*, No. 106, *ante*.

194. Duty of officers to call meeting—When served with requisition duly signed by members.]—The secretary or other officer of a friendly society, being served with a requisition duly signed, under stat. 10 Geo. 4, c. 56, s. 9, to call a meeting for the purpose of altering or rescinding the rules, cannot, in the exercise of his discretion, refuse, but is bound to convene such meeting.—*R. v. BANNATYNE* (1851), 17 Q. B. 524; 18 L. T. O. S. 74; 117 E. R. 1382; *sub nom.* *R. v. ALDIAM & UNITED PARISHES INSURANCE SOCIETY*, 21 L. J. Q. B. 1; 16 J. P. 149; 15 Jur. 1035; *previous proceedings, sub nom.* *R. v. BANNATYNE*, 2 L. M. & P. 213.

195. ———.]—A *mandamus* to the officer to sign the notice for convening a meeting under 10 Geo. 4, c. 56, s. 9, will not be granted unless it appears that the requisition provided for by the sect. has been made within a year.—*R. v. ALDIAM & UNITED PARISHES INSURANCE SOCIETY* (1854), 2 W. R. 456; *sub nom. Re ALDIAM & UNITED PARISHES INSURANCE SOCIETY*, 18 J. P. Jo. 311.

196. Place of meeting—Whether society restricted to place where business carried on.]—Notwithstanding that 9 & 10 Vict. c. 27, s. 12, substitutes the registrar of friendly societies for the clerk of the peace of the county in respect of the custody & enrolment of the rules, the proviso to 10 Geo. 4, c. 56, s. 10, whereby the power of any such society to alter its place of meeting is restricted to the selection of some place within the county in which the rules of the society are enrolled is not altered, & the registrar is not bound to register an alteration of the place of meeting to a place in a county, other than that in which for the purpose of its business the society was established.—*R. v. FRIENDLY SOCIETIES' REGISTRAR* (1852), 19 L. T. O. S. 182; 16 J. P. 613.

197. Unauthorised change in by officers—

PART XIV.

192 i. Validity of special resolution—Where rules not complied with—As to notice.]—*Pitt*, sued the trustees of a friendly society lodge on an agreement appointing him sole medical attendant for five years. The agreement was made by the trustees in purported pursuance of a resolution passed at a summoned meeting of the lodge, directing them to sign an agreement for five years, but without the word "sole." The notice concerning the summoned meeting had not mentioned the appointment of a medical officer as one of the matters of business to be dealt with, though it specified certain matters, " & any other business properly brought forward." The rules

of the society provided as follows:—"As to meetings other than financial meetings no business shall be transacted unless mentioned in the circular convening the same"—*Held*: the notice did not sufficiently notify the business of appointing a medical officer.—*HELWIG v. JONAS*, [1922] V. L. R. 261.—*AUS.*

192 ii. ———.]—A majority of members of a society, which was established in connection with, & had received its charter from the Grand Lodge of Free Gardeners in Scotland, resolved to return the charter & apply for a fresh charter from the Grand Lodge in England:—*Held*: applicants, who had received a certificate of membership in connection with the Grand Lodge of Scotland, & also had

Validity of new rules agreed to at changed place.]—

A friendly society was established in 1832 under the Acts then in force relating to friendly societies. In 1858 its rules were amended, & were certified by the registrar under 18 & 19 Vict. c. 63. Rule 1 mentioned its name & place of business at No. 106, Duke St., Liverpool. By rule 93, in case of any alteration in the place of meeting, written notice was to be sent to the Registrar of Friendly Societies, etc. In 1865 the annual general meeting of the Society was held in Manchester & on the same day & at the same place a special general meeting was held for the purpose of rescinding the existing rules & making new ones. These meetings were convened by the president & secretary. Resolutions were passed at the special general meeting rescinding the existing rules & making new rules, by one of which the committee were empowered to change the principal office of the society, either occasionally or permanently, should the interest of the society, seem to require it. Upon application for a rule for a *mandamus* to the Registrar of Friendly Societies to certify the new rules, he stated that he refused because he was of opinion that, until the place of meeting of the society was by a resolution of the society at a proper meeting called for that purpose changed from Liverpool, no meeting of the society elsewhere than in Liverpool could conformably to law make new or alter the existing rules of the society, & that in the notice convening the meeting & the rules passed there divers matters seemed to him in point of law objectionable, & he referred to them:—*Held*: an alteration in the place of meeting could only be made at a meeting of the society legally convened, & therefore the rules made at the meeting summoned by the president & secretary at Manchester were void.—*R. v. TIDD PRATT (OR PRATT)* (1865), 6 B. & S. 672; 29 J. P. Jo. 388; 122 E. R. 1343.

For validity of resolutions & meetings, *see*, further, Part XVIII., *post*.

198. Meeting of branch—Whether assent of central body necessary.]—*Re SHEFFIELD ORDER OF SOCIETY*, No. 394, *post*.

199. Meeting on licensed premises—Power of constable to enter.]—By Licensing Act, 1874 (c. 49), s. 16, "Any constable may, for the purpose of preventing or detecting the violation of any of the provisions of the principal Act, or this Act which it is his duty to enforce, at all times

voted in the minority, were entitled to an order declaring the resolution null & void.—*COATES & COTTRELL v. ST. JOHN'S BENEFIT SOCIETY* (1906), 23 S. C. 38.—*S. AF.*

192 iii. ———.]—The rules of a society provided for the method of electing officers. Officers having been duly elected at a general meeting, a further general meeting resolved that the election remain in abeyance:—*Held*: in the absence of a rule of the society authorising such procedure, the resolution was invalid & the duly elected officers were entitled to an interdict restraining interference with them in the performance of their functions.—*ACKERMAN & OULANG v. HENRY & WILLIAMS* (1919), W. L. D. 23.—*S. AF.*

enter on any licensed premises":—*Held*: a constable cannot under the above sect. demand admission to the licensed premises unless he has reasonable ground for suspecting that some violation of the said Acts is taking place or is about to take place thereon.—*DUNCAN v. DOWDING*, [1897] 1 Q. B. 575; 66 L. J. Q. B. 362; 76 L. T. 294; 61 J. P. 280; 45 W. R. 383; 13

T. L. R. 290; 41 Sol. Jo. 352; 18 Cox, C. C. 527, D. C.

Notice of adjournment of meeting—Of collecting society.]—See Part IV., ante.

Resolutions for amalgamation, conversion or secession.]—See Part XX., post.

Resolutions to dissolve.]—See Part XXII., post.

Part XV.—Property and Funds.

SECT. 1.—IN GENERAL.

200. Jurisdiction of court—To order transfer of funds—After dissolution.]—*Re ECLIPSE MUTUAL BENEFIT ASSOCN.*, No. 425, *post*.

Dissolution of societies, *see* Part XXII.

201. — To grant injunction & appoint receiver—Funds in danger.]—Where the funds of a benefit society are in danger, the ct. will grant a motion for injunction & receiver, against the parties having the possession of, or control over its funds, notwithstanding the bill as framed is bad for multifariousness & for want of parties.—*EVANS v. COVENTRY* (1854), 5 De G. M. & G. 911; 3 Eq. Rep. 545; 24 L. T. O. S. 186; 19 J. P. 37; 3 W. R. 149; 5 W. R. 187; 43 E. R. 1125, L. J.J.; *subsequent proceedings* (1857), 8 De G. M. & G. 835, L. J.J.

Annotations:—*Reid*. *Kearns v. Leaf*, *Aldebert v. Kearns* (1864), 1 Hem. & M. 681. *Montd*. *Re English & Irish Church & University Assoc. Soc.* (1862), 1 Hem. & M. 79; *Re State Fire Insce.* (1863), 1 De G. J. & Sm. 634; *Re Mercantile Trading Co., Stringer's Case* (1869), 20 L. T. 553; *Re Albert Life Assoc.*, *Bell's Case*, *Kerr's & Stubbs' Cases*, *Bleackley's Case*, *Craig's Exors.' Case*, *Wilson's Case* (1870), L. R. 9 Eq. 706.

— **To restrain dealings with funds—Where rules improvident.]—See No. 56, ante.**

SECT. 2.—BORROWING AND LENDING.

See 1896 Act, ss. 45, 46, 47 (1).

202. Borrowing—Formalities of rules not complied with—Validity of debt.]—(1) Moneys were borrowed for a friendly society & applied for its benefit:—*Held*: a valid debt was constituted as against the society, although the formalities required by its rules had not been followed.

(2) A simple contract debt of a friendly society contracted in 1840:—*Held*: not barred by Stat. Limitations in 1860, a trust of the property having, on its dissolution, been declared for the benefit of its creditors.

(3) A society based upon irrational principles, & seeking to realise a visionary & unattainable

object under Mr. Owen's system:—*Held*: the rules, as certified by the barrister, must be treated as conclusive as to the character of the society.

(4) In consequence of the failure & insolvency of a benefit society, there was no officer or board in existence who could be made parties to a suit by a creditor to obtain payment out of the co.'s property. Pltf. having made the trustees & one of each class of members parties:—*Held*: the suit was properly constituted.—*PARE v. CLEGG* (1861), 29 Beav. 589; 30 L. J. Ch. 742; 4 L. T. 669; 26 J. P. 53; 7 Jur. N. S. 1136; 9 W. R. 795; 54 E. R. 756.

Annotation:—*As to* (3) *Reid*. *Bowman v. Secular Soc.*, [1917] A. C. 406.

203. Lending—Validity of bond to society—Rules not duly registered.]—*JONES v. WOOLLAM*, No. 18, *ante*.

204. — To person other than member—On personal security.]—The trustees of a friendly society lent out of the surplus funds of the society a sum of £300 to A. on the security of a joint & several promissory note made by A., & by B. & C. as his sureties. None of the makers was a member of the society. C. having died, the trustees claimed to prove against his estate on the note:—*Held*: (1) that as it was not alleged that the money was borrowed for an illegal purpose, the contract was not illegal, but merely unauthorised; (2) it was not competent to the makers of the note to allege by way of defence that the payee had no authority to lend the money, & the proof, therefore, must be admitted.—*Re COLTMAN*, *COLTMAN v. COLTMAN* (1881), 10 Ch. D. 64; 51 L. J. Ch. 3; 45 L. T. 392, 30 W. R. 342, C. A.

Annotations:—*As to* (1) *Reid*. *Lougher v. Molynoux*, [1916] 1 K. B. 718. *As to* (2) *Reid*. *Brougham v. Dwyer* (1913), 108 L. T. 504.

205. — To members—Whether conditions usurious.]—The members of a benefit society raised a joint stock fund, portions of which were from time to time advanced to members of the society, by way of loan, at 5 per cent. interest: the sums so advanced were put up to competition among the members, & the member who bid

PART XV. SECT. 1.

a. Transfer of fund for different purpose than provided for in rules.]—The rules of a court of the Ancient Order of Foresters provided for a Court Silk & Funeral Fund. By an amendment of the rules the district to transfer the court's fund

to a new District Silk & Funeral Fund, where the moneys would be applied to different purposes though they would bear the same name:—*Held*: the Court Fund was a particular fund within Friendly Societies Act, 1909, s. 40, & the transfer was invalid.—*COOK v. DONALDSON* (1915), 34 N. Z. L. R. 833. —N.Z.

PART XV. SECT. 2.

a. Borrowing—Liability of—*COLONIAL BANK OF AUSTRALASIA v. CURTAIN* (1878), 4 V. L. R. 38.—AUS.

b. — — — — —.]—A building society, registered under the Act No. 254, power to borrow, under rules

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highest obtained the loan. Deft., a member of the society, having bid £15 17s. 6d. for a loan of £80, the £15 17s. 6d. to be paid in addition to 5 per cent. interest on the £80:—*Held*: the transaction was not usurious.—*SILVER v. BARNES* (1839), 6 Bing. N. C. 180; 8 Scott, 300; 9 L. J. C. P. 118; 133 E. R. 71; *previous proceedings*, 3 J. P. 534.

Annotations:—*Folld. Burbridge v. Cotton* (1851), 5 De G. & Sm. 17. *Reid. Cutbill v. Kingdom* (1847), 1 Exch. 494; *Bear v. Bromley* (1852), 18 Q. B. 271. *Mentd. Hope v. Meek* (1855), 10 Exch. 829; *Re Lead Co.'s Workmen's Fund Soc.*, *Lowes v. Smelting down Lead with Pit & Sea Coal*, [1904] 2 Ch. 196.

206. ———— .]—The Frugal Investment Assocn. was formed in 1845, & was certified under 4 & 5 Will. 4, c. 40. Its objects were to advance the Society's funds to its members, & to accumulate them, & to divide the profits periodically. The advances were made by putting up a share at one of the meetings for competition among the members, & the member offering the highest premium for it was entitled to that share, & as many more, to the number of twenty, as he chose to take at the same premium. For each share so taken he was to pay the premium agreed upon, & also 8s. a month for 100 months, during which time only the society was to exist, as redemption money; & on these conditions he might have an immediate advance of £100, the full value of his share, on giving security for the repayment of it, together with such premium & redemption money. He was also entitled to participate in the general profits of the society. B. became a member, & obtained an advancement of five shares at premiums of £71 for three, & £73 for the other two; & he gave security as required, & received an advance of £500. B. died, & on the society pressing for payment of the moneys so secured to them, B.'s ex'rix. filed a bill against them, alleging that the transaction was usurious, & the society illegal, & claiming to redeem the security on repayment of the £500, with legal interest only:—*Held*: on the authority of *Silver v. Barnes*, No. 205, *ante*, that the transaction, being between partners, was not usurious.—*BURBRIDGE v. COTTON* (1851), 5 De G. & Sm. 17; 21 L. J. Ch. 201; 18 L. T. O. S. 88; 15 Jur. 1070; 64 E. R. 998.

207. ———— .]—**Liability of sureties.**—By the rules of a money club, members were to pay a weekly subscription, & when the aggregate amount of subscriptions & fines attained a specified sum, it was to be put up to competition amongst the members, & sold to the highest bidder. A member purchased a share or loan of £40, & gave a promissory note for that amount, made by himself & two others as his sureties, as a security:—*Held*: weekly subscriptions paid after the purchase of the share, did not constitute part payment of the promissory note so given, & the sureties were notwithstanding liable for the whole amount of the note.—*JONES v. GRETTON* (1853), 8 Exch. 773; 1 C. L. R. 666; 22 L. J. Ex. 247; 21 L. T. O. S. 167; 17 J. P. 473; 155 E. R. 1565.

— *Reid. Hope v. Meek* (1855), 10 Exch. 829.

giving such power with a reasonable limitation; & an individual member of a society, registered under Friendly Societies Act, 1865, s. 4, is liable to an action to recover repayment of a loan to the society, notwithstanding s. 16, allowing the trustee to sue & be sued in respect of the

property of the society, & notwithstanding the subsequent incorporation of the society.

If a member so sued would rely on the absence of a reasonable limitation of the borrowing power in the rules giving power to borrow, he must distinctly plead such omission.—

208. ———— .]—**Loan of over fifty pounds—Effect of illegality.**—1896 Act, s. 46 (c), provides that a registered society "shall not make any loan" to a member exceeding £50, & sect. 84 makes it an offence to do "anything forbidden by this Act" subject to a penalty of £5 (sect. 89). Therefore a loan exceeding £50 by a registered society to a member is an illegal & void transaction & the money cannot be recovered.—*LOUGHER v. MOLYNEUX*, [1916] 1 K. B. 718; 85 L. J. K. B. 911; 114 L. T. 696; 60 Sol. Jo. 605.

209. Realisation of mortgage securities—Validity of sale.—When purchased by member of committee.]—In 1899 pltf. mortgaged certain property to the trustees of a friendly society to secure an advance. In 1902 they, in exercise of their power of sale, which had arisen, put up the property for sale by auction, such sale being directed & entirely managed by a committee of the society, whose duty it was to realise mtge. securities. Previous to the sale D., a member of the committee, had on his own account inspected the property. He knew the reserve, if he had not himself fixed it, & he took part in instructing the auctioneer, who was nominated by him. He attended the auction, & bought the property for himself, pltf., who had only accidentally heard of the sale three days before it took place, being present & bidding against him. The sale was at a small undervalue. In an action against the trustees of the society & D.:—*Held*: the sale was invalid, & pltf. was still entitled to redeem the mtge.—*HODSON v. DEANS*, [1903] 2 Ch. 647; 72 L. J. Ch. 751; 89 L. T. 92; 52 W. R. 122; 19 T. L. R. 596; 47 Sol. Jo. 750.

Annotation:—*Expld. Bath v. Standard Land Co.*, [1911] 1 Ch. 618.

210. Discharge of mortgage—Effect of reconveyance—Vesting of legal estate in person redeeming without notice—Priority over subsequent mortgagees.—A piece of land was mortgaged to a friendly society, & by way of second mtge. to a banking co. A building society agreed to pay off the first mtge. & to make a further advance, having no notice of the second mtge. Accordingly by a deed indorsed on the first mtge. deed, the first mtgees. reconveyed to the mtgor.; & by another deed he conveyed the land to the building society to secure the repayment of the sum paid to the first mtgees. & the further advance:—*Held*: as the legal estate had passed by a reconveyance & not by a receipt under 38 & 39 Vict. c. 60, s. 16 (7), it was vested in the building society, & gave them priority over the second mtgees.—*CARLISLE BANKING CO. v. THOMPSON* (1884), 28 Ch. D. 398; 53 L. T. 115; 33 W. R. 119.

See, generally, MORTGAGE.

SECT. 3.—INVESTMENTS.

See 1896 Act, s. 41, & 52, Sched. 1 (5); 1908 Act, s. 4.

211. Investment not in accordance with statute

COLONIAL BANK OF AUSTRALASIA v. DRAPER, COLONIAL BANK OF AUSTRALASIA v. FIE (1878), 4 V. L. R. 527.—

PART XV. SECT. 3.

a. Investment not in accordance .]—The trustees of a friendly

—**Liability of trustees for.**—**LUDLOW v. RYLAND** (1881), *Diprose & Gammon*, 123.

—**Loan to non-member on personal security.**—*See* No. 204, *ante*.

Transfer of investments—To new trustees.—*See* Part XV., sect. 4, *post*.

SECT. 4.—VESTING AND DEVOLUTION.

See 1896 Act, ss. 49, 50, 51.

212. In whom vested — Trustees of society for time being.—Where it was ordered by one of the original rules of a friendly society, established under the 33 Geo. 3, c. 54, that the meetings should be held at a certain public house, which after some years was altered by expunging the name of the house without inserting any other; but the meeting at which the alteration was resolved upon, did not appear to have been attended with all the previous formalities required by sect. 3 of the Act, although the substituted rule was confirmed by the justices at sessions, & inrolled; & the club box, containing the society's money, securities, etc., was deposited in the hands of the master of the house, who had previously entered into a bond to the clerk of the peace, with condition among others that he, his heirs, etc., would at any time thereafter, when required to do so by a majority of the society at one of their annual, or quarterly meetings, or by their committee for the time being well & truly return & deliver unto the committee for the time being of the society, for the use of the same society, the society's box, & all their securities, etc., which should have been deposited therein, or otherwise delivered to debt. for the use of the society, uninjured, & in the same manner, plight, & condition that the same were, or should be in, when so delivered to him, etc.; & likewise would render a just & true account according to the rules, orders, & regulations of the society, & of the Act of Parliament, & those presents; & all the members of the society, except twenty-seven or twenty-eight, who continued to assemble at the old house, & appointed a second committee out of their number, removed their meetings to another inn, in pursuance of a resolution carried by them at an extraordinary general meeting, convened at the first house by the legally appointed committee for the time being, & of which six days' public notice had been given; but the master of the house refused to deliver up the box to the committee, who had made a formal requisition of it, broke it open, & took out the contents. In an action against him on the bond for the non-delivery:—*Held*: he had committed a breach in refusing to deliver up the box, etc., to the committee, for the time being, who were, under the circumstances, authorised in demanding it; & the last words of the condition were not to be connected with their demand.—**WYBERGH v. AINLEY** (1824), *M'Cle.* 669; 148 E. R. 280.

213. ——— Expulsion of lodge.—A District Oddfellows Society, after expelling a lodge

of the society for non-payment of subscriptions & fines, was registered as a friendly society pursuant to 13 & 14 Vict. c. 115, under a name which, upon an objection of the certifying barrister, was altered from the original name. Some deposit-notes of a banker's, with whom a portion of the subscriptions were deposited, remained in the hands of the Grand Master of the expelled lodge, & were demanded from him by the trustees of the registered society:—*Held*: whether the expulsion of the lodge had been proper or not, he was bound to deliver up the notes to the trustees, & he was ordered to pay the costs of a suit instituted by the trustees against him for their recovery.—**YEATES v. ROBERTS** (1855), 7 De G. M. & G. 227; 3 Eq. Rep. 830; 3 W. R. 461; 44 E. R. 80, L. JJ. *Annotation*:—*Reid. Re Smith v. Pryse* (1857), 28 L. T. O. S.

214. ———.—*R. v. LOOSE*, No. 348, 1
—**Collecting society.**—*See* Part IV., *ante*.

215. Transfer to new trustees — Where old trustee absconded.—A sum of money in the funds, standing in the name of two trustees of a friendly society, one of whom had absconded, ordered to be transferred by the other trustee into his own name, jointly with that of another trustee, elected in the room of him who had absconded.—*Re FRIENDLY SOCIETY* (1822), 1 Sim. & St. 82; 57 E. R. 33.

216. ——— Where old trustee expelled.—A society, not then requiring registration as a friendly society, was formed; but, the members having disagreed, some of them registered it under Friendly Societies Act, 1850 (c. 115). The object of the society was the relief of widows & orphans of its members. One of the trustees of the old assocn. had funds in his hands, which he refused to transfer to new trustees, who had been appointed after the registration; & they filed a bill against such old trustee, to compel a transfer to them. The old trustee, & several members of the old assocn. had been expelled from the registered society:—*Held*: (1) the certificate of the barrister acting under above Act, was sufficient evidence to show that the society was not illegal under Unlawful Societies Act, 1799 (c. 79), & was evidence that the same came within Friendly Societies Act, 1850 (c. 115); (2) the old assocn. & new society were identical; (3) the power to appoint new trustees included the power of removal under the latter statute; (4) the remedies pointed out by the same statutes were inadequate to the purpose of compelling a transfer of stock, & did not oust the jurisdiction of the Ct. of Ch.; (5) the fund must be transferred to the new trustees, & the old trustee must pay the costs.—**HODGES v. WALK** (1853), 22 L. T. O. S. 144; 2 W. R. 65.

Annotation:—*As to* (2) *Reid. Yeates v. Roberts* (1855), 3 Eq. Rep. 830.

217. ——— Under new rules.—**DEWHURST v. CLARKSON**, No. 87, *ante*.

218. ——— On registration of society.—**OLDHAM OUR LADY'S SICK & BURIAL SOCIETY v. TAYLOR**, No. 13, *ante*.

society registered under Friendly Societies Act, 1873, invested the funds of the society in shares of a registered Building Co.:—*Held*: the investment by the trustees was *ultra vires* the Friendly Society.—**GILBERT v. NEWCASTLE PERMANENT INVESTMENT &**

BUILDING SOCIETY (1896), 17 N. S. W. Eq. 72.—**AUS.**

PART XV. SECT. 4.

d. In whom vested—Trustees & successors—Bond—Charge by successors

—Where a tion in security had been granted in favour of the trustees nomination of a friendly society & their successors:—*Held*: Friendly Societies Act, 1896, s. 50, did not entitle the successors of the trustees named in the bond to

Sect. 4.—Vesting and devolution. Parts XVI., XVII. & XVIII. Sect. 1: Sub-sects. 1 & 2.]

219. ———.] — *M'KENNY v. BARNSLEY CORPN.* (1894), 10 T. L. R. 533, C. A.

Annotation:—Reid. Blake v. Smither (1906), 22 T. L. R. 698.

220. ——— *Of equitable mortgage — Necessity for legal transfer.*]—The committee of a benefit club, which was not registered, advanced some of the club money on the security of a deposit of a lease.

Afterwards the surviving members of the club formed a new society, under a different name, which succeeded to the funds of the old club. The new society was duly registered under the 10 Geo. 4, c. 56:—*Held*: the equitable mtge. would not vest in the public officer of the new society without a legal transfer.—*DAVIES v. GRIFFITHS* (1853), 1 W. R. 402.

For distribution of funds on dissolution, *see* Part XXI., Sect. 5, *post*.

Part XVI.—Quinquennial Valuation.

See 1896 Act, s. 28; 1916 Act, s. 1.

221. *Failure to make — Liability of officers & members.*]—*FRIENDLY SOCIETIES' REGISTRAR v. NODEN* (1881), *Diprose & Gammon*, 430.

Power of Chief Registrar to defer valuations — On application of society.]—*See* 1916 Act, s. 1.

Part XVII.—Accounts and Inspection of Affairs.

See 1896 Act, ss. 26–30, 55, 76, sched. 1 (10); 1908 Act, s. 7.

Annual return of receipts & expenditure—Liability for failure to make.]—*See* Part XIX., Sect. 1, s. 1.

222. *Audited accounts — Whether conclusive — Right of members to impeach for fraud.*]—Under an order directing an account, & not referring to settled accounts, the accounting party may set up settled accounts, though the order does not direct that settled accounts shall not be disturbed & the opposite party may impeach them, though the order does not expressly give him liberty to do so. By the rules of a benefit society it was provided that the accounts should be audited, & that, after they had been audited & signed by the auditors, the secretary & treasurer should not be answerable for any mistakes, omissions, or errors that might afterwards be proved in them. By 10 Geo. 4, c. 56, s. 33, it was directed that the accounts of a society of this description should be audited by two or more members of the society. In Dec. 1883, an order was made for an account of all moneys received by S., the late secretary.

S. carried in audited accounts down to Oct. 1880. & claimed to have them treated as conclusive, while plffs. claimed to have them disregarded. On examination of the audited accounts, it appeared that they had throughout been audited & signed by one person only, who was not a member of the society. *BACON, V.-C.*, made an order expressing his opinion that the accounts had been audited in accordance with the rules, & directing the account under the order of Dec. 1883, to commence from Oct. 1880, the date of the last audit:—*Held*: on appeal, that the accounts had not been duly audited in accordance with 10 Geo. 4, c. 56, s. 33, & the rules, & the order of the Vice-Chancellor must be discharged, but without prejudice to the right of deft. to show that the accounts in question were to be treated as settled accounts on any other ground than that they were audited in accordance with 10 Geo. 4, c. 56, s. 33, & the rules.—*HOLGATE v. SHUTT* (1884), 28 Ch. D. 111; 54 L. J. Ch. 436; 51 L. T. 673; 49 J. P. 228, C. A.

223. *Right of member to inspect books.*]—*MOFFATT v. TAUNTON* (1891), *Diprose & Gammon*, 307.

charge the debtor upon an extract of the bond without producing legal evidence of their right to the contract, even though the fact of their appointment as trustees was known to the debtor.—*MITCHELL v. ST. MUNOO LODGE OF ANCIENT SHEPHERDS*, [1916] S. C. 689. **SCOT.**

PART XVI.

a. Failure of actuary to adopt.]—An actuary appointed under the rules of a friendly society to report as to payments to be made to a seceding of the central authority did

not take for the basis of his report the last quinquennial valuation as provided by the rules of the society, but had a new valuation made without the concurrence of the seceding lodge, & based his report on this new valuation. His report was confirmed by the tors of the society. Under the a report so confirmed was binding & conclusive. The seceding lodge objected to the report as having been made on a wrong basis, & commenced an action in the supreme ct. to establish its rights:—*Held*: the actuary not having acted in accordance with the rules his report was void, & the

firmation by the directors did not give it any validity.—*BATTERSBY v. WHEATLEY* (1914), 34 N. Z. L. R. 94.—**N.Z.**

PART XVII.

1. Powers of Registrar to order inquiry.]—When duly called upon by members of a friendly society, the Registrar may order an inquiry into the affairs of the society, of an exhaustive or limited character, as he may deem fit.—*PROFESSIONAL & CIVIL SERVICE SUPPLY ASSOCN. v. DOUGAL* (1898), 5 S. L. T. 359.—**SCOT.**

Part XVIII.—Disputes.

SECT. 1.—PROVISIONS FOR SETTLEMENT IN RULES.

SUB-SECT. 1.—NECESSITY FOR.

See 1896 Act, s. 9 (3), sched. 1

SUB-SECT. 2.—EFFECT ON JURISDICTION OF COURT.

See 1896 Act, s. 68 (1).

224. Whether jurisdiction of court ousted.]—Where the rules of a friendly society provide for reference of disputes to a committee of the society, the county ct. has no jurisdiction.—*TURNER v. SCOTT* (1857), 28 L. T. O. S. 373.

225. —.]—(1) Where the rules of a friendly society provide for reference of disputes, the county ct. is deprived of jurisdiction by 18 & 19 Vict. c. 63.

(2) Where the judge of a county ct. decides such a dispute as is within the rules, & thereby acts beyond his jurisdiction, an application to a superior ct. for a prohibition after execution issued upon the judgment below, must, if it can be made at all, be made promptly, or the ct. will not interfere.—*Re DENTON v. MARSHALL* (1863), 1 H. & C. 654; 1 New Rep. 242; 32 L. J. Ex. 89; 7 L. T. 689; 27 J. P. 345; 9 Jur. N. S. 337; 11 W. R. 268; 158 E. R. 1046.

226. —.]—*NETHERWAY v. RAVEN LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS* (1878), Diprose & Gammon, 387.

227. —.]—*CAMILL v. EUSTACE* (1879), Diprose & Gammon, 409.

228. —.]—*LOYAL PRINCE OF WALES GRAND UNITED ORDER OF ODDFELLOWS TRUSTEES v. WREXHAM DISTRICT TRUSTEES* (1885), Diprose & Gammon, 29.

229. —.]—*STRAW v. DISNEY* (1889), Diprose & Gammon, 110.

230. —.]—*DIGGLE v. ROSE LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS* (1889), Diprose & Gammon, 300.

231. —.]—Justices have power under Divided Parishes & Poor Law Amendment Act,

1876 (c. 61), s. 23, to make an order for the payment to the guardians of any union or parish of any periodical payment to which a pauper may be entitled. Guardians applied to the justices under this sect. for an order for payment to them of a weekly allowance which they alleged that a pauper was entitled to under the rules of a friendly society. The trustees of the society disputed the claim. The rules of the society provided that all disputes arising between any member or any person claiming an account of any member & the society should be referred to arbn.:—*Held*: the guardians were claiming the payment on account of a member, & the dispute between the guardians & the trustees as to whether or not the pauper was entitled to the payment must be settled by arbitration, in accordance with the rules of the society, & until the dispute had been so settled the justices had no jurisdiction to make an order for the payment of the weekly allowance to the guardians.—*R. v. RICHARDSON*, [1891] 2 Q. B. 323; 70 L. T. 805; 58 J. P. 640; 42 W. R. 540; 10 T. L. R. 493; 38 Sol. Jo. 620; 10 R. 338; *nom. R. v. RICHARDSON, ETC., DURHAM J.J. & IBERLAND & DURHAM MINERS PERMANENT RELIEF FUND FRIENDLY SOCIETY*, 63 L. J. M. C. 212.

232. —.]—*FALCONER v. TRAVELLERS' REST LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS* (1895), Diprose & Gammon, 426.

233. —.]—*Re ROYAL LIVER FRIENDLY SOCIETY* (1895), *Times*, Nov. 16.

234. —.]—Dispute already dealt with in accordance with rules.]—*TANNER v. SURGEY LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS* (1890), Diprose & Gammon, 252.

235. —.]—*Friendly Societies Act, 1875 (c. 60), s. 30.]—The provisions of above sect. of above Act, apply to all friendly societies, not only to friendly societies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society. Consequently, though the rules of a friendly society provide for the settlement of disputes between the society & members by arbn. a ct. of summary jurisdiction has jurisdiction under above sect. of above Act, to decide such disputes.—*Re HOLT* (1878), 4 Q. B. D. 29; *sub nom. Re UNITED PATRIOTS' NATIONAL BENEFIT SOCIETY & HOLT*,*

PART XVIII. SECT. 1, SUB-SECT. 2.

224 i. Whether jurisdiction of court ousted.]—*CHEETHAM v. ELLIOTT* (1886), 12 V. L. R. 370.—AUS.

224 ii. —.]—*KINGHAM v. JOEL* (1897), 23 V. L. R. 284.—AUS.

224 iii. —.]—*SHARPE v. BROWN*, [1918] V. L. R. 678.—AUS.

224 iv. —.]—*LACEY v. SHANKS*, [1924] St. R. Qd. 298.—AUS.

224 v. —.]—*ESSERY v. COURT PRIDE OF THE DOMINION* (1883), 2 O. R. 596.—CAN.

224 vi. —.]—An action to establish the right of a person to membership in a benefit society will not be entertained by the ct., even where the society submits to the jurisdiction, until the remedies provided by the

constitution of the society have exhausted. A dispute arose as to the pltf.'s right to continue to be a of the deft. society, & a body of of the society decided against him; the pltf., instead of appealing to the Grand Lodge, as permitted by the constitution (by which he was admittedly bound), brought an action against the society. The action was dismissed, but without costs & without prejudice to any other action being brought after the remedies provided by the constitution should be exhausted.—*ZILLIAX v. INDEPENDENT ORDER OF FORESTERS* (1906), 8 O. W. R. 631; 13 O. L. R. 155.—CAN.

224 vii. —.]—*IRVIN v. PETERIAN WIDOWS' FUND ASSOCN.* 5 I. Ch. R. 1; 8 Ir. Jur. 88.—IR.

224 viii. —.]—*DUGAN v. LODGE OF*

ANCIENT SHEPHERDS TRUSTEES (1898) 33 I. L. T. 14.—IR.

224 ix. —.]—*M'CAFFREY v. M'MAHON* (1901), 35 I. L. T. 97.—IR.

224 x. —.]—*R. v. WATERFORD J.J.*, [1919] 2 I. R. 213.—IR.

224 xi. —.]—*MANSON v. DOULL* (1840), 2 Durl. (Cl. of Scss.) 1015; 36 Fac. Coll. 1084.—SCOT.

224 xii. —.]—*Re BRODIE v. JOHNSON* (1861), 30 Beav. 129; 54 E. R. 237.—SCOT.

224 xiii. —.]—*M'GOWAN v. CITY OF GLASGOW FRIENDLY SOCIETY*, [1913] S. C. 991.—SCOT.

224 xiv. —.]—*CRICHTON v. DAIRY MYRTLE LODGE OF FREE GARDENERS* (1904), 6 F. (Cl. of Scss.) 398; 41 Sc. L. R. 337; 11 S. L. T. 753.—SCOT.

Sect. 1.—Provisions for settlement in rules: Sub-sects. 2 & 3, A.]

48 L. J. M. C. 55; 27 W. R. 339; *sub nom. Re HOLT, Ex p. UNITED PATRIOTS' NATIONAL BENEFIT SOCIETY*, 39 L. T. 622; 43 J. P. 396, D. C.

Annotation:—Reid. White v. Hussey (1885), Diprose & Gammon, 415.

236. — Rules binding on reinstated member.] —BARKER v. PRUDENCE OF THE VALE LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS (1891), Diprose & Gammon, 421.

237. — Claim not dealt with by committee—Alternative provisions in rules.]—Re HOGG, Ex p. PARKIN (1898), 14 T. L. R. 210.

— **Collecting society.]—See Part IV., ante.**

See, also, ARBITRATION, Vol. II., pp. 350 et seq.

Finality of arbitrators' award—Dispute referred, in accordance with rules.]—See Sect. 2, sub-sect. 1, post.

SUB-SECT. 3.—WHAT DISPUTES WITHIN PROVISIONS.

A. Disputes between Society and Members.

238. General rule—Acts ultra vires.]—Where the rules of a registered society contain a provision for the reference of disputes between a member & the society & its officers to arbn. it is not an answer to an application for a stay of proceedings that the question at issue is whether or not the act complained of is *ultra vires*.—Cox v. HUTCHINSON, [1910] 1 Ch. 513; 79 L. J. (Ch. 259); 102 L. T. 213; 26 T. L. R. 263; 54 Sol. Jo. 271. *Annotations:—Consd. Heard v. Pickthorne*, [1913] 3 K. B. 299; *Reid. Winter v. Wilkinson*, [1915] 1 Ch. 317.

239. Claim for sick pay.]—CAHILL v. EUSTACE (1879), Diprose & Gammon, 409.

240. —.]—STRAW v. DISNEY (1889), Diprose & Gammon, 110.

241. —.]—BARKER v. PRUDENCE OF THE VALE LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS (1891), Diprose & Gammon, 421.

242. —.]—Applt., a member of a friendly society, claimed from the society sick pay on behalf of his son, who was also a member, but was mentally afflicted & unable to claim it for himself. The ct. arbn. committee decided against the claim, & that decision was affirmed on appeal

by the district arbn. committee, who charged applt. with the expenses of the proceeding. Applt. having refused to pay the expenses was suspended & ceased to be a member. In an action by applt. against the society claiming an injunction & damages for wrongful exclusion:—*Held*: (1) the questions about sick pay & expenses were disputes within 1896 Act, s. 68, & therefore should be decided only in the manner directed by the rules of the society; (2) the rules were not *ultra vires*; (3) the decisions, even if erroneous in point of law, being given without misconduct were binding & conclusive & not removable into any ct. of law or restrainable by injunction & could be enforced without resorting to a county ct.; & the action was not maintainable.—CATT v. WOOD, [1910] A. C. 404; 79 L. J. K. B. 782; 102 L. T. 614; 26 T. L. R. 455, H. L.

Wayman v. Friendly Society of the Order of United Brethren Friendly [1917] 1 K. B. 677.

243. Reduction of sick pay.] —FALCONER v. TRAVELLERS' REST LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS (1895), Diprose & Gammon, 426.

244. Recovery of medical expenses.] —NETHERWAY v. RAVEN LODGE, MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS (1878), Diprose & Gammon, 387.

245. Enrolment of member's wife.]—The rules of a friendly society following the terms of Friendly Societies Act, 1875 (c. 60), s. 22, provided for the appointment of an arbitrator, & for the reference of disputes between the society & its members to arbn.:—*Held*: a claim raising a question as to whether the second wife of an enrolled member was entitled to enrolment & to the benefits of the society, & a claim for injunction arising upon a suggestion that the society was about to dispose of its funds otherwise than for the benefit of its members, were both disputes within the arbn. rule & the provisions of sect. 22, & were not the subject of an action in the High Ct.—STONE v. LIVERPOOL MARINE SOCIETY (1891), 63 L. J. Q. B. 471; 10 R. 592; *affd.*, 10 T. L. R. 370, C. A.

Annotations:—Appld. Cox v. Hutchinson, [1910] 1 Ch. 513. *Reid. Heard v. Pickthorne*, [1913] 3 K. B. 299; *Winter v. Wilkinson* (1914), 79 J. P. 241.

246. Distribution of fund by trustees.]—By 13 & 14 Vict. c. 115, s. 22, any dispute arising between the members of any friendly society & the trustees,

PART XVIII. SECT. 1, SUB-SECT. 3. —A.

g. Expulsion of member.]—The Glasgow District Arbitration Committee of the Ancient Order of Foresters, in the exercise of its jurisdiction, under the rules of the society, pronounced an award removing A., a branch secretary, from office, expelling him from the society, & calling upon him to deliver the books of the Order in his possession to the district secretary:—*Held*: the District Arbitration Committee having jurisdiction to deprive A. of office had, as incidental thereto, jurisdiction to order delivery of the books to the district secretary although the books might be the property of the branch.—GLASGOW DISTRICT OF ANCIENT ORDER OF FORESTERS v. STEVENSON (1899), 2 F. (Ct. of Sess.) 14.—SCOT.

h. —.]—COLLINS v. BARROW-FIELD UNITED ODDFELLOWS. S. C. 190.—SCOT.

243 l. Reduction of sick pay.]—Plff. became a member of an Oddfellows' Lodge by subscription that he had examined the general laws & bye-laws, & was ready & willing to yield obedience thereto. At that time there was a bye-law in force fixing the amount of the weekly sick benefit payable to members & also another bye-law by which the society could repeal, suspend, or amend existing bye-laws by a bye-law passed by a two-thirds vote. Subsequently a bye-law was passed reducing the amount of the sick benefit, whereupon the plff. availed himself of the various appeals permitted by the constitution, & on his failing thereon, brought an action seeking a declaration that the action of the lodge was contrary to natural justice & that he was entitled to payment of the amount fixed when he became a member:—*Held*: this was a matter within the competence of the society & the ct. could not interfere.—BAKER v. FOREST CITY

LODGE, PARKHOUSE v. DOMINION LODGE (1898), 28 O. R. 238; 24 A. R. —CAN.

244 l. Recovery of medical —.]—OSBORNE v. WILSON (1902), 21 N. Z. L. R. 244.—N.Z.

k. Dispute as to validity of rules.] —FALCONER v. WEEDON (1888), 14 V. L. R. 846.—AUS.

l. —.]—A provision in the rules of a friendly society that "all disputes between a member or person claiming through a member or under the rules of the society and the society or any officer thereof shall be decided by "the governing body of the society does not oust the jurisdiction of the Supreme Court in an action by a member in which the complaint is that the defendants, acting under certain amended rules purporting to have been made by the society, but which the plaintiff alleges to have been made, have usurped the control of the

treasurer, or other officer, or committee thereof, shall be settled in such manner as the rules of such society shall direct, & the decision so made shall be binding, & conclusive; but if such dispute shall be of such a kind, that, for the settlement of it, according to the laws in force, recourse must be had to a ct. of equity, it may be referred, at the option of either party, to the judge of the county ct. Where, by the rules of a friendly society, disputes between members & the trustees may be referred to the arbn. of a certain number of the committee, a dispute, which affects the interests of all the individual members of the society, arising between some of its members, who are also members of the committee, & the trustees, where the question is not one which necessarily requires that recourse should be had to a ct. of equity, such dispute cannot be referred to the judge of the county ct., but must be referred to other members of the committee. Where a dispute arose between two of the members of the committee of a friendly society, & the trustees, touching the distribution of a fund in the hands of the latter; & by one of the rules of the society, it was ordered that disputes were to be referred to such members of the committee as should not be personally interested in the matter:—*Held*: the judge of the county ct. had no jurisdiction in such case, & the ct. granted a prohibition against further proceedings in a plaint issued out of the ct. over which he presided.—*GRINHAM v. CARD* (1852), 7 Exch. 833; 21 L. J. Ex. 321; 16 J. P. 825; 155 E. R. 1187.

247. —.] — *STONE v. LIVERPOOL MARINE SOCIETY*, No. 245, *ante*.

248. Member also treasurer—Recovery of money from treasurer.]—18 & 19 Vict. c. 63, s. 40, giving a summary proceeding before justices against the officer of a friendly society not accounting for the money of the society does not take away the remedy at common law & a treasurer may be sued for money had & received. The rules of a friendly society formed under 10 Geo. 4, c. 56, provided that if any dispute should arise as to the legality or payment of any fine, money, or allowance, or as to the disqualification of any member at the time of his admission, or between any officer & member, it should be referred to the decision of the committee of the society, from whom there should be an appeal to justices. Before July, 1855, when 18 & 19 Vict. c. 63, came into operation, *deft.*, the treasurer of this society, received, as such, certain moneys, the balance of which he failed to pay over to *pltf.*s, the society's trustees, & to recover which *pltf.*s. after that date brought this action:—*Held*: whether the case was governed by 10 Geo. 4, c. 56, or by 18 & 19 Vict. c. 63, the action lay: for that *pltf.*s.' claim was not a dispute between the society & *deft.* in his capacity as an individual member of it, which disputes alone were required by either statute to be dealt with under the society's rules, & otherwise than by action.—

business, funds, and property of the society.—*BROSNAN v. TRAIT* (1903), 29 V. L. R. 280.—*AUS.*

m. Recovery of loan.]—*M'DONAGH v. CALVERT* (1914), 48 I. L. T. 35.—*IR.*

n. Reduction of minute of meeting.]—*DAVIE v. COLINTON FRIENDLY SOCIETY* (1870), 9 Macph. (Ct. of Sess.) 96.—*SCOT.*

o. Where society has acted in violation of rules.]—In an action by a

member of a friendly society — the society for declaration that the appointment of another member to the board of management was void in respect that under the rules of the society he was ineligible for election, it was in defence denied that he was ineligible, and it was also pleaded that the action was excluded by a rule of the society that "all disputes between the society and any member as such . . . may be determined by arbitration." The rule was passed under the Friendly Societies Act,

SINDEN v. BANKS (1861), 3 E. & E. 623; 30 L. J. Q. B. 102; 3 L. T. 775; 7 Jur. N. S. 910; 9 W. R. 415; 121 E. R. 570; *sub nom.* *LINDON v. BANKES*, 25 J. P. 390.

Annotations:—*Consd.* Municipal Permanent Investment Bldg. Soc. v. Richards (1888), 39 Ch. D. 372. *Apprvd.* Winter v. Wilkinson, [1915] 1 Ch. 317. *Refd.* Huckle v. Wilson, etc. Forty First Starr Bowkett Benefit Soc. Trustees (1877), 26 W. R. 98.

249. Expulsion of member—Claim for reinstatement.]—*Ex p. WOOLDRIDGE*, No. 181, *ante*.

250. —.]—*Pltf.* was expelled from a friendly society, the rules of which directed that disputes between a member & the officers should be decided by justices. He applied for an injunction to restrain the society, its members, & officers from excluding him:—*Held*: 1875 Act, s. 22, & rules only applied to disputes arising between members & the society & did not include a dispute as to whether a person who had been expelled from the society was entitled to be reinstated & therefore the ct. had jurisdiction to grant an injunction.—*WILLIS v. WELLS*, [1892] 2 Q. B. 225; 61 L. J. Q. B. 606; 67 L. T. 316; 56 J. P. 775; 41 W. R. 64; 36 Sol. Jo. 594; *sub nom.* *WILLIS v. NEW UNION SOCIETY*, 8 T. L. R. 653, D. C.

Annotations:—*Folld.* Palliser v. Dale, [1897] 1 Q. B. 257. *Refd.* Stone v. Liverpool Marine Soc. (1894), 63 L. J. Q. B. 471; Taylor v. National Amalgamated Apprvd. Soc., [1914] 2 K. B. 352.

251. — Legality of expulsion.]—58 & 59 Vict. c. 26, s. 10 (1) merely extended the period during which Friendly Societies Act, 1875 (c. 60), s. 22, was applicable to disputes within it, & did not extend the provisions of that sect. to a class of disputes not previously within it, namely, disputes as to the title of a person to be a member of the society. The jurisdiction of the ct was therefore not ousted with regard to such disputes by those enactments.

A dispute between a friendly society & a member who has been expelled as to the legality of the expulsion is not a dispute which must be decided in the manner provided by the rules of the society.—*PALLISER v. DALE*, [1897] 1 Q. B. 257; 66 L. J. Q. B. 236; 76 L. T. 14; 45 W. R. 291; 13 T. L. R. 147, C. A.

Annotations:—*Refd.* Andrews v. Mitchell, [1905] A. C. 78; Catt v. Wood, [1910] A. C. 404; Cox v. Hutchinson, [1910] 1 Ch. 513; Heard v. Pickthorne, [1913] 3 K. B. 299; Taylor v. National Amalgamated Apprvd. Soc., [1914] 2 K. B. 352; Wayman v. Perseverance Lodge of the Cambridge Order of United Brethren Friendly Soc. (1916), 116 L. T. 14.

— Generally.]—*See* Part XIII., Sect. 6, sub-sect. 2, *ante*.

252. Expenses of arbitration.] — *CATT v. WOOD*, No. 242, *ante*.

Mode of settlement of disputes — By arbitration.] — *See* Sect. 2, sub-sect. 1, *post*.

— By justices.]—*See* Sect. 2, sub-sect. 2, *post*.

— By county court.]—*See* Sect. 2, sub-sect. 3,

which provides that every dispute between a member and the society shall be decided in manner directed by the rules of the society "without appeal, and shall not be removable into any ct. of law . . .":—*Held*: the action was competent in respect that the jurisdiction of the ct. was not excluded in a case where the averment was that the society had acted in violation of its rules.
M'GOWAN v. CITY OF FRIENDLY SOCIETY, [1913] 8 C. 991.—*SCOT.*

Sect. 1.—Provisions for settlement in rules: Sub-sect. 3, B. Sect. 2: Sub-sects. 1 & 2.]

B. Other Disputes.

Mode of settlement by arbn., see Sect. 2, sub-sect. 1, *post*.

253. Between society & medical officer—Wrongful dismissal.]—By the rules of a friendly society, a committee was empowered to determine all grievances, differences, & disputes which might arise relative to the affairs of the society, subject to an appeal to two magistrates, & it provided that each member should pay 3s. annually to the society's doctor. Pltf. was duly appointed to that office. The committee dismissed him & appointed another in his stead. An application was thereupon made to two magistrates, who recommended that a general meeting of the society should be convened. At this meeting, a large majority of the members voted for pltf. In an action against the stewards of the society, to recover the amount of the contributions received by them from the members, for the services of the doctor, subsequently to the dismissal of pltf., the jury found that the committee had not acted *bonâ fide* in dismissing him:—*Held*: pltf. was entitled to retain the verdict, the matter not being a grievance or dispute within the jurisdiction of the committee. —*GARNER v. SHELLEY* (1820), 5 Bing. 477; 3 Moo. & P. 98; 2 Man. & Ry. M. C. 452; 7 L. J. O. S. C. P. 191; 130 E. R. 1146.

254. Between society & branch officers—Wrongful division of branch funds.]—The rules of the O. Friendly Society provided that if any dispute should arise between the society & the board of directors & any district, lodge, or member such dispute should be referred to the following general meeting for settlement, except where otherwise provided by the rules. The rules further provided that no lodge should divide its funds or any part thereof without the sanction of the board of directors & a certificate of dissolution, & that any lodge acting contrary to this rule should forfeit the money so divided to the general fund of the society, to be recovered by legal process. 1896 Act, s. 68, enacts that every dispute between an officer of any registered branch of any society & the society or branch of which that registered branch is a branch "shall be decided in manner directed by the rules of the society or branch." Defts., who were the trustees, secretary, & treasurer of a lodge registered as a branch of the O. Friendly Society, wrongfully divided the funds of the lodge between the members thereof in breach of the rules. The trustees of the society brought an action to recover the funds from defts.:—*Held*: (1) defts. were liable to be sued as trustees in whom property was vested by statute to be held upon certain trusts, & (2) the right of action against them was not taken away by 1896 Act, s. 68. *Semble*: (3) upon the construction of the rules also, the question in the action ought not to be referred to a general meeting of the society for settlement.—*WINTER v. WILKINSON*, [1915] 1 Ch. 317; 81 L. J. Ch. 237; 70 J. P. 241; 31 T. L. R. 121; 13 L. G. R. 425; *sub nom.* *WINTER v. WILKINSON*, *WINTER v. BRACEWELL*, 112 L. T. 482, C. A.

255. Between society & member's administrator—Claim on life policy.]—(1) A claim by an administrator on a policy of life assurance granted to the intestate by a society enrolled under

Friendly Societies Acts, 1829 (c. 56), & 1834 (c. 40), is not "a dispute between the society & a member, or a person claiming on account of a member," within sect. 27 of the former Act, which requires such disputes to be determined by arbn.

(2) *Semble*: ordinary life policies of assurance, by which the sum assured is payable to the exors. or administrators of the assured, are not within the purview of the Friendly Societies Acts.—*KELSALL v. TYLER* (1856), 11 Exch. 513; 25 L. J. Ex. 153; 26 L. T. O. S. 226; 20 J. P. 150; 156 E. R. 933.

Annotation:—*As to* (2) *Reid*. *Laing v. Reed* (1869), 39 L. J. Ch. 3, n.

Payments on death of members, see Part XI., Sect. 4, *ante*.

256. Between parent & junior societies—Secession of junior society.]—*SNELL v. VINE* (1890), Diprose & Gammon, 313.

Secession of societies, see Part XX., Sect. 3, *post*.

257. Between society & poor law guardians—Claim for cost of relief of pauper member.]—*R. v. RICHARDSON*, No. 231, *ante*.

SECT. 2.—SETTLEMENT OF DISPUTES.

SUB-SECT. 1.—BY ARBITRATION.

See, generally, ARBITRATION, Vol. II., pp. 312 *et seq.*

258. Appointment of arbitrators—Whether compellable by minority of society—Dispute between society's bankers & expelled members.]—When deposits are made in a savings' bank by a benefit society, of whom a part have since been expelled by an order of magistrates who had no authority to interpose, the managers of the bank are not compellable, upon the application of the members so illegally expelled, to appoint an arbitrator to settle disputes as between such managers & the depositors. Nor, in any case, where deposits have been made on behalf of a society, are the managers compellable to appoint an arbitrator upon the application of individual members, not being the representatives of the whole or of a majority of such society.—*R. v. WITHAM SAVINGS BANK* (1834), 1 Ad. & El. 321; 3 Nev. & M. K. B. 416; 2 Nev. & M. M. C. 294; 3 L. J. M. C. 85; 110 E. R. 1228.

259. Discretion of arbitrators to hear counsel.]—It is competent to arbitrators under 18 & 19 Vict. c. 63, to decline to hear counsel. *Semble*: all arbitrators have the like discretion.—*Re MACQUEEN & NOTTINGHAM CALEDONIAN SOCIETY* (1861), 9 C. B. N. S. 793; 142 E. R. 312.

Annotation:—*Mentd.* *R. v. St. Mary Abbots Assmt. Com.* (1893), 14 Lydc. Rat. App. [1891–1893] 276.

260. Finality of arbitrators' award—When made bonâ fide—Though decision erroneous.]—(1) The award of arbitrators acting under 4 & 5 Will. 4, c. 40, in a reference of a dispute between a friendly society & one of the members of it is final. The jurisdiction of justices to determine such a dispute after arbitrators have made an award, will arise if the award be a nullity, but is not raised by the fact that the decision of the arbitrators is erroneous. On an application for a rule under Justices Protection Act, 1847 (c. 44), calling on a magistrate of the police courts of

the metropolis, to hear & determine a dispute between a friendly society & the widow of an expelled member, it was disclosed that deceased husband had been expelled without a previous summons required by the rules, but also that arbitrators, in whom *malâ fides* was not shown, had heard & decided on the objection:—*Held*: the magistrate had properly declined jurisdiction.

(2) The jurisdiction of the justices only arises in case the arbitrators neglect or refuse to make an award (WIGHTMAN, J.).—*Ex p.* LONG (1854), 24 L. T. O. S. 73; 19 J. P. 118; 3 W. R. 18.

261. — — — — —.]—CATT v. WOOD, No. 242, *ante*.

262. — — — — — Jurisdiction of justices to interfere—
—Not unless award a nullity.]—*Ex p.* LONG, No. 260, *ante*.

263. — — — — — Jurisdiction of High Court to interfere.]—Applt., a member of a friendly society, having met with an accident, applied to his society for relief. His claim was refused, & under the rules of the society the dispute was referred to arbitrators, who decided against him:—*Held*: the High Ct. had no jurisdiction to interfere in the matter.—*Re* GOLLINGS & TRADESMEN'S FRIENDLY SOCIETY, PETERBOROUGH (1891), 64 L. T. 775, D. C.

264. — — — — — Jurisdiction of county court to interfere—Provision in society's rules for appeals.]—HEATH v. LOYAL OAK LODGE TRUSTEES MANCHESTER UNITY INDEPENDENT ORDER OF ODDFELLOWS (1892), Diprose & Gammon, 27, D. C.

265. Arbitration improperly conducted.
In an arbn. between a member of a friendly society & the society, arising out of a claim for sick pay the arbitrators appointed under rules of the society, after hearing claimant, heard the evidence of two witnesses, in the absence of claimant, who was excluded from the room, & given no opportunity of cross-examining the witnesses. By one of the rules of the society, "where no decision is made on a dispute within forty days after application for reference to arbn., the member may apply to a ct. of summary jurisdiction." The member applied to justices, who decided that, the arbn. having been improperly conducted, the decision of the arbitrators was void & that consequently the justices had jurisdiction to hear & determine the dispute:—*Held*: as the arbitrators had given a decision which was valid until set aside, the jurisdiction of the justices to hear the complaint did not arise.—BACHE v. BILLINGHAM, [1894] 1 Q. B. 107; 63 L. J. M. C. 1; 69 L. T. 648; 58 J. P. 181; 42 W. R. 217; 9 R. 79, C. A.

Annotation:—*Mentd.* Scrimaglio v. Thornett & Fehr (1924), 131 L. T. 174.

266. Validity of award—Where jurisdiction exceeded.]—1896 Act, s. 68, which enacts that every dispute between a member of a friendly society & the society shall be decided in manner directed by the rules of the society, & that the decision so given shall be binding & conclusive on all parties without appeal, does not apply to a decision given by the arbitration committee

without jurisdiction, the rules having been disregarded upon a question of substance.

A member of a friendly society was duly summoned before the arbn. committee for a breach of the rules, & was in his absence expelled from the society by a resolution of the committee upon a different charge, viz., of fraud & disgraceful conduct, of which no written notice had been given to him as required by the rules:—*Held*: the decision was null & void.—ANDREWS v. MITCHELL, [1905] A. C. 78; 74 L. J. K. B. 333; 91 L. T. 537, H. L.

Annotations:—*Distd.* Catt v. Wood, [1910] A. C. 404. *Appld.* Wayman v. Perseverance Lodge of the Cambridgeshire Order of United Brethren Friendly Soc., [1917] 1 K. B. 677. *Refd.* Cox v. Hutchinson, [1910] 1 Ch. 513; *Re* Enoch & Zaretsky, Bock, [1910] 1 K. B. 327; *Heard* v. Pickthorne, [1913] 3 K. B. 2

267. — — — — —.]—LOACH v. COLEY (1907), 122 L. T. Jo. 463.

268. Enforcement of arbitrators' award—By justices.]—HAMMOND v. BENDYSHE, No. 285, *post*.

269. — — — — — By county court.]—GRIMSBY DISTRICT OF THE ANCIENT ORDER OF FORESTERS v. COURT YARBOROUGH (1885), Diprose & Gammon, 325.

270. — — — — —.]—LOYAL PRINCE OF WALES LODGE, GRAND UNITED ORDER OF ODDFELLOWS TRUSTEES v. WREXHAM DISTRICT TRUSTEES (1885), Diprose & Gammon, 29.

271. — — — — —.]—LEEDS DISTRICT OF THE GRAND UNITED ORDER OF ODDFELLOWS TRUSTEES v. MOUNTAIN FLOWER LODGE (1891), Diprose & Gammon, 22.

272. — — — — —.]—CATT v. WOOD, No. 242, *ante*.

Settlement of disputes by county court generally, *see* Sub-sect. 3, *post*.

Whether jurisdiction of court ousted—By provision for arbitration in rules.]—*See* Sect. 1, sub-sect. 2, *ante*.

SUB-SECT. 2. — BY JUSTICES.

See 1896 Act, s. 68 (5).

273. Extent of jurisdiction—Limited to subject matter of complaint.]—By 33 Geo. 3, c. 54, s. 15, it is enacted, that if any member of the society shall think himself aggrieved by any thing done by any such society, two justices may, on complaint upon oath of such member, summon the presidents or stewards of the society, & the justices are to hear & determine the matter of such complaint, & to make such orders therein as to them shall seem just:—*Held*: the jurisdiction of the magistrates was confined strictly to the subject matter of the complaint, & therefore where it appeared that a party had complained to the justices that he had been deprived of relief to which he was entitled, & the justices awarded not only that the steward should give him such

PART XVIII. SECT. 2, SUB-SECT. 2.

p. Jurisdiction ousted by rules.]—Claims made by members for "mortality money" against Friendly Societies not receiving contributions more than ten miles from the registered offices are not within the jurisdiction

of Justices when the rules of societies provide a mode for settlement of such claims by arbitration.—*R. v. DUBLIN JJ.* (1891), 28 L. R. Ir. 516.—*IR.*

q. — — — — — Unless acting as arbitrators.]—The rules of a friendly

provided that all the society & its members "shall be determined by a ct. of summary jurisdiction." A dispute having been decided by justices in favour of a member, the society appealed from the decision to the Ct. of Quarter Sessions. The chairman

Sect. 2.—Settlement of disputes: Sub-sects. 2 & 3.]

relief, but also that the party should be continued a member of the society, the latter part of the order was illegal, inasmuch as the expulsion of the party was no part of the complaint.—*R. v. SOPER* (1825), 3 B. & C. 857; 5 Dow. & Ry. K. B. 669; 3 Dow. & Ry. M. C. 31; 107 E. R. 951.

Annotation:—*Mentd. R. v. Bidwell* (1847), 2 Car. & Kir. 564.

274. Necessity for jurisdiction—Residence in county where society held.]—Where a member of a benefit society, complaining of relief having been improperly refused, applies for a summary remedy under 49 Geo. 3, c. 125, s. 3, the proceedings must be before two justices resident in the county where the society is held.—*SHARP v. ASPINALL* (1829), 10 B. & C. 47; 5 Man. & Ry. K. B. 71; 2 Man. & Ry. M. C. 558; 8 L. J. O. S. M. C. 70; 109 E. R. 369.

275. Where rules direct reference to justices—Whether decision final.]—The decision of justices under 21 & 22 Vict. c. 101, s. 5, of a dispute which had been referred to them pursuant to one of the rules of a benefit society, is a determination of a complaint which the justices have power to determine in a summary manner within Summary Jurisdiction Act, 1857 (c. 43), s. 2, & the justices ought, on application by the unsuccessful party, to state a case in the manner pointed out by Summary Jurisdiction Act, 1857 (c. 43).—*R. v. LAMBARDE* (1866), L. R. 1 Q. B. 388; *sub nom. R. v. LAMBARDE KENT JJ.*, *R. v. RYCROFT KENT JJ.*, 14 W. R. 680; *sub nom. WATTS v. KENT JJ.*, *PEARCE v. KENT JJ.*, 35 L. J. M. C. 190; *sub nom. WATTS v. KENT JJ.*, *PERCH v. KENT JJ.*, 14 L. T. 448.

Annotation:—*Overd. Callaghan v. Dolwin* (1869), L. R. 4 C. P. 288.

276. ———.]—No appeal lies against the decision of a magistrate under 21 & 22 Vict. c. 101, s. 3, notwithstanding the general words of Summary Jurisdiction Act, 1857 (c. 43), s. 2, that, "after the hearing & determination by a justice or justices of any information or complaint which he or they have power to determine in a summary way by any law now in force or hereafter to be made," either party, if dissatisfied with the decision, may demand a case for the opinion of a superior ct., the persons selected by the rules of the society to settle all disputes between the society & its members being, whether justices or other referees, to be regarded as arbitrators, whose decision is to be final & conclusive.—*CALLAGHAN v. DOLWIN* (1869), L. R. 4 C. P. 288; 38 L. J. M. C. 110; 21 L. T. 827; 17 W. R. 733.

Annotation:—*Refd. Municipal Soc. v. Kent* (1884), 9 App. Cas. 260.

277. Where rules direct settlement by arbitration—Effect of settlement by justices—Acquiescence of parties in want of jurisdiction.]—Trespass does not lie against a magistrate for any thing done by him in the discharge of his duty, unless he is made acquainted with every fact necessary to enable him to determine, when called on to act. Where, therefore, the treasurer of a benefit society brought such action against a magistrate for issuing a warrant of distress against him, upon a

previous order of two magistrates for the relief of a member, in pursuance of 33 Geo. 3, c. 54, s. 15:—*Held*: the action could not be maintained; it appearing on the face of the order, that the treasurer made no defence, deft.'s jurisdiction not having been questioned at the time, & the treasurer having neglected to present to his notice a rule of the society, which directed all disputes between its members to be referred to arbn. & which rule was confirmed by sect. 16 of the Act, whereby the award was made conclusive without being subject to the control of the magistrates.—*PIKE v. CARTER* (1825), 3 Bing. 78; 10 Moore, C. P. 376; 4 Dow. & Ry. M. C. 145; 3 L. J. O. S. C. P. 169; 130 E. R. 443; *subsequent proceedings*, 3 Bing. 85.

Annotations:—*Mentd. Calder v. Halket* (1840), 3 Moo. P. C. C. 28; *Fornley v. Worthington* (1840), 1 Man. & G. 491; *Pease v. Chaytor* (1863), 3 B. & S. 620.

278. ———.]—21 & 22 Vict. c. 101, s. 5, gives to justices of the peace jurisdiction to determine disputes arising between members or representatives of members of friendly societies established under 18 & 19 Vict. c. 63, or any of the Acts thereby repealed "where the rules of any such society shall direct disputes to be referred to justices."

A dispute as to the payment of money having arisen between the representative of a member & the secretary of a friendly society, whose rules did not direct disputes to be referred to justices, there being a rule that such disputes should be finally decided by arbitrators appointed by the society, the secretary of the society was summoned before a magistrate to answer the complaint of having unlawfully refused to pay the money. The rules of the society were put in evidence, but the magistrate's attention was not called to the fact that the rules did not direct disputes to be referred to justices, & an order was made for the payment of the money. A rule *nisi* having been obtained for a *certiorari* to quash the magistrate's order on the ground of want of jurisdiction:—*Held*: the conduct of applt. in not directing the magistrate's attention to the absence of any rule directing disputes to be referred to justices, disentitled him to the discretionary writ of *certiorari*, & the rule was discharge with costs.—*Re WEST LONDON PHILANTHROPIC BURIAL SOCIETY, CORDERY v. GREAVES* (1869), 20 L. T. 972; *sub nom. R. v. WEST LONDON PHILANTHROPIC BURIAL SOCIETY*, 33 J. P. 614.

279. Where award refused by arbitrators.]—(1) On a dispute between the members of a friendly society, called The Leeds Philanthropic Society, & A., whom they had expelled, the arbitrators appointed by the rules of the society made an award that A. should be expelled the society. A. thereupon made complaint to a justice of the peace under 4 & 5 Will. 4, c. 40, s. 7, that he had been wrongfully expelled, & that arbitrators had been appointed who had neglected & refused to make any award; & two justices by their order, after reciting the above complaint, adjudged that all & singular the allegations were true, & ordered that A. should be re-instated in the society:—*Held*: the statement in the order that the arbitrators had neglected to make an award was not conclusive: but on motion to quash the

& justices at Quarter Sessions dismissed the appeal on the ground that under the rules of the society, & sect. 68, sub-s. 1, of the Friendly Societies Act, 1896, they had no juris-

to hear it. The society applied for a writ of *certiorari* to quash the decision of Quarter Sessions:—*Held*: there was a right of appeal. Where jurisdiction is given directly by a

statute to one of the ordinary tribunals of the county, such as a ct. of summary jurisdiction, the justices exercising the jurisdiction act not as arbitrators but as a ct. to whose decisions appeal &

order of justices, the circumstances under which the award was made might be gone into on affidavit.

There were contradictory affidavits as to whether the arbitrators wrongfully refused to hear evidence on the part of A.:—*Held*: (2) there being a sufficient evidence to warrant the conclusion to which the justices had arrived, it was to be presumed that they were right as to the fact; (3) such fact warranted the statement that the arbitrators had neglected to make an award, & the order of justices was therefore good.—*R. v. GRANT* (1849), 14 Q. B. 43; 3 New Mag. Cas. 183; 4 New Sess. Cas. 13; 19 L. J. M. C. 59; 13 L. T. O. S. 301; 13 J. P. 408; 13 Jur. 1026; 117 E. R. 17.

Annotations:—*As to* (1) *Consd. Ex p. Long* (1854), 24 L. T. O. S. 73. *Distd. Bache v. Billingham*, [1894] 1 Q. B. 107.

280. —.]—*Ex p. LONG*, No. 260, *ante*.

281. —.]—The rules of a benefit society, established, enrolled & certified under 10 Geo. 4, c. 56, 4 & 5 Will. 4, c. 40, & 9 & 10 Vict. c. 27, provided that, if any misunderstanding should happen between the society & any of its members, the matter should be submitted to the decision of arbitrators according to 10 Geo. 4, c. 56, nine of whom should be elected in the first quarterly meeting after the passing of the laws; & that, when any dispute should arise the names of the arbitrators should be shuffled in a box or glass, & the first five names taken up by the complaining party should be the arbitrators for the question at issue, & their decision should be final. The society at their first quarterly meeting, appointed a general committee for the purpose of electing arbitrators; & nine arbitrators were shortly afterwards elected. Afterwards, in consequence of some of them having left the neighbourhood, & of others having refused to act if called on, the general committee elected nine new arbitrators in the place of the first set. After the first election, but before the second D., a member of the society was expelled for an infringement of one of the rules, as directed by the rule itself. He applied, after the second election of arbitrators to have the question of his expulsion referred to arbn. The society appointed a day for that purpose; & D. & six of the arbitrators last elected attended. D. refused to draw five names out of the nine, according to the rule; & he eventually, with the consent of the society, signed an agreement, submitting the dispute to five out of the six arbitrators then present, he having been previously allowed, on his own request, to reject any one of the six he chose; their decision to be final. The five arbitrators made their award, adjudging him to be properly expelled. D. applied for a rehearing, which was granted; but, upon the meeting for rehearing, D. refused to select his arbitrators according to the rule; & he subsequently made a complaint before justices, under 4 & 5 Will. 4, c. 40, ss. 7, 8, & the justices made an order requiring the society to reinstate him, or to pay him £50:—*Held*: the justices had no jurisdiction to make such order, there having been no neglect or refusal by the arbitrators to make an award,

& it not being open to D. to contend that the application for settlement by arbitration had not been complied with in forty days, he being estopped, by the written agreement from disputing the validity of the appointment of the arbitrators.—*R. v. EVANS* (1854), 3 E. & B. 303; 2 C. L. R. 969; 23 L. J. M. C. 100; 22 L. T. O. S. 241; 18 J. P. 247; 18 Jur. 696; 118 E. R. 1178.

Annotation:—*Reid. Callaghan v. Dolwin* (1869), 21 L. T. 827.

Where award made by arbitrators—Finality of award.]—*See* Sub-sect. 1, *ante*.

282. Jurisdiction ousted by new rules—New rules unenrolled—Claim under original rules.]—*R. v. COTTON*, No. 90, *ante*.

283. Form & contents of justices' order.]—An order of justices upon a party, requiring him to pay money to a person claiming it as member of a friendly society, under 49 Geo. 3, c. 125, s. 3, must find in direct terms that the person applying is a member, that he is entitled to the money, & that the party against whom the application is made is, at the time, an officer of the society. An order of justices served upon D. does not find him to be an officer, by being directed to "D. steward of," etc. Nor by reciting a complaint upon oath which states him to be so. An order does not show appct. to be a member, & entitled to the money, by reciting that he made complaint upon oath, in which complaint he stated himself to be a member, & the money to be due. Though the order afterwards direct the money "so due owing as aforesaid" to be paid. A warrant of distress, founded upon & reciting such order, & omitting to find as above, is bad; & if goods be taken under such warrant, the justices are liable in trespass.—*DAY v. KING* (1836), 5 Ad. & El. 350; 2 Har. & W. 178; 6 Nev. & M. K. B. 845; 5 L. J. M. C. 130; 111 E. R. 1201.

Annotations:—*Mentd. R. v. Toke* (1838), 8 Ad. & El. 227; *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610; *Wilkinson v. Gray* (1844), 9 J. P. 71.

284. Enforcement of orders by distress—What must be set out in warrant.]—*DAY v. KING*, No. 283, *ante*.

285. — Justices acting as arbitrators—Necessity for summons before issue of warrant.]—Pltf., the steward of a friendly society, not having paid money in obedience to an order of two justices under 10 Geo. 4, c. 56, s. 28, the justices, without further summons, issued a distress warrant, under which pltf.'s goods were seized:—*Held*: in an action of trespass, the seizure was not justified by the statute.—*HAMMOND v. BENDYSHE* (1849), 13 Q. B. 869; 3 New Sess. Cas. 619; 18 L. J. M. C. 219; 13 L. T. O. S. 486; 13 J. P. 619; 14 Jur. 62; 116 E. R. 1405.

See, further, DISTRESS, Vol. XVIII., p. 452, Nos. 1878, 1879.

SUB-SECT. 3.—BY COUNTY COURT.

See 1896 Act, s. 68 (5), (6).

286. In respect of what matters—Propriety of mode of convening special meetings.]—*HOEY v.*

certiorari apply, unless excluded by express provision.—*R. v. WATERFORD* [1919] 2 I. R. 213.—*IR.*

r. Appeal to county court.]—A friendly society was summoned before justices who gave a decree against it

for the balance of a sum alleged to be due by it. An appeal was taken to the ct.:—*Held*: under the Petty Sessions Acts there is a general right of appeal to the county ct., & that this right of appeal is not excluded by 59 & 60 Vict. c. 26, s. 7.—*R. (M'ARENY)*

v. TYRONE COUNTY COURT JUDGE (1910), 44 I. L. T. 147.—*IR.*

PART XVIII. SECT. 2, SUB-SECT. 3.
s. *Enforcement of award.*]—Under Friendly Societies Act, 1896, s. 102,

Sect. 2.—Settlement of disputes: Sub-sects. 3 & 4.
Part XIX. Sect. 1: Sub-sects. 1 & 2, A.]

M'FARLANE (1858), 4 C. B. N. S. 718; 4 Jur. N. S. 785; 140 E. R. 1274.

Annotations:—*Reid. Ex p. Wooldridge* (1862), 1 B. & S. 844; *R. v. Tidd Pratt* (1865), 6 B. & S. 672.

Special resolutions & meetings generally, *see* Part XIV., *ante*.

287. When application may be made—After lapse of forty days—Failure by society to reconsider.]—*TINSLEY v. FARMERS' GLORY LODGE OF ODDFELLOWS* (1884), Diprose & Gammon, 252.

288. ——— ——— ———.]—*WHITE v. HUSSEY* (1885), Diprose & Gammon, 415.

289. ——— ——— Failure to hold meeting to adjudicate.]—*R. v. SHROPSHIRE COUNTY COURT JUDGE, Re THOMAS* (1887), 3 T. L. R. 526.

290. ——— ——— Appeal to general committee under rules—Failure of general committee to decide dispute.]—By Friendly Societies Act, 1875 (c. 60), s. 22, disputes between members of a registered friendly society & the society are to be decided in manner directed by the rules of the society. By Friendly Societies Act, 1875 (c. 60), s. 22 (d), where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply to the county ct., which may hear & determine the matter in dispute. A member of a branch of a friendly society having been excluded therefrom by the branch committee appealed, under the rules of the branch, to the general committee of the society who failed to decide the dispute within forty days after application:—*Held*: the appeal was a "reference" within the sub-sect., & a county ct. had jurisdiction to hear & determine the matter in dispute.—*R. v. CATLEY, CATLEY v. BILL* (1887), 19 Q. B. D. 491; 52 J. P. 38; *sub nom. R. v. NORTHAMPTONSHIRE COUNTY COURT JUDGE*, 57 L. T. 108; 35 W. R. 717.

291. ——— ——— Failure to agree to umpire—Alteration in rules.]—An action was brought by pltf., the widow of a member of a friendly society, against deft., who was the statutory officer of the society, to recover a benefit to which she claimed to be entitled under the rules. Rule 20 of the society's rules of 1908 provided that disputes between members or persons claiming through or on account of a member & the society should be decided by arbn., & prescribed certain formalities to be observed. It further provided that each dispute should be decided by three arbitrators, the first elected by claimant, the second by the society, & the third to be a county ct. judge or other person agreed on by the parties, who should act as umpire. On Mar. 11, 1910, pltf. applied for benefit under the rules. On Apr. 2, the society passed a resolution refusing plf.'s application as being contrary to rule. On Apr. 18 pltf. made an application for arbn. under the rules. This was assented to by the society, but the parties were unable to agree as to an umpire, & after the expiration of forty days, pltf. in Jan. 1911 commenced proceedings in the county ct. by virtue of 1896 Act, s. 68 (6). In Sept. 1910,

the society had amended its rules & by rule 20 as so amended it was provided that disputes should in the first instance be referred to the general committee, from whose decision there should be an appeal to an appeal committee. It was contended before the judge that pltf. not having complied with these regulations, he had no jurisdiction to entertain the action. To this contention he gave effect & declined to hear the case:—*Held*: the judge was wrong, & the alteration in the rule could not affect the right of pltf., which had become vested, to go to the county ct., & the judge accordingly had jurisdiction to try the case.—*RITSON v. DOBSON* (1911), 104 L. T. 808.

292. ——— After compliance with conditions.]—*STOCK v. REVILL* (1885), Diprose & Gammon, 418.

293. ——— After expiry of time for appeal.]—*HUTTON v. MOORE* (1887), Diprose & Gammon, 326.

——— Dispute as to proposed amalgamation—After special resolution passed & confirmed.]—*See* No. 385, *post*.

294. Irregular adjudication by society—Where provision for arbitration in rules.]—While applt., who had been for many years the secretary of resp. society, was away on his military duties, a complaint was made against him of having misapplied the society's funds. He denied the allegation & some correspondence passed between him & his successor in the secretaryship on the subject. Some months later, without giving him any notice of an intention to hold an inquiry, without formulating any charge against him, & without hearing him, the committee of management of the society passed a resolution that applt. be expelled from the society under rule 3 (2) of the rules, which provided that "any officer misapplying the funds shall repay the same & be expelled without prejudice to his liability to prosecution for such misapplication." The rules of the society provided for the decision of disputes by arbitration. Applt. took proceedings against the resps. in the county ct. for a declaration that the resolution was *ultra vires* & void & that he was still a member of the society, & for an injunction & damages. Resps. contended that the ct. had no jurisdiction to try the action by reason of 1896 Act, s. 68, & 1908 Act, s. 6. The county ct. judge made a declaration & granted the injunction asked for:—*Held*: if the committee of management in passing the resolution expelling applt. adjudicated on the question they were guilty of misconduct, & if they did not adjudicate in the proper sense they acted in direct opposition to the rules, which required that the dispute should be left to arbn., & in either view therefore the county ct. judge had jurisdiction to declare the resolution to be a nullity.—*WAYMAN v. PERSEVERANCE LODGE OF CAMBRIDGESHIRE ORDER OF UNITED BRETHREN FRIENDLY SOCIETY*, [1917] 1 K. B. 677; 86 L. J. K. B. 243; 116 L. T. 14; 33 T. L. R. 90.

295. New rules not enrolled—Subsisting society under old rules.]—A friendly society enrolled its rules in 1832, under 10 Geo. 4, c. 56, & shortly afterwards framed new rules, which were never enrolled or certified. In an action in the county

"appln. for enforcement may be made to the Sheriff Court. *H. v. H.* that a petition to the Sheriff to enforce an order by a superior court directing --- of its branches to reinstate a

certain person as a member thereof was not competent in respect that a decree to such effect could not be enforced, & that the Sheriff was therefore not bound to pronounce it.—

GALL v. LOYAL GLENBOGIE LODGE OF THE ODDFELLOWS' FRIENDLY SOCIETY (1900), 2 F. (Ct. of Sess.) 1187; 37 Sc. L. R. 911.—*SCOT*

ct., by a member against the stewards, for sick pay:—*Held*: (1) the society was a subsisting society under the original rules, by virtue of 18 & 19 Vict. c. 63, s. 2 (2), consequently, the county ct. had jurisdiction, under sect. 41 of that Act.—*Re MEREDITH & WHITTINGHAM* (1856), 1 C. B. N. S. 216; 21 J. P. 326; 140 E. R. 91.

296. Application made after rules deposited—Dispute arising before deposit.—The rules of a friendly society had not been enrolled previous to the passing of 18 & 19 Vict. c. 63. Subsequently a copy of the rules was deposited with the registrar. After this deposit, but before any certificate was obtained, application was made to the judge of the county ct. to settle a dispute which had arisen before the deposit:—*Held*: the county ct. had no jurisdiction; & a prohibition was awarded.—*SMITH v. PRYSE* (1857), 7 E. & B. 339; 28 L. T. O. S. 286; 5 W. R. 294; 21 J. P. Jo. 133; 119 E. R. 1273; *sub nom. R. v. TRAF-FORD, SMITH v. PRYSE*, 26 L. J. Q. B. 95; 3 Jur. N. S. 387.

297. Persons “interested”—Dispute between trustees & committee—Trustees not members of society.—The trustees of a friendly society, who were not members, applied to the county ct. judge to restrain the committee of management from obtaining a certificate to alter the rules from the Registrar of Friendly Societies, in pursuance of a meeting held, as the trustees alleged, without due notice, & informally. The county ct. judge made an order holding the meeting illegal, etc.:—*Held*: a prohibition must issue, on the ground that the trustees were not persons “interested” as required by 18 & 19 Vict. c. 63, s. 41, & the county ct. had therefore no jurisdiction.—*HULL v. M’FARLANE* (1857), 2 C. B. N. S. 796; 27 L. J. C. P. 41; 22 J. P. 178; 3 Jur. N. S. 1262; 140 E. R. 629.

Annotation:—*Mentd.* *Tunbridge Wells Corp. v. National Telephone Co.* (1900), 83 L. T. 525.

298. Improper exclusion of member—Right to reinstate.—*Ex p. WOOLDRIDGE*, No. 181, *ante*.

Jurisdiction to hear appeal—Provision for settle-

ment in rules—Unregistered society.—*See* No. 3, *ante*.

— **Collecting society.**—*See* No. 31, *ante*.

— **From award of registrar dissolving society.**—*See* No. 413, *post*.

299. Appeal from county court to High Court—Application to county court on form of action—County court judge not sitting as arbitrator.—*WILKINSON v. JAGGER*, No. 393, *post*.

300. Removal of proceedings from county court.—The provisions in the Friendly Societies Act 1875 (c. 60), ss. 22 (d), & 30 (10), for the reference of all disputes between the society & its members to the county ct., are permissive only, & not peremptory; & therefore there is in a proper case jurisdiction to remove to the High Ct. by *certiorari* proceedings in an action commenced against a friendly society by one of its members.—*Re ROYAL LIVER FRIENDLY SOCIETY* (1887), 35 Ch. D. 332; 56 L. J. Ch. 821; 56 L. T. 817; 36 W. R. 7.

Annotations:—*Consd.* *Wilkinson v. Jagger* (1887), 20 Q. B. D. 423. *Distd.* *Stone v. Liverpool Marine Soc.* (1894), 63 L. J. Q. B. 471. *Reid.* *Re Griffin, Griffin v. Griffin*, [1902] 1 Ch. 135.

301. — Concurrent jurisdiction of High Court.—1875 Act, s. 22 (d) conferred a jurisdiction on the county ct., but did not take away the jurisdiction of the High Ct. (*CHITTY, J.*).—*TIPLADY v. ROYAL LIVER FRIENDLY SOCIETY* (1887), 3 T. L. R. 697.

— **Subsequent issue of writ of procedendo.**—*See* CROWN PRACTICE, Vol. XVI., p. 455, No. 3280.

Necessity for jurisdiction—Usual place of business of society—Within district of county court.—*See* COUNTY COURTS, Vol. XIII., p. 460, No. 108.

SUB-SECT. 4. BY REGISTRAR.

See 1896 Act, s. 68.

Part XIX.—Offences, Penalties and Proceedings.

SECT. 1.—STATUTORY OFFENCES AND PENALTIES.

SUB-SECT. 1.—FAILURE TO MAKE ANNUAL RETURN, ETC.

302. Failure to make annual return—Liability of secretary for.—*TOMPKINS v. KILGOUR* (1879), *Diprose & Gammon*, 262.

303. — — — — — FRIENDLY SOCIETIES’ REGISTRAR v. RATIONAL SICK & BURIAL ASSOCN. & OTHER SOCIETIES (1884), *Diprose & Gammon*, 13.

304. — — — — — FRIENDLY SOCIETIES’ REGISTRAR v. UNITED FORESTERS CLUB, & OTHER SOCIETIES (1884), *Diprose & Gammon*, 12.

305. Failure to pay fine imposed by rules—On neglecting to make annual return.—*IMPERIAL ORDER OF ODDFELLOWS v. BARLOW* (1884), *Diprose & Gammon*, 15.

SUB-SECT. 2.—MISAPPLYING AND WITHHOLDING FUNDS.

A. In General.

See 1896 Act, s. 87 (3); 1908 Act, s. 9.

306. Dishonesty must be shown—Mere inability to pay insufficient.—To render the treasurer of a friendly society liable to the penalties imposed

PART XIX. SECT. 1, SUB-SECT. 2.—A.
1. *Dishonesty must be shown—Un-*
application of funds.—

In order to bring, within Friendly Societies Act, 1896, s. 16, sub-s. (8), a person who has applied a friendly property to purposes other

than those expressed or directed in the rules of the society & authorized by the Act, it is necessary to prove that such of property was done with

Sect. 1.—Statutory offences and penalties: Sub-sect. 2, A. & B.; sub-sects. 3 & 4. Sect. 2: Sub-sect. 1.]

by 18 & 19 Vict. c. 63, s. 24, for "withholding or misapplying" moneys of the society which have come to his hands as treasurer, it must be shown that he has been guilty of some fraud or misrepresentation. Mere inability to pay over the money to the trustees is not enough.—**BARRETT v. MARKHAM** (1872), L. R. 7 C. P. 405; 41 L. J. M. C. 118; 27 L. T. 313; 36 J. P. 535.

Annotation:—Apld. Madden v. Rhodes, [1906] 1 K. B. 534.

307. — Members acting honestly.]—It is desirable that building or friendly societies should have ready means of enforcing their claims for even small sums. Taking into consideration the words of the sect. [Friendly Societies Act, 1875 (c. 60), s. 16 (e)]. There has been no such misapplication as was contemplated by it. Sect. 16 (9) deals with obtaining by false representation & with retaining property & misapplying it. That means dishonestly withholding & dishonestly misapplying. The provisions as to a penalty & imprisonment cannot be construed to apply to persons acting quite honestly (**DAY, J.**).—**SCOTT v. WILSON** (1893), 9 T. L. R. 402, D. C.

308. — Procedure where fraud not proved.]—**MACKIE v. FOX**, No. 320, *post*.

309. Issue of summons in *prima facie* case.]—The steward of a club, registered as a friendly society under Friendly Societies Act, 1875 (c. 60), was entrusted with the club stock of wine, spirits, beer, tobacco, etc., it being his duty to pay over weekly to the secretary the amount received during the week in respect of the articles supplied to members & to produce his stock at the end of each quarter. On an account being taken at the end of a quarter, a large deficiency was found to exist. A metropolitan police magistrate having declined to issue a summons against the steward under sect. 16 (9) of the Act, for withholding or misapplying property of the club:—**Held**: on a rule for *mandamus*, these facts disclosed a *prima facie* case of withholding or misapplying the property of the club, & the magistrate ought to issue the summons.—**R. v. BENNETT & WARD** (1891), 63 L. J. M. C. 181; 38 Sol. Jo. 532; 10 R. 456.

B. Particular Instances.

Wrongful investment of funds—Liability of trustees.]—See Part XV., Sect. 3, *ante*.

310. Obtaining money by false pretences.]—**R. v. ROBSON** (1883), Diprose & Gammon, 259.

311. Withholding property of society—Liability of officers.]—**R. v. WATSON** (1884), Diprose & Gammon 536.

312. — Solicitors to a society.]—**R. v. JELF** (1888), Diprose & Gammon, 529.

313. — Morning Star Lodge, Manchester Unity Independent Order of Oddfellows (Leeds District) v. Hewitt (1892), Diprose & Gammon, 261.

314. — R. v. Rhodes (1893), Diprose & Gammon, 344.

315. — R. v. Smith (1894), Diprose & Gammon, 244.

316. Wrongful payment to members—Liability of treasurer.]—**LOCKETT v. BARRINGTON** (1892), Diprose & Gammon, 300.

Recovery of property & funds.]—See Sect. 3, *post*.

Criminal proceedings under general law.]—See Sect. 2, *post*.

SUB-SECT. 3.—OTHER OFFENCES.

See 1896 Act, ss. 87–90; 1908 Act, s. 9.

317. Failure to make quinquennial valuation—Liability of secretary & members.]—**FRIENDLY SOCIETIES' REGISTRAR v. NODEN** (1881), Diprose & Gammon, 430.

318. Refusal to allow member to inspect books.]—**MOFFATT v. TAUNTON** (1891), Diprose & Gammon, 307.

Failure to give notice of application for transfer—Collecting society.]—See No. 35, *ante*.

319. Loan to member exceeding £50.]—**LOUGHER v. MOLYNEUX**, No. 208, *ante*.

SUB-SECT. 4.—SUMMARY PROCEDURE UNDER STATUTE.

See 1896 Act, ss. 87, 91–93, as amended by 1908 Act, ss. 9, 10, & Collecting Societies & Industrial Assurance Cos. Act, 1896 (c. 26), s. 14.

320. Effect of taking summary proceedings—Whether remedy by action barred.]—**SHARP v. WARREN**, No. 364, *post*.

321. — SINDEN v. BANKS, No. 248, *ante*.

322. — Where under 1875 Act, s. 16 (9), a penalty was imposed upon resp. for misapplying the moneys of a friendly society & an order to repay such moneys having been made against him, he was imprisoned for default in paying the penalty & repaying the moneys:—Held: the order to repay the money misapplied by resp. & the imprisonments which was executive upon it, were a bar to an action subsequently brought by the society for the recovery of the same moneys.—**VERNON v. WATSON**, [1891] 2 Q. B. 288; 60 L. J. Q. B. 472; 64 L. T. 728; 56 J. P. 85; 39 W. R. 519; 7 T. L. R. 534, C. A.

323. Whether entitled to benefit of summary powers—Society in nature of trade union.]—**HORNBY v. CLOSE**, No. 69, *ante*.

Nature & objects of friendly societies, see Part II., ante.

324. Who may be proceeded against—Whether officer holding money jointly with non-officer member.]—(1) An officer of a friendly society, entrusted with moneys of the society jointly with

criminal intent.—**DUNCAN v. KERPENT** (1900), 26 V. L. R. 182.—AUS.

money under bond

of it.]—The case did not come within that section which was a penal one relating to the misapplication of money whereas these persons holding money as trustees under directions from

lodge that appointed them are not guilty of misapplying money within Friendly Societies Act, 1865, s. 36.—**DARTON v. KNIGHT** (1869), 6 W. W. & A'B. AUS.

another person, who is a member but not an officer of the society, is not within the summary remedy provided by 33 Geo. 3, c. 54, s. 8.

(2) The stewards of a friendly society who were, in fact, but not in name, trustees of the society, allowed to petition under that Act by the description of trustees—*Re HEANOR FRIENDLY SOCIETY* (1838), 1 Beav. 508; 2 Jur. 1061; 48 E. R. 1037.

325. — Whether assignee of insolvent officer—Estate more than sufficient to cover balance due to society.]—An officer of a friendly society, being indebted to the society for moneys received on their behalf, resigned his office & made an assignment for the benefit of his creditors. The assignee received from the estate more than the balance due to the society but refused to pay it over. No specific money belonging to the society was proved to have come to the hands of the assignee:—*Held*: the assignee was not liable to be proceeded against before justices under 18 & 19 Vict. c. 63, s. 21.—*Ex p. O'DONNELL* (1865), L. R. 1 Q. B. 274; 30 J. P. 279; 14 W. R. 83; *sub nom. MINERVA LODGE v. GLADSTONE, ETC., LIVERPOOL JJ., Ex p. O'DONNELL*, 35 L. J. M. C. 99.

326. Complaint by officer specially appointed.]—*Ex p. GORDON* (1851), 15 J. P. Jo. 767.

327. Detention of property by officer of unregistered society—Subsequent registration by majority of members.]—(1) G. was appointed treasurer of a lodge which acted as a friendly society unregistered, but afterwards he resigned his office & the members dissolved, some of the members continuing to meet at G.'s house, while the rest of the members registered themselves under the Friendly Societies Acts. The registered society then demanded the books & papers from G., who declined to give them up:—*Held*: as G. was never a member or officer of the registered society, & did not obtain the papers as the papers of a registered society, the justices had no jurisdiction under 18 & 19 Vict. c. 63, s. 24, to enforce delivery of the papers.

(2) *Qu.*: whether the offence of detaining books, etc., of a friendly society is a continuing offence, or comes within the time of limitation in Summary Jurisdiction Act, 1848 (c. 43), s. 11.—*PATRICK v. GILBERT* (1870), 34 J. P. 597; 18 W. R. 315.

328. Time within which proceedings must be brought—Under Summary Jurisdiction Act, 1848 (c. 43), s. 11—Detention of books—Continuing offence.]—*PATRICK v. GILBERT*, No. 327, *ante*.

329. — — — Repayment of money misapplied.]—By 1896 Act, s. 87 (3), if any person wilfully applies any property of the society to an unauthorised purpose, he is liable on complaint to be summarily convicted & fined, & by 1908 Act, s. 9, where, on such a complaint, it is not proved that he acted with fraudulent intent, he may be ordered to repay any sum of money applied improperly, but shall not be liable to conviction:—*Held*: the limit of six months imposed by Summary Jurisdiction Act, 1848 (c. 43), s. 11, as regards the time within which a complaint or information must be made, is a bar to summary proceedings for an order for repayment of a sum of money which was misapplied more than six months before the laying of the information.—*MACKIE v. FOX* (1911), 105 L. T. 523; 75 J. P. 470; 22 Cox, C. C. 610, D. C.

SECT. 2. — CRIMINAL PROCEEDINGS UNDER GENERAL LAW AGAINST OFFICERS AND MEMBERS.

SUB-SECT. 1.—FORGERY.

Officers, generally, *see* Part XII., *ante*.

Members, generally *see* Part XIII., *ante*.

See 1896 Act, s. 87; Forgery Act, 1913 (c. 27); & generally, CRIMINAL LAW, Vol. XV., p. 1041, Nos. 1173 *et seq.*

330. What amounts to forgery—Whether members can be convicted of forgery.]—A writing purporting to authorise the bearers to receive money deposited in a bank by a friendly society on accountable receipts, & purporting to be signed by the principal officers of the society, may, in an indictment for forgery, be alleged to be a warrant for the payment of money. The bankers having received the money on terms of repayment to the order of the society, it is forgery, etc., in members of the society to forge such a document & receive the money thereby.—*R. v. HARRIS & LLOYD* (1842), 1 Car. & Kir. 179; 2 Mood. C. C. 267, C. C. R.

331. — — —]—Prisoner was the treasurer, & also a member of an unenrolled friendly society, & it was his duty to pay moneys received into the society's bankers. Prisoner produced to the society a fictitious book, purporting it to be the bank pass-book, containing entries purporting to vouch that he had paid certain moneys into the bank, & that the bank acknowledged the receipt of them, which book did not truly represent the state of account. Prisoner having at various times drawn out moneys which he had appropriated for his own purpose, the jury found prisoner guilty of presenting a false account with intent to obtain credit for having paid the moneys into the bank with a view to obtain other moneys from the society which he might fraudulently appropriate to his own use:—*Held*: prisoner, though a member of the society, might properly be convicted of uttering a forged receipt with intent, etc.—*R. v. SMITH* (1862), L. & C. 168; 31 L. J. M. C. 154; 6 L. T. 300; 26 J. P. 452; 8 Jur. N. S. 572; 10 W. R. 583; 9 Cox, C. C. 162, C. C. R.

Annotation:—*Apld. R. v. Moody*, (1862), 31 L. J. M. C. 156.

332. — — — Although part owners of the money.]—Prisoner, being the secretary of an unenrolled benefit society of which his wife was a member, & having received a sum of money belonging to the members with directions to pay it into a certain savings bank, uttered what purported to be a bank pass-book containing a false entry of the receipt of the money, knowing it to be forged, in order to induce the members of the society to believe that he had paid the money into the bank when he had not done so. The jury also found that he did this for the purpose of being continued in his office of secretary, & thereby obtaining further moneys, & that the society was in fact defrauded by his uttering the forged writing:—*Held*: he was rightly convicted of uttering an accountable receipt, it was no objection to the conviction that he was part owner of the money, & there was evidence of an uttering with intent to defraud.—*R. v. MOODY* (1862), L. & C. 173; 31 L. J. M. C. 156; 6 L. T. 301; 26 J. P. 485; 8 Jur. N. S. 574; 10 W. R. 585; 9 Cox, C. C. 166, C. C. R.

333. — — — After dissolution of society.]—

Sect. 2.—Criminal proceedings under general law against officers and members: Sub-sects. 1, 2

By the rules of a society of Odd Fellows, having a branch called the "Conqueror Lodge," the family of deceased members of the branch lodge became entitled to a sum of money on the presentation of a certificate, filled up according to a certain form, to the secretary of the head society. After the dissolution of the "Conqueror Lodge" a forged certificate purporting to relate to the death of a member of that lodge was presented to the secretary, & a sum of money paid under it:—*Held*: an indictment for forgery or uttering the certificate could not be sustained, there being, at the time it was forged & uttered, no such branch lodge or society in existence.—*R. v. ROUSE* (1849), 4 Cox, C. C. 7.

SUB-SECT. 2.—EMBEZZLEMENT.

See 1896 Act, s. 87; & generally, CRIMINAL LAW, Vol. XV., pp. 926 *et seq.*

Officers generally, see Part XII., *ante*.

Members generally, see Part XIII., *ante*.

334. What amounts to embezzlement—Whether officer is "clerk or servant."—It is embezzlement in the clerk of a friendly society fraudulently to withhold the rents of a house collected in the course of his duty as clerk; & he may be laid to be the clerk or servant of the trustees to whom the house was conveyed, if appointed either by them or the society.—*R. v. MILLER* (1842), 2 Mood. C. C. 240, C. C. R.

Annotations:—*Reid*. *R. v. Watts* (1850), 14 J. P. 329; *R. v. Stainer* (1870), 18 W. R. 439.

335. ———.—Prisoner, a member of, & also clerk to, a friendly society, stated that he could put out their money to more advantage with a firm in London, & with the consent of the society drew the money from the bank, & appropriated it to his own purposes, & there was no such firm as he had represented:—*Held*: this was neither embezzlement nor larceny, prisoner not being a clerk or servant, & a part-owner of the money.—*R. v. WAITE* (1847), 2 Cox, C. C. 245.

Annotations:—*Distd.* *R. v. Woolley* (1850), 4 Cox, C. C. 251. *Reid*. *R. v. Watts* (1850), 14 J. P. 402.

336. ———.—The secretary of an unenrolled friendly society, whose duty it is to receive the weekly contributions of the members, to enter them in a book, & hand over the amount to the treasurer, who in his turn pays it into a bank on the names of the trustees of the society, may be properly described as the servant of the trustees in an indictment charging him with embezzling sums so received, & he cannot be described as the servant of the treasurer.—*R. v. WOOLLEY* (1850), 4 Cox, C. C. 251.

337. ———.—T. was appointed secretary of a club or friendly society, his duty being to make out promissory notes for money advanced to

borrowers, to inquire into sureties, to call meetings, & countersign all cheques on the treasurer. There was no definite duty to get in money for the club. The club on one occasion indorsed one of their promissory notes to T., directing him to sue the party or get better security. T. sued by his attorney, got the money & appropriated it:—*Held*: he was rightly convicted of embezzlement, for his duty as secretary was cognate to the duty of receiving money for the club; & though the note was indorsed to him, & an action brought in his own name, this was merely machinery for receiving the money.—*R. v. TONGUE* (1860), Bell, C. C. 289; 30 L. J. M. C. 49; 3 L. T. 415; 25 J. P. 245; 9 W. R. 59; 8 Cox, C. C. 386, C. C. R.

Annotation:—*Reid*. *R. v. Stainer* (1870), 18 W. R. 439.

338. ———.—A. was treasurer of a friendly society, whose rules directed that all the moneys of the society should be paid to the treasurer, & that he should make no payments except on an order signed by the secretary, & countersigned by the chairman, or a trustee, & that he should give security. By another rule all the moneys of the society were vested in trustees. A. was a member of the society, but received no payment for filling the office of treasurer:—*Held*: on an indictment against A. as clerk & servant of the trustees of the society, for embezzling money which he had received as treasurer, A. was not the "clerk or servant" of the trustees within Larceny Act, 1861 (c. 96), s. 68.—*R. v. TYRRE* (1869), L. R. 1 C. C. R. 177; 38 L. J. M. C. 58; 19 L. T. 657; 33 J. P. 134; 17 W. R. 334; 11 Cox, C. C. 241; C. C. R.

Annotation:—*Mentd.* *R. v. Saunders* (1899), 68 L. J. Q. B. 296.

339. ———.—In whom property should be laid.—It is embezzlement in a member of & secretary to a society, fraudulently to withhold money received from a member to be paid over to the trustees; & he may be stated, to be the clerk & servant of the trustees, & the money may be properly stated to be their property, though the society be not enrolled, & though the money ought in the ordinary course to have been received by a steward.—*R. v. HALL* (1836), 1 Mood. C. C. 474, C. C. R.

Annotations:—*Consd.* *R. v. Murphy* (1850), 4 Cox, C. C. 101; *R. v. Watts* (1850), 2 Den. 14. *Folld.* *R. v. Woolley* (1850), 4 Cox, C. C. 251.

340. ———.—A member of, & secretary to, a benefit society, deriving a percentage from the funds of the society, received in the course of his duty certain moneys from the members of the society, which it was his duty to pay into an account in the savings bank, kept in the names of certain other members of the society. Instead of paying the money into the bank, he appropriated it:—*Held*: he could not be convicted of embezzling the money upon an indictment charging him to be the servant of "B. & others," & laying the money to be that of "B. & others," B. being an ordinary member of the society.—*R. v. TAFES* (1850), 4 Cox, C. C. 169. *Annotation*:—*Folld.* *R. v. Diprose* (1868), 19 L. T. 292.

PART XIX. SECT. 2, SUB-SECT. 2.

334 i. What amounts to embezzlement—Whether officer is "clerk or servant."—According to the Rules of a Friendly Society certified under 17 Vict. No. 26, s. 11, the financial secretary was elected by the members & might be dismissed by them. He was paid his salary by the Trustees through the who was elected in like

manner. It was his duty to receive the subscriptions of the members & to pay over the amount to the Treasurer. Prisoner being a member of the society & its financial secretary was convicted of having embezzled certain moneys of the society, being charged with having done so as the "servant" of the trustees:—*Held*: rightly so charged.—*R. v. MORROW* (1872), 11 N. S. W. S. C. R. 63.—**AUS.**

334 ii. ———.—It is sufficient to warrant a conviction for embezzlement, to prove that the prisoner was employed as secretary of a friendly society, & had not duly accounted according to the rules of the society & that having taken upon himself to collect moneys, he was answerable as a servant for embezzling such moneys.—*R. v. MURPHY* (1850), 4 Cox, C. C. 101.

341. ———. —Where, by the rules of certain unenrolled friendly societies, the members of one lodge were at liberty to pay their contributions to another lodge, if more convenient to them so to do:—*Held*: in an indictment against the secretary of a lodge for embezzling moneys received from a member of another lodge, the moneys may be laid as the property of, & prisoner may be alleged to be clerk & servant to, the trustees of his lodge, to whose account all moneys received by him ought to be paid, although the trustees, in their turn would, in this instance, have to account to the other lodge for the particular sum received on its behalf.

The secretary of an unenrolled friendly society, who is paid a yearly salary out of its funds, is properly described in the indictment as clerk & servant to the trustees, & it would be incorrect to designate him as employed in the capacity of clerk & servant. The latter description only applies, where prisoner is employed on temporary occasions, & does not usually fill the situation of clerk or servant.—*R. v. WOOLLEY* (1850), 4 Cox, C. C. 255.

342. ———. —The secretary of a friendly society under 18 & 19 Vict. c. 63, in which no trustee had ever been appointed, was convicted on an indictment for embezzlement, prior to the coming into operation of Larceny Act, 1868 (c. 116), & the indictment described him as the servant of the treasurer, & also as the servant of C., a member, & others:—*Held*: the conviction was wrong.—*R. v. DIPROSE* (1868), 19 L. T. 292; 33 J. P. 37; 17 W. R. 180; 11 Cox, C. C. 185, C. C. R.

343. ———. —Prisoner, a member of a friendly society, was employed to receive the weekly payments made by the members. He gave correct receipts to the members, but omitted to enter in the contribution & cash books a large number of the sums so received. On being called upon for an explanation, he admitted that he had received the sums so omitted:—*Held*: he was guilty of embezzlement.—*R. v. PROUD* (1861), Le. & Ca. 97; 31 L. J. M. C. 71; 5 L. T. 331; 25 J. P. 772; 10 W. R. 62; 9 Cox, C. C. 22, C. C. R.

Annotations:—*Consd.* *R. v. Bren* (1863), Le. & Ca. 346; *R. v. Tyree* (1869), L. R. 1 C. C. R. 177. *Refd.* *R. v. Balls* (1871), L. R. 1 C. C. R. 328. *Mentd.* *Gordon v. Jennings* (1882), 46 L. T. 534.

344. Form of indictment — Property to be laid in trustees. —The secretary of a friendly society, of which A. & others were the trustees, was charged with embezzling money belonging to the society. In the indictment the property was laid as "of A. & others," without alleging that they were trustees of the society:—*Held*: the indictment might be amended by adding the words "trustees of, etc."—*R. v. MARKS* (1866), 10 Cox, C. C. 367.

345. Effect of failure to prove registration of society. —*R. v. KEW* (1885), Diprose & Gammon, 212.

SUB-SECT. 3.—LARCENY.

See 1896 Act, s. 87; & generally, CRIMINAL LAW, Vol. XV., pp. 865 *et seq.*

Officers generally, see Part XII., *ante*.

Members generally, see Part XIII., *ante*.

346. What amounts to larceny. —A treasurer of a money club received small weekly payments from each member, & had authority, with the secretary's consent, to lend the club money to members. There was a parochial division of the funds, & profits, among the members:—*Held*: the treasurer could not be indicted as a fraudulent bailee under 20 & 21 Vict. c. 54, s. 4, for larceny of moneys paid in by a member.—*R. v. HASSALL* (1861), Le. & Ca. 58; 30 L. J. M. C. 175; 4 L. T. 561; 25 J. P. 613; 7 Jur. N. S. 1064; 9 W. R. 708; 8 Cox, C. C. 491, C. C. R.

Annotations:—*Refd.* *R. v. De Banks* (1884), 13 Q. B. D. 29; *R. v. Ashwell* (1885), 16 Q. B. D. 190; *R. v. Holloway Governor, Ex p. George* (1897), 66 L. J. Q. B. 830; *Moss v. Hancock*, [1899] 2 Q. B. 111.

347. ———. —In whom property should be laid. —One of three stewards of a benefit society, not enrolled under 10 Geo. 4, c. 56, having the key to one of three locks upon the box, & abstracting the contents during the temporary absence of his co-trustees, cannot be convicted of larceny under a count in the indictment laying the property in the landlord of the inn where the box was kept at the time of the theft.

Prisoner had the lawful possession of the box at the time he abstracted its contents. He had also a joint property in those contents; he cannot therefore be held to have stolen the contents of that box from the landlord, who was not responsible for the same while in such possession of prisoner & his co-trustees (*PLATT, B.*).—*R. v. MARCHANT* (1815), 5 L. T. O. S. 347.

348. ———. —Prisoner, who was a trustee of a friendly society, was appointed by a resolution of the society to receive money from the treasurer & carry it to the bank. He received the money from the treasurer's clerk, but instead of taking it to the bank, he applied it to his own purposes. He was indicted for stealing as bailee of the money of the treasurer, & also for a common law larceny, the money being laid as that of the treasurer. 18 & 19 Vict. c. 63, s. 18, vests the property of such societies in the trustees & directs that in all indictments the property shall be laid in their names:—*Held*: prisoner could not under these counts be convicted either as a bailee or of a common law larceny.—*R. v. LOOSE* (1860), Bell, C. C. 259; 29 L. J. M. C. 132; 2 L. T. 254; 24 J. P. 341; 6 Jur. N. S. 513; 8 W. R. 422; 8 Cox, C. C. 302, C. C. R.

Annotation:—*Apld.* *R. v. Marsh* (1862), 3 F. & F. 623.

349. ———. —H., a member of a friendly society, was in possession of a shop where goods were sold for the benefit of the society. Each member partook of the profit, & was subject to the loss arising from the shop. H. had the sole management, & was answerable for the safety of all the property & money coming to his possession in the course of the management. Prisoner, also a member of the society, assisted in the shop without salary, & was indicted for stealing some marked money which H. had placed in the till. The money was laid in the indictment as belonging to H.:—*Held*: the money was properly laid in the indictment as belonging to H., & prisoner, although a member, could be convicted of larceny.

345 i. Effect of failure to prove registration of society. —*R. v. WOOD* (1862), 1 W. & W. 371.—AUS.

PART XIX. SECT. 2, SUB-SECT. 3.
347 i. What amounts to larceny.—In

whom property should be laid.—*R. WATSON*, [1908] V. L. R. 103.—AUS.

Sect. 2.—Criminal proceedings under general law against officers and members: Sub-sect. 3. Sect. 3: Sub-sect. 1, A. (a), (b) & (c), & B. (a) & (b).]

—*R. v. WEBSTER* (1861), Le. & Ca. 77; 31 L. J. M. C. 17; 5 L. T. 327; 26 J. P. 212; 7 Jur. N. S. 1208; 10 W. R. 20; 9 Cox, C. C. 13, C. C. R. Annotation:—*Reid. R. v. Lowrie* (1867), 36 L. J. M. C. 24.

350. ———.]—Any person who has an interest in a sum of money is a "beneficial owner" within the meaning of Larceny Act, 1868 (c. 116), s. 1. Where then a number of persons have a right to have a fund applied to the extinction of their liability under a guarantee, these persons are all "beneficial owners," & any one of them who misappropriates the fund to his own use may be properly convicted of stealing it.

A. was a member & acted as the secretary of a committee which had guaranteed the expenses of an entertainment. He in the discharge of his duty obtained possession of the entrance moneys, & paid the amount into the banking account of one B. Subsequently, by means of false representations, he obtained a cheque for the amount from B., cashed it, & absconded with the proceeds:—*Held*: (1) he was properly convicted under Larceny Act, 1868 (c. 116), s. 1, of stealing moneys of which he with others was the beneficial owner; (2) a count in the indictment which charged that A. had stolen the moneys of the members of the committee was bad.—*R. v. NEAT* (1899), 69 L. J. Q. B. 118; 81 L. T. 680; 64 J. P. 39; 16 T. L. R. 109; 19 Cox, C. C. 424, C. C. R.

351. ——— In unregistered society.]—A member of two unenrolled benefit clubs paid as secretary & entrusted with the funds to deposit in the bank in the joint names of himself & the treasurer, dishonestly appropriating to himself the sums entrusted to him, cannot be found guilty of larceny as a servant, nor of embezzlement, nor of larceny as a bailee.—*R. v. MARSH* (1862), 3 F. & F. 523.

352. ———.]—*R. v. WINFER* (1878), Diprose & Gammon, 527.

353. Jurisdiction of quarter sessions—Where justices' order obtained under the statute—But not complied with.]—*R. v. STAFFORD JJ., Ex p. FOSTER* (1894), 67 L. T. Jo. 123, D. C.

SECT. 3.—LEGAL PROCEEDINGS.

B-SECT. 1.—BY AND AGAINST SOCIETIES.

A. By Societies.

(a) In General.

See 1896 Act, s. 94; 1908 Act, s. 11.

354. Whether Attorney-General necessary party—Society in nature of private charity.]—A voluntary society entered into with an intention to provide by a weekly subscription for such of the members as should become necessitous, & their widows, is in the nature only of a private charity, & not necessary the A.-G. should be a party.—*ANON.* (1745), 3 Atk. 277; 26 E. R. 962, L. C.

—*See, generally, CROWN PRACTICE, Vol. XVI., p. 488, Nos. 3701 et seq.; CHARITIES, pp. 397, 398, Nos. 2213–2234.*

355. Action on promissory note—Rules filed after note made—Before payment due.]—In an

action by the treasurer of a friendly society on a promissory note, it is unnecessary to prove the averment in the declaration, that the rules of the society were filed before the making of the promises. It is sufficient to show that they were filed before deft.'s default in paying the note.—*MARGETT v. PARKES* (1844), 1 Dow. & L. 582; 13 L. J. Ex. 87; 2 L. T. O. S. 104.

Registration of rules.]—See Part XI., Sect. 2, ante.

356. Action on bond—Repayment of money due from defaulting secretary—Coercion & threats.]—*ANDREWS v. SOUTHWART* (1885), Diprose & Gammon, 73.

357. Injunction to restrain libel—Likely to injure society—Circulated by members to non-members.]—An injunction can be granted to restrain a libel likely to injure a friendly society or joint stock co. A member of a friendly society issued to persons not members of the society circulars containing inaccurate statements as to the financial condition of the society:—*Held*: such circulars ought to be restrained by injunction.—*HILL v. HART-DAVIES* (1882), 21 Ch. D. 798; 51 L. J. Ch. 845; 47 L. T. 82; 31 W. R. 22.

Annotation:—*Consd. Liverpool Household Stores Assocn. v. Smith* (1887), 37 Ch. D. 170.

358. Solicitors to conduct litigation—Power of board of management to direct trustees as to—Trustees merely nominal plaintiffs.]—*LASKEY v. RUNTZ*, No. 362, post.

359. Costs—When awarded on county court scale—High Court action against several defendants—Judgment exceeding fifty pounds recovered against one.]—Defts. B. & R. entered into a joint & several bond in £50 to plffs., who were the trustees of a friendly society, to secure the fidelity of deft. B., who was the treasurer of the society. B. having failed to account for £90, plffs. brought an action in the High Ct. against both defts., in which they recovered judgment for £50 against both defts. & for £90 against deft. B., with costs against deft. B. & such costs against deft. R. as they were entitled to. The judge who tried the case having refused to certify that the case was fit to be tried in the High Ct.:—*Held*: as against deft. R. plffs. were only entitled to costs on the county ct. scale.—*DUXBURY v. BARLOW*, [1901] 2 K. B. 23; 70 L. J. K. B. 478; 84 L. T. 518; 49 W. R. 540; 17 T. L. R. 420; 45 Sol. Jo. 407, C. A.

(b) By Whom Action maintainable.

See 1896 Act, s. 94; 1908 Act, s. 11.

360. Officers properly appointed.]—*SHARP v. WARREN*, No. 364, post.

361. ——— Appointment contrary to rules.]—*DEWHURST v. CLARKSON*, No. 87, ante.

362. Trustees—Mere nominal plaintiffs.]—By the rules of a society the property of the society was vested in trustees of the society for the time being in whose names any action concerning the property of the society should be brought or defended. The trustees brought actions on behalf of the society, & with the sanction of the society they employed a firm of solrs. to conduct the actions:—*Held*: the trustees were nominal plffs., the real litigants being the society & therefore the board of management of the society had power to direct the trustees as to any change of solrs.—

LASKEY v. RUNTZ (1908), 24 T. L. R. 496; 52 Sol. Jo. 459.

— **Elected under new rules—New rules not registered.]—See No. 100, ante.**

363. Stewards acting as trustees.]—Re HEANOR FRIENDLY SOCIETY, No. 324, ante.

(c) *Against Members.*

See 1896 Act, s. 94, as amended by 1908 Act, s. 11.

364. For recovery of money.]—(1) Assumpsit for money had & received may be maintained against one who had been a member of a benefit club for money entrusted to his keeping by the rest of the society, in the name of the officers properly appointed for managing their affairs, under the articles.

(2) If by the articles, the society are empowered to appoint a treasurer, an appointment of two persons to be treasurers is within the power.

(3) It is not an objection to such an action that deft. having been a member at the time when the promise is laid to have been made in the declaration was a partner or tenant in common & therefore could not be sued in *assumpsit* for money had & received.

(4) An Act of Parliament giving a summary remedy to persons against defaulters, though in terms apparently prescribing such remedy is cumulative, & does not take away the previous right to sue by action at law.—**SHARP v. WARREN** (1818), 6 Price, 131; 146 E. R. 763.

Annotation:—As to (4) Rejd. Eastern Archipelago Co. v. R. (1853), 2 E. & B. 856.

365. — Society not within Act.]—Re BRITON FRIENDLY SOCIETY (1852), 1 W. R. 50.

366. — Improperly paid.]—JAMES v. BARRETT (1882), Diprose & Gammon, 292.

367. — Time for proceedings—Whether non-payment a continuing cause of complaint.]—HARRPIN v. SYKES (1885), 1 T. L. R. 307; 49 J. P. Jo. 148, D. C.

To restrain libellous circulars.]—See No. 357, ante.

In case of disputes generally, *see* Part XVIII., *ante*.

Proceedings under Friendly Societies Acts.]—See Sect. 1, ante.

Criminal proceedings.]—See Sect. 2, ante.

B. Against Societies.

(a) *Against Whom Action maintainable.*

See 1896 Act, s. 94; 1908 Act, s. 11.

368. Trustees—For debts incurred before ap-

pointment.]—A friendly society was established & registered under 13 & 14 Vict. c. 115, but no appointment of trustees took place until after the passing of 18 & 19 Vict. c. 63, & the resolution appointing the trustees was not transmitted to the registrar as required by sect. 13 of the earlier Act:—*Held*: the persons so appointed were the proper parties to be sued for a debt due from the society, although partly contracted before their appointment.—BECKETT v. WILLETTTS** (1857), 20 L. T. O. S. 144; 5 W. R. 622; 21 J. P. Jo. 356.**

369. Trustees secretary & treasurer of branch—Action by trustees of society—Misapplication of funds.]—WINTER v. WILKINSON, No. 254, ante.

370. Secretary—Action by solicitor of member—On agreement to pay costs.]—Proceedings having been taken by a member of a society in a county ct. to enforce a claim against the society, a compromise was come to between plff., the solr. of the member, & the society, by which (*inter alia*) the society promised to pay plff. certain costs & charges. These costs & charges not having been paid, plff. sued the secretary of the society in a superior ct.:—*Held*: this was a proceeding within 18 & 19 Vict. c. 63, s. 19, touching the right of the society, & was properly brought against the secretary under 21 & 22 Vict. c. 101, s. 7.—ROBERTS v. PAGE** (1876), 1 Q. B. D. 476; 45 L. J. Q. B. 601; 35 L. T. 325.**

371. Representations of classes in society Where society ceased to exist.]—PARK v. CLEGG, No. 202, ante.

(b) *Personal Liability of Officers.*

Officers generally, *see* Part XII., *ante*.

372. To be distrained upon.]—PIKE v. CARTER, No. 277, ante.

373. To repay money—Where money improperly divided among members.]—COX v. JAMES (1882), Diprose & Gammon, 282.

Annotation:—Rejd. Winter v. Wilkinson, [1915] 1 Ch. 317.

374. For contempt of court—Where trustees evade order of the court.]—Defts., trustees of a branch of a friendly society, were restrained by injunction from dividing certain money among the members of the branch. Shortly afterwards deft. trustees retired, & new trustees were appointed, who, being aware of the effect of the injunction, under an order of the branch society, divided the money among the members, including the old trustees. The ct. considered, on the facts, that the proceedings were an attempt on the part of the branch society & the old & new trustees to avoid the injunction, & a device for disobeying it, in which the new trustees co-operated:—*Held*: the new trustees, as well as the old, were guilty

PART XIX. SECT. 3, SUB-SECT. 1.—
A. (c).

b. For cancellation of certificate.]—After an appln. for membership in a benevolent association had been accepted a dispute arose as to applicant's age, & an action was brought by him to compel the association to issue to him a certificate of membership. This action was settled, the association accepting an affidavit of applicant's brother as proof of his age & thereupon issuing the certificate of membership. Subsequently the association brought this action asking for cancellation of the certificate on the ground that applicant's age was not in fact

that stated by his brother:—Held: nothing less than clear proof by the assocn. of the actual age of applicant, & of fraud in procuring & making the affidavit, would suffice to undo the settlement & entitle the association to cancellation of the certificate.—**SONS OF SCOTLAND BENEVOLENT IN. v. FAULKNER** (1899), 26 A. R. 1.—**CAN.**

PART XIX. SECT. 3, SUB-SECT. 1.—
B.

a. Where society divided into lodges.]—By the rules of a friendly society, divided into lodges, a member who

an accident disabling him for life was entitled to a provision, on the lodge of which he was a member reporting in favour of his appln. & on the same being approved of by a majority of the whole lodges of the society, in which case the central committee were directed to pay over the sum:—Held: an action by a to recover the above provision against the lodge to which he belonged & not against the society or its central committee, was incompetent.—**M'KENNAN v. GREENOCK LODGE OF UNITED OPERATIVE MASONRY ASSOCN.** (1873), 11 Macph. (Cl. of Sess.) 548; 45 Sc. Jur. 351.—**SCOT.**

Sect. 3.—Legal proceedings: Sub-sect. 1, B. (b)
(c); **sub-sect. 2, A. & B. Part XX. Sects. 1**

of contempt of ct.—**AVERY v. ANDREWS** (1882), 51 L. J. Ch. 414; *sub nom.* **AVORY v. ANDREWS**, 46 L. T. 279; 30 W. R. 564.

Annotations:—*Consd.* **United Telephone Co. v. Dale** (1884), 25 Ch. D. 778; **Seaward v. Paterson**, [1897] 1 Ch. 545. *Refd.* **Bosch v. Simms Manufacturing Co.** (1909), 25 T. L. R. 419; **Scott v. Scott**, [1913] A. C. 417.

375. To be committed—Where judgment obtained against secretary—For sick pay due to member.]—**BIBBY v. IMPERIAL LODGE OF DRUIDS (SECRETARY)** (1892), *Diprose & Gammon*, 177.

To obey order of justices—To reinstate a member.]—*See* Part XIII., Sect. 6, sub-sect. 2, D., *ante*.

For offences generally.]—*See* Sects. 1 & 2, *ante*.

(c) *Other Cases.*

Sec 1896 Act, s. 94; 1908 Act, s. 11.

376. To garnishee debt due to member—Where no notice of withdrawal given—In accordance with rules.]—**COWLEY v. TAYLOR, ACKERS, GARNISHEES** (1908), 124 L. T. Jo. 569, D. C.

377. To recover insurance premiums—By person having no insurable interest—Where no fraud proved on the part of society.]—**EVANSON v. CROOKS**, No. 144, *ante*.

378. Admissibility in evidence of rules—To ascertain whether fund under control of central body.]—**CRICHTON v. WEST** (1896), 12 T. L. R. 164, D. C.

By members—Generally.]—*See* Sub-sect. 2, A., *post*.

By representatives of members—As to rights of members, payments on death, etc.]—*See* Part XIII., Sects. 3 & 4, *ante*.

By Poor Law guardians—As to maintenance of members.]—*See* Part XIII., Sect. 3, sub-sect. 2, C., *ante*.

Rules generally, *see* Part XI., *ante*.

SUB-SECT. 2. BY AND AGAINST MEMBERS

A. *By Members.*

See 1896 Act, s. 94; 1908 Act, s. 11.

379. To recover property—When property taken

by another member.]—A member of an amicable society entrusted with a box containing the fund, & bound by bond to keep it safely, cannot maintain trover against another member & a third person, who take it from him.—**HOLLIDAY v. CAMSELL & WHITE** (1787), 1 Term Rep. 658; 99 E. R. 1305.

380. To recover deposits—Action by father of minor against treasurer—No privity of contract.]—In an action for money had & received, brought to recover sums deposited with deft. as the treasurer of a money club, it appeared that the money had been deposited not by pltf. but by his son, a minor, who was a member of the club, & who had made several payments himself, but had afterwards run away from his service, & the payments were then continued by his sister from money furnished by her mother. There was no evidence that deft. knew anything of pltf.:—*Held*: the proper question for the jury was whether there was any privity of contract between deft. & pltf., & a direction that if the money deposited was the money of pltf., he was entitled to recover, was wrong.—**BLUCK v. SIDDAWAY** (1846), 15 L. J. Q. B. 359.

381. For declaration & injunction—Against other members.]—**CLOUGH v. RATCLIFFE**, No. 15, *ante*.

382. To establish right to shares—On dissolution of unregistered society.]—**MASON v. WATKINS**, No. 23, *ante*.

383. Damages for negligence of medical officer—Whether society liable for.]—**BARNES v. LINCOLN ODDFELLOWS' MEDICAL ASSOCN.** (1895), 99 L. T. Jo. 217.

Disputes generally.]—*See* Part XVIII.

As to rights of members & title to membership.]—*See* Part XIII., Sect. 3, *ante*.

By representatives of members—As to payments on death.]—*See* Part XIII., Sect. 4, *ante*.

B. *Against Members.*

By society.]—*See* Sect. 3, sub-sect. 1, A. (a), *ante*.

For statutory offences & penalties.]—*See* Sect. 1, *ante*.

Criminal proceedings.]—*See* Sect. 2, *ante*.

PART XIX. SECT. 3, SUB-SECT. 2.—A.

d. *To recover premium for endowment policy—Friendly Societies Act, 1896, s. 45.]—***BYRNE v. RUDD**, [1920] 2 I. R. 20.—IR.

Part XX. Amalgamation, Conversion, Secession, Expulsion, etc.

SECT. 1.—AMALGAMATION.

See 1896 Act, ss. 70, 72.

384. Power to amalgamate—With limited company.]—The N. C. S. C., a limited co., had power by its memorandum to make & carry into effect "such arrangements with respect to the union of interests or amalgamation, either in whole or in part, or working arrangements with any other cos. or persons of a similar nature to that of this co.":—*Held*: the taking over bodily, the stock, assets, & liabilities of the N. S. A., a friendly society, which had the same objects, & giving a new class of shares in the N. C. S. C. to the shareholders of the N. S. A., was an amalgamation within the power of the co.—*PULBROOK v. NEW CIVIL SERVICE CO-OPERATION, LTD.* (1877), 26 W. R. 11.

385. — Jurisdiction of county court to interfere—Before special resolution passed & confirmed.]—The committee of a friendly society having agreed for the amalgamation of the society with another co., summoned a general meeting in order to pass a special resolution for carrying the amalgamation into effect. Some of the members, who were dissatisfied with the provision proposed to be made for the satisfaction of their claims, filed a plaint in the county ct. to restrain the society from carrying into effect the amalgamation & obtained a receiver of the assets of the society, although the resolution for amalgamation had not then been passed. The public officer of the society applied for a writ of prohibition to restrain the proceedings in the county ct.:—*Held*: the county ct. had no jurisdiction to interfere with the action of the society until the special resolution had been passed & confirmed.—*JONES v. SLEE* (1886), 32 Ch. D. 585; 55 L. J. Ch. 908; 55 L. T. 129; 51 J. P. 83; 34 W. R. 692; 2 T. L. R. 625, C. A.

Annotations:—*Mentd.* *Re Briton Medical & General Life Assocn.* (1888), 59 L. T. 134; *The Recepta*, [1893] P. 255.

SECT. 2.—CONVERSION INTO LIMITED COMPANY.

See 1896 Act, ss. 71, 72.

Limited companies generally, see COMPANIES, Vols. IX., X.

386. Extension of objects — General rule.]—It is not competent for a society, registered under 1896 Act, under the guise of converting itself into a limited co. pursuant to sect. 71 (1) of that Act, to turn itself into a co. with objects much more

extensive than & widely differing from the objects specified by the rules of the society or by sect. 8 (1) of the Act. The procedure under sect. 71 (1) is a mere matter of machinery under which a society can become a different legal entity having objects identical with the objects prescribed by its rules or by sect. 8 (1), though when converted it can exercise such powers of altering or enlarging its objects, as defined by its memorandum, as are conferred by the Cos. Act on all limited cos.—*BLTYHE v. BIRTLEY*, [1910] 1 Ch. 228; 79 L. J. Ch. 315; 101 L. T. 842; 26 T. L. R. 215; 17 Mans. 165, C. A.

Annotation:—*Distd.* *McGlade v. Royal London Mutual Insec. Soc.*, [1910] 2 Ch. 169.

387. — Whether court will sanction — Where business previously included insurance.]—The ct. will in a proper case sanction the extension of the objects of a friendly society, which has been converted into a limited co., though the business carried on by the society before conversion included insurance business.—*Re ROYAL LONDON MUTUAL ASSURANCE SOCIETY, LTD.* (1910), 55 Sol. Jo. 46.

388. — Where shares not yet allotted — Special resolution ineffective.]—A burial society which subsequently conducted life assurance business up to a limited amount was registered under 1896 Act, & attained to a membership of 373,000, with an income of £149,000 a year. In 1913 a special resolution was passed for the conversion of the society into a co. limited by shares pursuant to 1896 Act, s. 71. The objects of the co. under its memorandum were restricted to the objects of the society immediately prior to the conversion. There were no signatories to the memorandum of assocn. & no register of shareholders of the co., nor had any shares been in fact allotted. It was estimated that two years might elapse before the allotment of shares could be made. In 1914 a special resolution of the co. was passed altering & extending the object clauses of the memorandum. Upon a petition being presented by the co. for the confirmation by the ct. of this special resolution:—*Held*: the conversion of the society into a limited co. under sect. 71 did not involve the simultaneous conversion of the members of the society into members of the co., & inasmuch as there were no members of the co. in existence within Co.'s (Consolidation) Act, 1908, s. 24, there was no special resolution properly passed which the ct. could confirm, & no such order as was asked could be made on the petition.—*Re BLACKBURN PHILANTHROPIC ASSURANCE CO., LTD.*, [1914] 2 Ch. 430; 84 L. J. Ch. 145; 58 Sol. Jo. 798; 21 Mans. 342.

389. — Whether exercise of extended powers

PART XX. SECT. 2.

386 I. Extension of objects—General rule.]—A scheme for the conversion of a friendly society into a co., the memorandum of association of which permit (a) the distribution of surplus assets among members, who under the rules of the society would have had no right to participate in that surplus, & (b) payments to employees of sums

out of capital which were unauthorised by the society's rules; *in ultra vires*.—*WILKINSON v. CITY OF GLASGOW FRIENDLY SOCIETY*, [1911] 8. C. 476; 48 Sc. L. R. 504; 1 S. L. T. 86.—SCOT.

*s. Resolution for conversion — Rules of society cannot override statute.]—*A resolution for the conversion of a society into a limited co. in terms of Friendly Societies Act, 1896, s. 71, passed by a general meeting of "dele-

in ultra vires in respect that under the sect. a resolution for conversion can only be carried by a certain majority of the members at a general meeting & that requirement is not affected by the rule of the society providing that meetings should consist of "delegates."—*WILKINSON v. CITY OF GLASGOW FRIENDLY SOCIETY*, [1911] 8. C. 476; 48 Sc. L. R. 504; 1 S. L. T. 86.—SCOT.

2.—Conversion into limited company. Sects. 8 & 4. Part XXI.]

restrained—Action by one member on behalf of others.]—Where a registered friendly society, in avowed exercise of 1896 Act, s. 71, passed a special resolution to convert itself into a co. under the Cos. Acts, with a memorandum of assocn. annexed thereto, & obtained registration of itself as a co., & a member of the co. who had been a member of the friendly society, suing on behalf of himself & all other the members of the co., moved for an injunction to restrain the co. from exercising any of the powers enumerated in the memorandum of assocn. in excess of those allowed by the 1896 Act:—*Held*: the action was misconceived & the motion ought to be refused.—*McGLADE v. ROYAL LONDON MUTUAL INSURANCE SOCIETY, LTD.*, [1910] 2 Ch. 169; 79 L. J. Ch. 631; 103 L. T. 155; 26 T. L. R. 471; 54 Sol. Jo. 505; 17 Mans. 358, C. A.

390. Effect of conversion into limited company—Whether members of society become members of company simultaneously.]—*Re BLACKBURN PHILANTHROPIC ASSURANCE CO., LTD.*, No. 388, *ante*.

Amalgamation with limited company.]—*See* Sect. 1.

SECT. 3.—SECESSION.

See 1896 Act, ss. 20, 21, 81.

391. Secession of lodge from central society—Binding force of rules.]—It seems to me that when you get to the bottom of the case it determines itself by the application of the very simplest principles of the law of contract. All members of this lodge are members of the order. This is fundamental. By the act of initiation they become members of the order grouped in a particular lodge, & promise that they will, to the best of their ability, conform to all rules duly passed by the authorised committee of the lodge, district, or order. The district & the lodge are not different incorporations. They consist of an aggregate of individuals, all of whom belong to the order. That is the cardinal point of the whole matter to my mind. The members of the order may group themselves into lodges & into districts, & each district, viewing itself for that purpose as a centre, & each lodge viewing itself for that purpose as a centre, for the moment may acquire by registration a separate existence; but, if they do, it is only a separate existence *quoad* themselves as a district & its lodges, & it neither destroys nor affects in any way their outstanding obligations to the order of which they are members, & to a group of members to which they belong to a larger body. They cannot by anything they do to themselves as a group destroy the contractual obligations which already exist between themselves & the larger body (*BOWEN, L.J.*).—*SCHOFIELD v. VAUSE* (1886), 58 L. T. 491, n.; 36 W. R. 170, n., C. A.

392. — Whether the consent of district necessary—Construction of rules.]—*GREEN v. HENDRY* (1890), *Times*, May 19, C. A.

393. Registration of lodge as branch—Whether conclusive evidence of status.]—A branch "lodge" of a friendly society, registered as a branch under Friendly Societies Act, 1875 (c. 60), having taken

steps to secede from the society the validity of which the "district" of the society to which it belonged refused to recognise, the trustees of the "district" issued a plaint in the county ct. against the trustees of the "lodge" to recover sums which had become due under the rules to the "district" funds after the alleged secession, & of which payment had been refused. *Pltfs.* particulars stated further, that the action was brought for the enforcing of the rules of the society in respect of other matters, & of settling a dispute between *pltfs.* & *defts.* On the case coming before the ct. for trial, it appeared that the "lodge" still remained registered under the Act as a branch of the society, & an adjournment was granted for the purpose of enabling *defts.* to apply for a rectification of the register. The registrar of friendly societies having refused to cancel the registration of the branch until the dispute between the "district" & the "lodge" was determined by competent authority, the county ct. judge, on the adjourned hearing, held, that, by sect. 11 (10) of the Act, the certificate of registration was conclusive of the status of the "lodge" as a branch, & refused to hear evidence as to the validity of the secession giving judgment for *pltfs.* accordingly. *Defts.* appealed by way of motion in the Q. B. Div. for a new trial:—*Held*: (1) on a preliminary objection to the appeal the action, being an "application" to the county ct. within sect. 22 (d) of the Act, was in the nature of an ordinary county ct. action, & not a reference to the county ct. judge sitting as an arbitrator, & the appeal was therefore rightly brought by way of motion; (2) sect. 11 (10) did not make the certificate of registration conclusive evidence of the status of the "lodge" as a branch, but the question of the validity of the secession was one for the judge to hear & determine on the whole evidence in the action.—*WILKINSON v. JAGGER* (1887), 20 Q. B. D. 423; 57 L. J. Q. B. 254; 58 L. T. 487; 52 J. P. 533; 36 W. R. 169; 4 T. L. R. 144.

394. Notice of secession—Whether essential—To members joining after resolution to secede.]—A branch friendly society having resolved to secede from the parent society, & the grand secretary having refused without a reason to grant a certificate of secession, the branch society appealed against this refusal:—*Held*: (1) notice of proposed secession need not be given to members who joined the branch after the resolution to secede; (2) the assent of the central body was not necessary to the holding of the branch society's special meeting; (3) the majority of branch members must assent, & also the majority at the special meeting must assent, to secession; (4) in settling accounts, the funds of the branch meeting were not to be divided as in case of being wound up; (5) in construing the Friendly Societies Acts, the substance of the procedure & not technicalities were to be looked to.—*Re SHEFFIELD ORDER OF DRUIDS SOCIETY* (1892), 56 J. P. 613; 8 T. L. R. 389, D. C.

395. Special meeting to resolve on secession—Whether assent of central body essential.]—*Re SHEFFIELD ORDER OF DRUIDS SOCIETY*, No. 394, *ante*.

396. — Presence of three-fourths of members of parent society.]—*BOLTON DISTRICT NATIONAL INDEPENDENT ORDER OF ODDFELLOWS v. NATIONAL INDEPENDENT ORDER OF ODDFELLOWS* (1896), *Diprose & Gammon*, 55.

397. Consent of members to secession—Majority

of branch members—& majority at special meeting.]—*Re SHEFFIELD ORDER OF DRUIDS SOCIETY*, No. 394, *ante*.

398. Settlement of accounts on secession—Division of funds of branch—Not as in winding up.]—*Re SHEFFIELD ORDER OF DRUIDS SOCIETY*, No. 394, *ante*.

Dissolution of societies, see Part XXII.

399. Liability of seceding branch—For amount due on secession—Share in deficit of funds.]—*SNELL v. VINE* (1890), Diprose & Gammon, 313.

400. ——— Effect of alteration of rule as to—Before expiry of notice of secession.]—*GUTBERLET v. WOOLGAR* (1898), Report of Chief Registrar of Friendly Societies (Parliamentary Papers, Vol. 79), 32.

401. ——— For unpaid levies & fines—Enforcement of award of district committee.]—*LEEDS DISTRICT OF THE GRAND UNITED ORDER OF ODD-FELLOWS TRUSTEES v. MOUNTAIN FLOWER LODGE* (1891), Diprose & Gammon, 22.

SECT. 4.—EXPULSION AND SUSPENSION.

See 1896 Act, ss. 20, 21, 84.

402. Right to funds—Funds provided by parent society to make up deficiency to branch.]—*DIXON v. CHADWICK* (1892), 1 New Rep. 28.

Settlement of disputes.]—See Part XVIII., Sect. 2.

403. Liability of expelled branch—Amount due upon valuation of interests of certain members.]—*STRICKLAND v. STARKIE* (1900), Report of Chief Registrar of Friendly Societies (Parliamentary Papers, Vol. 72), 89.

404. Branch suspended from benefits—Whether suspended from liabilities.]—*WILSON v. ALFRED* (1892), Diprose & Gammon, 23.

Expulsion of members.]—See Part XIII, Sect. 6, sub-sect. 2, *ante*.

Whether members expelled from society—On expulsion of branch.]—See Part XIII., Sect. 6, sub-sect. 2, C., *ante*.

Part XXI.—Cancellation and Suspension of Registry.

See 1896 Act, s. 77.

405. “On proof that society exists for illegal purpose”—Time at which legality determined.]—The M. Friendly Society was registered on June 4, 1913. On Apr. 18, 1914, the Chief Registrar of Friendly Societies, under 1896 Act, s. 77, cancelled the registry of the society. The ground alleged for the cancellation was that the society existed for an illegal purpose, viz. paying pensions to persons who were not entitled thereto under the rules of the society & contrary to the said rules. In 1904 a society called the N. Trust, having rules regulating its constitution but not being registered, was founded by W., who, at the time of the cancellation of the registry of the M. Society, was the honorary treasurer of this society. On May 7, 1914, the trust was ordered, in an action in the Ch. Div., to be dissolved & the assets distributed amongst the persons entitled thereto. The rules of the M. Society contained no reference to the trust or the members thereof, & no provision connecting the society with the trust, or suggesting that the society was empowered or intended to carry on the work of the trust, or to pay pensions to members of the trust who should not have duly qualified for pensions in accordance with the rules of the society. The Chief Registrar, from certain facts & documents, came to the conclusion that the society was founded by W. with the object & intention of using its funds to make immediate payments to members of the trust in contravention of the rules of the society. On Dec. 18, 1913, summonses were granted by magistrates at the instance of the Registrar under

1896 Act, s. 87 (3), against the officers of the society for applying “wilfully & with intent to defraud” part of the property of the society to purposes other than those expressed in the rules. These summonses were dismissed by the magistrates on Jan. 2, 1914, on the ground that there had been “no unlawful & wilful intent to defraud.” After the police ct. proceedings the society submitted certain amendments of the rules for registration; but, after considerable negotiation, no arrangement could be made as to amendments of the rules so as to meet the objections of the Registrar in regard to the unauthorised payments of pensions, which still continued to be made. Ultimately the Registrar, considering that the circumstances showed the society existed for an illegal purpose, cancelled the registration:—*Held*: (1) the time to be considered for determining the illegality of a friendly society is when the Chief Registrar has to decide whether the cancelling order shall be made, & not the time when the society was founded; (2) the unauthorised payments made *ultra vires* of the rules did not in themselves make the society one existing for an unlawful purpose, as such a purpose must be one which the law prohibits; (3) the society at the time of the order was really desirous of having new rules sanctioned, & there was nothing to show that it intended to cloak by the rules any illegal object.—*Re MIDDLE AGE PENSION FRIENDLY SOCIETY*, [1915] 1 K. B. 432; 84 L. J. K. B. 378; 112 L. T. 641, D. C.

406. ——— Illegality independently of rules—Payments made *ultra vires*.]—*Re MIDDLE AGE PENSION FRIENDLY SOCIETY*, No. 405,

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f. When suspension becomes expulsion.]—The rules of a friendly society provided that any lodge which continued suspended for two years should be deemed to be expelled. A lodge was suspended for disobedience by the Board of Directors:—*Held*:

that until the expiration of the period of two years the lodge could not be treated as expelled, & continued bound by the rules.—*SHARPE v. BROWN*, [1916] V. L. R. 678.—AUS.

g. Effect of expulsion from society on a lodge.]—Expulsion from society terminated the existence of a lodge

within Friendly Societies Act s. 1 (1) (b). [1923] V. L. R. 533.—AUS.

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h. On proof of breach of Cancellation proper.]—*Re TEUTONIA LODGE*, [1923] V. L. R. 533.—AUS.

Part XXII.—Dissolution.

SECT. 1.—IN GENERAL.

See 1896 Act, ss. 77–83, amended by 1908 Act, s. 8, & Collecting Societies & Industrial Assurance Cos. Act, 1896 (c. 26), s. 12.

Dissolution of clubs.—See CLUBS, Vol. VIII., pp. 526, 527, Nos. 142–148.

407. Power of society to dissolve itself—Where majority of members agree.—The ct. will not enjoin a society from dissolving itself where a great majority of its members agree to such dissolution, notwithstanding a rule, that if “three agree to hold the society, it shall not be dissolved.”—*WATERHOUSE v. MURGATROYD* (1831), 9 L. J. O. S. Ch. 272.

Annotation :—*Expld. Poore v. Dennett, Isle of Wight Brotherly Soc.* (1854), 23 L. T. O. S. 51.

408. Society deviating from rules—Jurisdiction of court.—The ct. has no jurisdiction on petition in the case of a friendly society, where they have ceased to act on the rules allowed & filed pursuant to 33 Geo. 3, c. 51.

It is a great misfortune to these societies that they are in the habit of deviating from their rules. Here, since 1813, they have ceased to act upon the rules that have been registered & have proceeded upon a different plan. What has been done since has been done by agreement & not under the regulations. They have become dissolved, & the ct. has no longer any jurisdiction under the Act; if any relief can be given it must be upon bill (PLUMER, M.R.).—*Ex p. NORRISH* (1821), Jac. 102; 37 E. R. 811.

Annotations :—*Consd. R. v. Godolphin* (1838), 8 Ad. & El 338. *Expld. R. v. Cotton* (1850), 14 Jur. 788.

Alteration of rules generally, see Part XI., Sect. 6, *ante*.

SECT. 2.—BY INSTRUMENT.

See 1896 Act, s. 79.

409. Must be in accordance with rules—Necessity for consent of committee—Instrument of juvenile branch—Executed by fathers of members.—(1) In 1873 a friendly society instituted a society to be called the juvenile branch of the lodge, & drew up rules for it which were registered & certified. The society was to consist of persons between the ages of six & eighteen. By rule 3, it was to be “governed” by a committee of eight appointed by the lodge. It was provided by rule 21 that no rules should be altered without the consent of a majority of members present at a special meeting. The members having been reduced to six persons about sixteen years of age, one of the members & the fathers of the rest on their behalf, without the consent of the committee, signed an instrument for dissolution of the society & distribution of its funds under

Friendly Societies Act, 1855 (c. 63), s. 13, & Friendly Societies Act, 1875 (c. 60), s. 25, & the dissolution was advertised. The trustees in whom the property of the society was vested brought an action to set aside the instrument. The judge held that it must be set aside, on the ground that the fathers had no sufficient authority to sign on behalf of their children. On appeal:—*Held*: as the Act of 1875 preserved the rules of old societies so far as they were not contrary to the Act, rule 3 was still in force; it was to be considered a fundamental rule of the society from which the members could not escape; the members could not dissolve the society without the consent of the committee; & the instrument of dissolution must be set aside.

(2) *Qu.*: whether, if the infant members had power by themselves to dissolve the society by signing an instrument of dissolution, an instrument signed for them by their fathers, guardians, or agents would suffice.—*RUDD v. JAMES*, [1896] 2 Ch. 554; 65 L. J. Ch. 781; 74 L. T. 714; 60 J. P. 628; 12 T. L. R. 490, C. A.

410. Whether binding on member's widow.—*FORTUNE v. ORR* (1894), Diprose & Gammon, 539.

411. Death of member before instrument registered—Right of legal personal representative—To receive share.—*RUSSELL v. HEREFORD FRIENDLY SOCIETY* (1899), Report of Chief Registrar of Friendly Societies (Parliamentary Papers, Vol. 91), 21

SECT. 3.—BY AWARD OF REGISTRAR.

See 1896 Act, s. 80, as amended by 1908 Act, s. 8.

412. Jurisdiction of Registrar—Claims by & against managing director.—*R. v. FRIENDLY SOCIETIES' CHIEF REGISTRAR, Ex p. EVANS* (1900), Report of Chief Registrar of Friendly Societies (Parliamentary Papers, Vol. 72), 89; 16 T. L. R. 346, C. A.

413. Appeal from award—On what grounds.—A member has no right of appeal under Friendly Societies Act, 1875 (c. 60), s. 25 (8) (e), against an award of the Chief Registrar dissolving the society, merely on the ground that he is dissatisfied with the provision made for settling his claims.—*WILMOT v. GRACE*, [1892] 1 Q. B. 812; 61 L. J. Q. B. 498; 66 L. T. 287; 56 J. P. 392; 40 W. R. 350; 36 Sol. Jo. 329, D. C.

SECT. 4.—WINDING UP BY THE COURT.

See, generally, COMPANIES, Vol. X., pp. 814 *et seq.*

414. Under Companies Acts—Society ceasing to

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k. Under Companies Acts—As unregistered company.—The ct. has jurisdiction, under Companies Act,

s. 199, to wind up compulsorily, as an unregistered company, a Society, registered under the Friendly Societies Acts, but not registered under the Companies Act, 1862. Members of a

Friendly Society, who have given notice of withdrawal of deposits are not in the same position as outside creditors, & are not entitled *ex debito* to obtain an order for winding

carry on business—Whether within Companies Act, 1862 (c. 89).]—A petition was presented to have a friendly & provident society which had done no business since 1844 wound up under above Act :—*Held* : the society came within the terms of that Act.—*Re ALFRETON DISTRICT FRIENDLY & PROVIDENT SOCIETY* (1863), 7 L. T. 817; 27 J. P. 132; 11 W. R. 301.

415. — Jurisdiction of High Court to order—As unregistered company under Companies Act, 1908 (c. 69), s. 268.]—*Re TWENTIETH CENTURY EQUITABLE FRIENDLY SOCIETY*, [1910] W. N. 236.

416. — Consent of majority of members.]—The ct. has jurisdiction to wind up under Cos. Acts as an unregistered co. a friendly society which has not been registered under Friendly Societies Acts or any other Acts. The winding-up order will be made, if a large majority of members desire it, notwithstanding that an action is pending in which the society could be wound up.—*Re VICTORIA SOCIETY, KNOTTINGLEY*, [1913] 1 Ch. 167; 82 L. J. Ch. 176; 107 L. T. 755; 29 T. L. R. 94; *sub nom. Re KNOTTINGLEY LOYAL VICTORIA SOCIETY*, 57 Sol. Jo. 129; 20 Mans. 76.

417. — Society with no share capital.]—The proper tribunal to wind up a society registered under 1896 Act, as an unregistered co. under Cos. Act, 1908 (c. 69), s. 208, without share capital, is the High Ct. & not the county ct. Cos. Act, 1908 (c. 69), s. 131 (3), does not apply to such a case.—*Re IRONFOUNDERS' (BRADFORD BRANCH) SOCIAL CLUB & INSTITUTE* (1923), 67 Sol. Jo. 516.

418. — Alteration in rules authorising voluntary winding up—New rule ultra vires.]—*Re TEAN FRIENDLY SOCIETY*, No. 82, *ante*.

—*See, further, COMPANIES, Vol. X., pp. 1093 et seq.*

Alteration in rules, *see* Part XI., Sect. 6, *ante*.

419. Apart from Companies Acts—Jurisdiction to dissolve unregistered societies—No provision for winding up in rules—Majority of members consenting.]—In 1817 a society for the benefit of the workmen in a co., established by Royal Charter was founded, its main objects being to provide, by mutual assistance among its members, aid out of the society's funds towards a comfortable subsistence in times of sickness & old age. Membership was confined to workmen & others in the employment of the co. The members on their admission paid fines varying in amount according to age, & a yearly contribution of 30s. to the funds of the society until they attained sixty-five, when they ceased to contribute & became entitled to a pension of 6s. a week for life. The society was managed by a general committee in accordance with printed rules, which were varied from time to time, the latest being those sanctioned in 1891. The funds stood in the name of the co. as trustee. The society was never registered under Friendly Societies Acts, & there was no provision in the rules for a dissolution. The co. had ceased to carry on business, & no new members had been admitted since 1890. There were four hundred

& thirty-nine members, of whom eighty-eight had attained the age of sixty-five; & it was admitted that, with no new members coming in, the society was insolvent, & that the younger members would probably receive nothing if the former allowances for sick pay & pensions were continued. A large majority of pensioners & non-pensioners had voted for a dissolution by the ct., & an action was commenced, in which all classes of members were represented claiming a dissolution :—*Held* : (1) the ct. had jurisdiction to interfere & wind up the society, & to ascertain the rights of all the persons beneficially interested in its assets by a reference to chambers to settle a scheme for the equitable distribution of the remaining funds; (2) the principle to be adopted in calculating the amounts payable to the various members was, that the funds were divisible among existing members at the time of the dissolution in proportion to the amount contributed by each member for fines on admission & subscriptions, irrespective of any payments made in accordance with the rules, & without interest.

(3) It has been pointed out that the use of the word "partnership" in connection with these societies was really a misuse of the term, & I quite agree with that if I may say so respectfully. I think they are not partnerships either within the definition of the Partnership Act, 1890 (c. 30), or within the general acceptance of the word "partnership" (WARRINGTON, J.).—*Re LEAD CO.'S WORKMEN'S FUND SOCIETY, LOWES v. SMELTING DOWN LEAD WITH PIT & SEA COAL (GOVERNOR & Co.)*, [1904] 2 Ch. 196; 73 L. J. Ch. 628; 91 L. T. 433; 52 W. R. 571; 20 T. L. R. 504.

Annotations :—*As to* (1) *Distd. Blake v. Smither* (1906, 22 T. L. R. 698. *As to* (2) *Refd. Braithwaite v. A.G.* [1909] 1 Ch. 510.

420. — On sufficient grounds.]—The rules of an unregistered friendly society contained no provision for its winding up. The membership of the society, which at one time had been eighty-eight, decreased to forty-nine, & the funds from £923 to £176. The expenditure had been greater than the receipts for some years. At a meeting to decide whether the society should continue, twenty-seven members being present, a resolution was passed by a majority of one that the society should be dissolved. Subsequently at a committee meeting, at the suggestion of the trustees, the committee decided to continue the society. At a subsequent general meeting thirty-two members were present & paid their subscriptions. Pltfs., among whom were some who had paid their subscriptions, brought an action claiming a dissolution of the society :—*Held* : the ct. had jurisdiction to dissolve the society, but in the circumstances no sufficient reason had been shown for its dissolution.—*BLAKE v. SMITHER* (1906), 22 T. L. R. 698.

421. — Jurisdiction to ascertain rights of beneficiaries—Reference to chambers.]—*Re LEAD CO.'S WORKMEN'S FUND SOCIETY, LOWES v. SMELTING DOWN LEAD WITH PIT & SEA COAL (GOVERNOR & Co.)*, No. 419, *ante*.

Unregistered societies generally, *see* Part III., *ante*.

up; but where the circumstances, in the opinion of the ct., make it just & equitable so to do, the ct. will order such Society to be wound up.—

PROTESTANT LOAN FUND SOCIETY, *Ex p. MORTON*, FRIENDLY PROTESTANT PARTNERSHIP LOAN FUND CO., *Ex p. HALL*, [1895] 1 L. R. 1.—1R.

CANTILE LOAN SOCIETY, 98; 41 L. T. 9.—

MER-
1 L. R.

SECT. 5.—DISTRIBUTION OF FUNDS.

SUB-SECT. 1.—IN GENERAL.

Property & funds generally, *see* Part XV., *ante*.

422. In what proportion ordered—Equal distribution amongst members—Notwithstanding directions in rules.]—Where, by the rules of a benefit society, it was not to be dissolved unless with the assent of nine-tenths of the members, & those members of five years' standing were to have £5 for funeral expenses, & those of double standing double that amount, & a resolution was passed, at a meeting of not the requisite number of members, for the dissolution of the society, & an *ex p.* injunction was obtained by a member to restrain the dissolution, & after this seventy out of seventy-six members, of which the society was composed, agreed to a dissolution, & to an equal distribution of the funds:—*Held*: at the hearing of a motion to dissolve the injunction & for a decree, that as the assent of nine-tenths of the members, according to the rules, & of five-sixths in value, pursuant to 10 Geo. 4, c. 56, had been obtained to the dissolution, the ct. must declare the society dissolved; & it was directed that the funds should be equally distributed, notwithstanding some minute directions for division by the rules.—*POORE v. DENNETT, ISLE OF WIGHT BROTHERLY SOCIETY* (1854), 23 L. T. O. S. 51; 18 J. P. 215.

423. — Divisible amongst existing members at time of dissolution—In proportion to amount contributed for fines on admission & subscriptions—Without interest.]—*Re LEAD CO.'S WORKMEN'S FUND SOCIETY, LOWES v. SMELTING DOWN LEAD WITH PIT & SEA COAL (GOVERNOR & CO.)*, No. 419, *ante*.

424. Form of decree—Application of capital & funds—To answer claims of insurers & depositors—Valuation of immature assurance.]—(1) In a suit for winding up the affairs of a mutual co., which was formed for the purposes, among others, of insuring the payment of sums of money during the sickness & on the death of its members, & of receiving deposits at interest, & the rules of which as well as the terms of its policies provided that the funds of the society should alone be answerable for the claims of insurers, a decree was made which, among other things, declared that the insurers had a charge on so much of the capital & funds as was attributable to the insurance branch; & the decree contained directions for the valuation of immature assurances.

On appeal the decree was varied, & as varied, declared that the capital & funds ought to be applied to answer the claims of the insurers & depositors. But it was not disturbed as to the direction for valuation.

(2) Form of decree in such a case.—*EVANS v. COVENTRY* (1857), 8 De G. M. & G. 835; 26 L. J. Ch. 400; 29 L. T. O. S. 118; 22 J. P. 19; 3 Jur. N. S. 1225; 5 W. R. 436; 44 E. R. 612, 1. JJ.

Annotations:—As to (1) *Reid. Re State Fire Insce.* (1863), 1 De G. J. & Sm. 634; *Salisbury v. Met. Ry.* (1870), 23 L. T. 839; *Re National Funds Assoc.* (1878), 10 Ch. D. 118; *Gullerne v. London & Suburban General Permanent Bldg. Soc.* (1890), 25 Q. B. D. 485; *Coxon v. Gorst*,

[1891] 2 Ch. 73; *Re Sharpe, Re Bennett, Masonic & General Life Assoc. v. Sharpe*, [1892] 1 Ch. 154. *Generally, Mentd. Stringer's Case* (1869), 4 Ch. App. 475; *Flitcroft's Case* (1882), 21 Ch. D. 519; *Re Oxford Benefit Building & Investment Soc.* (1886), 35 Ch. D. 502; *Re Bennett, Masonic & General Life Assoc. v. Sharpe* (1891), 8 T. L. R. 194.

425. Appointment of person to convey or assure—Property in hands of trustee—Refusal to concur with co-trustees as to realisation.]—Under the Friendly Societies Acts & particularly under 10 Geo. 4, c. 56, s. 15, after a society within their provisions has been dissolved, though its affairs are not wound up, the Ct. of Ch. has no jurisdiction upon petition to appoint a person to convey or assure property in the possession of a trustee, who refuses to concur with his co-trustees in realising it, for the purpose of having it distributed among the members.—*Re ECLIPSE MUTUAL BENEFIT ASSOCN.* (1854), Kay, App. 30; 2 Eq. Rep. 221; 23 L. J. Ch. 280; 2 W. R. 311; 69 E. R. 328.

426. Action for recovery of funds by trustees—Funds distributed by steward amongst members.]—*PARNELL v. SMITH* (1846), 6 L. T. O. S. 315; 10 J. P. Jo. 53.

427. — Misapplication by solicitor—Whether cestuis que trust necessary parties.]—Seven persons belonging to a friendly society were appointed trustees for winding up the affairs of the society, & distributing the surplus funds among the living members & the representatives of the deceased. The trustees appointed their solr. to draw the necessary cheques on their bankers, which were to be countersigned by two of their number. The money was apportioned & the greater part paid, & there remained £700 in the banker's hands, which was irregularly drawn out & invested in the names of the solr. & the trustees appointed to countersign the cheques. The two trustees having died, the solr., as was alleged, applied the money to his own use. The only surviving trustee of the seven filed his bill to recover the trust fund merely, as it appeared though not altogether clearly, but not to administer it, & the solr. objected for want of parties:—*Held*: the objection was not sustainable.

If the object of the bill was to administer the trust money, it would be necessary to have the *cestuis que trust* represented; but as it is only for recovering the trust money in the hands of a stranger, for the purpose of having it administered afterwards, it may be recovered in the way in which it is proposed (*LORD LANGDALE, M.R.*).—*HORSLEY v. FAWCETT* (1847), 11 Beav. 565; 16 L. J. Ch. 157; 9 L. T. O. S. 332; 50 E. R. 935.

428. Position of creditors—Undertaking by trustees to apply property for their benefit—Debts not barred by lapse of time.]—*PARE v. CLEGG*, No. 202, *ante*.

Action by member against directors—To establish title to shares already apportioned—Whether illegality of society good defence.]—*See* No. 23, *ante*.

Death of signatory to instrument of dissolution—Right of legal representative to receive share.]—No. 411, *ante*.

PART XXII. SECT. 5, SUB-SECT. 1.
m. In what proportion ordered—
amongst existing members at

time of dissolution.]—The funds are divisible amongst the existing members at the time when the business of the society ceased to be carried on, in

proportion to the amounts contributed by them.—*TIERNEY v. TOUGH*, [1914] 1 I. R. 143.—*IR.*

SUB-SECT. 2.—FAILURE OF OBJECTS OF SOCIETY.

429. Sole survivor of society—Not entitled to principal of fund.]—A sole survivor of a society in the nature of a friendly society is not entitled to the principal of the fund belonging to the society & which arose from the contributions of members.

Qu.: how should this fund be dealt with. *Semble*: where a portion of the funds of such a society arises from donations by persons who are not members of the society, that portion is to be treated as a fund devoted to charity, & to be applied *cy-pres*.—*SPILLER v. MAUDE* (1864), 5 New Rep. 30; 11 L. T. 329; 28 J. P. 804; 10 Jur. N. S. 1089; 13 W. R. 69.

Annotations:—*Reid. Re Slovin, Slovin v. Hepburn*, [1891] 1 Ch. 373; *Re Buck, Bruty v. Mackey* (1896), 65 L. J. Ch. 881; *Braithwaite v. A.-G.*, [1909] 1 Ch. 510. *Mentd. Cunnack v. Edwards*, [1896] 2 Ch. 679; *Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149.

430. Whether funds pass to Crown as bona vacantia—Society not a charity.]—In 1810 a society was established to raise a fund, by the subscriptions, fines, & forfeitures of its members, to provide annuities for the widows of its deceased members. In 1830 the rules were revised, & the society conformed to the provisions of 10 Geo. 4, c. 56, but the objects of the society were in no way altered. By 1879 all the members had died. The last widow annuitant died in 1892, the society then having a surplus or unexpended fund of £1,250:—*Held*: (1) the society was not a "charity," & therefore the unexpended fund was not applicable *cy-pres* to charitable purposes; (2) the fund passed to the Crown as *bona vacantia*.—*CUNNACK v. EDWARDS*, [1896] 2 Ch. 679; 65 L. J. Ch. 801; 75 L. T. 122; 61 J. P. 36; 45 W. R. 99; 12 T. L. R. 614, C. A.

Annotations:—*As to (1) Consd. Re Buck, Bruty v. Mackey*, [1896] 2 Ch. 727. *Distd. Re Printers & Transferrers Amalgamated Trades Protection Soc.*, [1899] 2 Ch. 184. *Reid. Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149; *Braithwaite v. A.-G.*, [1909] 1 Ch. 510. *As to (2) Consd. Re Customs & Excise Officers' Mutual Guarantee Fund, Robson v. A.-G.*, [1917] 2 Ch. 18. *Reid. Re Higginson & Dean, Ex p. A.-G.*, [1899] 1 Q. B. 325; *Bowman v. Secular Soc.*, [1917] A. C. 406.

431. ———.]—"The Benefit Society for Girls educated at the School of Industry, Kendal," was established in 1808, & was registered as a friendly society under 33 Geo. 3, c. 54, s. 2. It consisted of honorary members & benefited members. The honorary members were ladies who gave in their names when the society was formed or were afterwards elected according to the rules & paid a subscription. They could not in any case derive benefit from the funds of the society. The benefited members were girls educated at the School of Industry; they paid weekly contributions to the society from the age

of seven to sixty-five, & were entitled to certain weekly payments in sickness varying with age up to sixty-five, & to an annuity of 2s. a week from fifty-six to sixty-five, 2s. 6d. from sixty-five to seventy, & 4s. from seventy for the rest of their lives. All payments by the members & all sick allowances ceased at sixty-five. The annuities became payable automatically on a member attaining fifty-six without any inquiry as to poverty. The rules of the society provided that the contributions of honorary members should be appropriated, one half "to raise a capital interest of which would be sufficient to pay the allowance to children under fifteen"; the other half "to be under the special direction of honorary members for relief in extraordinary cases not provided by the general fund."

The School of Industry was closed in 1845, & after that date no new members were admitted, but subscriptions continued to be received from both classes of members, sick allowances & annuities were paid, & the balance of the funds accumulated. This action was brought by the trustees to decide what was to be done with the accumulations, which amounted to £1,901 apportioned to the honorary members' fund & £304 apportioned to the benefited members' fund. The £1,901 appeared from the accounts to have arisen wholly from the first half of the honorary members' fund appropriated to provide for the allowances to children under fifteen. The only surviving benefited members were two women over sixty-five in receipt of annuities. Five persons who claimed to be honorary members were made defts.:—*Held*: (1) the society was not a charity, for the benefited members had a legal title to the benefits on making the payments without regard to their need; (2) the contributions of honorary members were absolute gifts to the society, & there could be no resulting trust in favour of the honorary members, the annuitants had no interest in the funds of the society other than the annuities which they had purchased, & therefore the surplus of the benefited members' fund, after providing for the annuities, & the whole of the honorary members' fund belonged to the Crown as *bona vacantia*.—*BRAITHWAITE v. A.-G.*, [1909] 1 Ch. 510; 78 L. J. Ch. 314; 100 L. T. 599; 73 J. P. 209; 25 T. L. R. 333.

Annotation:—*As to (2) Reid. Re Customs & Excise Mutual Guarantee Fund, Robson v. A.-G.*, [1917] 2 Ch. 18.

Bona vacantia, generally, see DESCENT & DISTRIBUTION, Vol. XVIII., p. 32, Nos. 317 et seq.

As to whether friendly societies treated as charities.]—See CHARITIES, Vol. VIII., p. 261, Nos. 240 et seq.

Effectuation of charitable trusts by means of schemes & the cy-pres doctrine.]—See CHARITIES, Vol. VIII., p. 336, Nos. 1244 et

PART XXII. SECT. 5, SUB-SECT. 2.

a. Sole survivor of society—Not entitled to appropriate.]—MITCHELL v. BARROWS (1878), R. (Cl. of Bens.) 954.—SCOT.

FRIENDS, SOCIETY OF.

See ECCLESIASTICAL LAW ; HUSBAND AND WIFE ; REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

FRUIT.

AGRICULTURE ; FOOD AND DRUGS.

FRUITS AND HOP PICKERS.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

FUEL ALLOTMENTS.

See SMALL DWELLINGS AND SMALL HOLDINGS ; COMMONS.

FUGITIVE CRIMINAL.

See EXTRADITION AND FUGITIVE OFFENDERS.

FUNERAL.

See BURIAL AND CREMATION ; EXECUTORS AND ADMINISTRATORS.

FUNERAL EXPENSES.

BURIAL AND CREMATION ; ESTATE AND OTHER DEATH DUTIES ; EXECUTORS AND ADMINISTRATORS.

FURIOUS DRIVING.

See CRIMINAL LAW AND PROCEDURE ; STREET AND AERIAL TRAFFIC

FURNISHED HOUSE.

See LANDLORD AND TENANT.

FURTHER ASSURANCE, COVENANT FOR.

See SALE OF LAND.

GALLON.

See WEIGHTS AND MEASURES.

GAMBLING.

See GAMING AND WAGERING.

GAME.

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<i>Animals</i>	ANIMALS.	<i>Licence to enter</i>	<i>See</i> LANDLORD AND
<i>Commissioners of Woods</i> „	CONSTITUTIONAL	<i>Land</i>	TENANT; REAL
	LAW.		PROPERTY.
<i>Dogs</i>	ANIMALS.	<i>Prescription</i>	EASEMENTS.
<i>Fish, Fishing and Fish-</i>		<i>Rating of Sporting Rights</i> „	RATES AND RATING.
<i>eries</i>	FISHERIES.	<i>Right to Game on Waste</i>	
<i>Forest</i>	CONSTITUTIONAL	<i>of Crown Manors</i>	COMMONS.
	LAW.	<i>Summary Jurisdiction,</i>	
<i>Franchise</i>	CONSTITUTIONAL	<i>Courts of</i>	MAGISTRATES.
	LAW.	<i>Trespass</i>	TRESPASS.
<i>Landlord and Tenant</i>	LANDLORD AND	<i>Warren</i>	
	TENANT.	<i>Wild Birds, Protection of</i>	ANIMALS.

Part I.—Definitions.

1. "Game"—*Feræ naturæ*—Fit for human food.]—(1) If P., a trespasser, start & capture a hare or wild animal on the soil of A., the property in the animal continues all the while in A., who can recover it by an action of trover.

(2) If P. start game in the forest or warren of A., & hunt it into the soil of B., & kill it there, the property also continues in A. *ratione privilegii*.

(3) If P. start game on the soil of A., & pursue & catch it on the soil of B., then the property is neither in A. nor B., but in P., the trespasser.

(4) When it is said that there is a qualified or special right of property in game, that is in animals *feræ naturæ* which are fit for the food of man, while they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill & appropriate such animals which is sometimes called by the law a reduction of them into possession. This right is said in law to exist *ratione soli*, or *ratione privilegii*.

(5) Property *ratione soli* is the common law right which every owner of land has to kill & take all such animals *feræ naturæ* as may from time to time be found on his land, & as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil.

(6) Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown in virtue of its prerogative, one man may have of killing & taking animals *feræ naturæ* on the land of another; & in like manner; the game, when killed or taken by virtue of this privilege, becomes the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil (LORD WESTBURY, C.).—BLADES v. HIGGS (1805), 11 H. L. Cas. 621; 20 O. B. N. S. 214; 6 New Rep. 274; 34 L. J. C. P. 286; 12 L. T. 615; 20 J. P. 390; 11 Jur. N. S. 701; 13 W. R. 927; 11 E. R. 1474, H. L.; *affy.* (1863), 13 C. B. N. S. 844, Ex. Ch.; (1862), 12 C. B. N. S. 501.

Annotations:—As to (1) *Consd.* R. v. Townley (1871), L. R. 1 C. C. R. 315. *Refd.* Hooper v. Clark (1867), 36 L. J. Q. B. 79; R. v. Roe (1870), 22 L. T. 414; R. v. Petch (1878), 38 L. T. 788; Elwes v. Brigg Gas Co. (1886), 33 Ch. D. 562. As to (4) *Refd.* R. v. Read (1878), 37 L. T. 722. As to (5) *Refd.* Chambers v. Miller (1862), 13 C. B. N. S. 125; Read v. Edwards (1864), 17 C. B. N. S. 245; Musgrave v. Foster (1871), 24 L. T. 614; R. v. Read (1878), 37 L. T. 722. *Generally, Mentd.* R. v. Dowlais Iron Co. (1868), 10 B. & S. 208.

2. ——— What are.]—Tithes are not payable in respect of turkeys or their eggs nor of tame partridges or pheasants because they are *feræ naturæ*.—HUGTON v. PRINCE (1596), Moore, K. B. 599; 72 E. R. 783.

—————.]—See, generally, ANIMALS, Vol. II., pp. 205 *et seq.*

3. ——— Things usually sported.]—JEFFRYES v. EVANS, No. 53, *post*.

4. ——— Live birds.]—The buying of game is prohibited in all cases by 58 Geo. 3, c. 75. There-

fore, a contract for the sale of live pheasants, for the purpose of breeding, passes no property to the purchaser, & cannot be enforced at law.—HELPS v. GLENISTER (1828), 8 B. & C. 553; 3 Man. & Ry. K. B. 12; 7 L. J. O. S. K. B. 117; 108 E. R. 1148.

Annotation:—*Consd.* Guyer v. R. (1889), 23 Q. B. D. 100.

5. ——— Game Act, 1831 (c. 32), s. 4.]—Above sect. imposes a penalty upon any licenced dealer in game who buys, sells, or knowingly has in his possession or control, any bird of game after the expiration of ten days from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively; & upon any person not licenced to deal in game, who buys or sells any bird of game after the expiration of same period, or who knowingly has in his possession or control any bird of game, except birds of game kept in a mew or breeding place, after the expiration of forty days from the respective days on which the season for lawfully killing such birds ends:—*Held*: (1) throughout this sect. the words "birds of game" include live birds; & (2) a licenced dealer in game incurs the penalty by selling such birds after the expiration of the ten days specified by the statute.—LOOME v. BAILY (1860), 3 E. & E. 441; 30 L. J. M. C. 31; 3 L. T. 406; 25 J. P. 55; 6 Jur. N. S. 1299; 9 W. R. 119; 121 E. R. 509.

Annotations:—As to (1) *Consd.* Cook v. Trevener, 1 K. B. 9. *Refd.* Kenyon v. Hart (1865), 29 J. P. 260.

6. ——— Live & dead birds—Game Act, 1831 (c. 32), s. 27.]—The word "game" in above sect. includes both live & dead birds & also birds reared in captivity. A person, therefore, not licenced to deal in game who purchases from another person, not licenced to deal in game, pheasants which were tame birds, commits an offence within above sect.—COOK v. TREVENER, [1911] 1 K. B. 9; 80 L. J. K. B. 118; 103 L. T. 725; 74 J. P. 469; 27 T. L. R. 8, D. C.

7. ——— Tame birds—Game Licences Act, 1860 (c. 90)—Revenue (No. 2) Act, 1861 (c. 91), s. 17.]—M., a pheasant breeder for many years, set pheasant eggs under barn door hens in coops, cutting one wing of each bird to prevent escape & facilitate identification. He sold two cock pheasants on Feb. 5 for £1 to one of the public. It was contended, on the part of M., that the two pheasants so sold were tame pheasants, & not game within the above Acts, & that it was not necessary for him to be the holder of a licence to deal in game:—*Held*: he was subject to the penalty under above Acts for dealing in game without a licence.—HARNETT v. MILES (1884), 48 J. P. 455, D. C.

Annotation:—*Consd.* Cook v. Trevener, [1911] 1 K. B. 9.

8. ——— Reared in captivity—Game Act, 1831 (c. 32), s. 27.]—COOK v. TREVENER, No. 6, *ante*.

9. ——— Pheasants under care of hen—Night Poaching Act, 1828 (c. 69).]—Prisoner was indicted for night poaching, unlawfully entering land by

PART I.

a. "Game"—

b. ——— *Laying or*

Rabbits constitute game.—HOPE v. CALLAGHAN (1888), 24 I. L. T. 5.—IR.
plover.]—PHILIP v. ROSALYN (EARL) (1833), 5 Sc. Jur. 433.—SCOT.

night to the number of three or more, for the purpose of taking, etc. The keepers were watching tame pheasants shut up in coops, when the prisoner with others entered. He was arrested & indicted under Night Poaching Act, 1828 (c. 69):—*Held*: the pheasants under the control or care of a hen were not game, but might be subjects of larceny.—*R. v. GARNHAM* (1861), 2 F. & F. 347; 8 Cox, C. C. 451.

— **Statutory definition.**—See Game Act, 1831 (c. 32), s. 2; Night Poaching Act, 1828 (c. 69), s. 13; Poaching Prevention Act, 1862 (c. 114), s. 1.

“ **Ground game** ”—**Statutory definition.**—See Ground Game Act, 1880 (c. 47), s. 8.

“ **Wild birds** ”—**Statutory definition.**—See Wild Birds Protection Act, 1880 (c. 35), s. 2, & Sched.

Part II.—Statutory Protection of Game.

SECT. 1.—CLOSE SEASONS.

See Game Act, 1831 (c. 32), s. 3.

10. Offences — “ Taking ” in close season—What amounts to.—A pheasant was caught accidentally between Feb. 1 & Oct. 1, by a farmer on his own farm, in a wire set for rabbits & not for pheasants, but finding the pheasant in the wire still alive, he, after releasing it & putting it on the ground, picked it up & carried it away with him. Game Act, 1831 (c. 32), s. 3, makes it unlawful “ to kill or take any game between Feb. 1 & Oct. 1 ”:—*Held*: the catching the pheasant in the wire & the picking it up & carrying it away, was not one continuous act, but the picking it up & carrying it away constituted a “ taking ” within the statute; but it was material for the justices to consider whether the farmer took the bird away with a view only to restore it to liberty, or with a view to killing it or keeping it, in which latter case they ought to convict.—*WATKINS v. PRICE* (1877), 47 L. J. M. C. 1; 37 L. T. 578; 42 J. P. 21, D. C.

What amounts to “ taking,” compare, No. 299, *post*.

— **By persons licenced to deal in game.**—See Nos. 403–406, *post*.

— **As regards wild birds.**—See ANIMALS, Vol. II., pp. 282, 283, Nos. 556–564.

11. — Killing on Sunday — “ Engine ” — Snare.—Applt. was convicted for that he, on Aug. 15, being Sunday, did use snares for the purpose of killing game. He set the snares on Aug. 13 & 14, & on Aug. 15 the snares were seen set ready to catch game, & two dead grouse were found caught in snares:—*Held*: a snare was an engine or instrument within the meaning of the section, & that putting down a snare on a day before Sunday for the purpose of killing game, & keeping it set on Sunday, was using an engine or instrument on Sunday.

The word engine, derived from *ingenium*, includes a snare which is a device or contrivance—an engine—for killing game (BLACKBURN, J.).—*ALLEN v. THOMPSON* (1870), L. R. 5 Q. B. 336;

39 L. J. M. C. 102; 22 L. T. 472; 35 J. P. 117; 18 W. R. 1196.

Annotations:—*Expld.* *R. v. Littlechild, R. v. Heslop* (1871), 40 L. J. M. C. 137. *Consd.* *Jones v. Davies* (1898), 67 L. J. Q. B. 294.

12. — By two persons jointly — Several offences.—*R. v. LITTLECHILD, R. v. HESLOP*, No. 190, *post*.

SECT. 2.—USE OF FIREARMS BY NIGHT.

See Hares Act, 1818 (c. 20), s. 5; Ground Game Act, 1880 (c. 47), s. 6.

13. By occupying owner — Ground Game Act, 1880 (c. 47), s. 6.—By above sect. no person having a right of killing ground game under this Act or otherwise, shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset & the commencement of the last hour before sunrise; & no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes, nor employ poison; & any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding £2:—*Held*: the sect. does not apply to an owner of land doing any of the acts prohibited therein upon his own land.—*SMITH v. HUNT* (1885), 51 L. T. 422; 50 J. P. 279; 2 T. L. R. 124; 16 Cox, C. C. 51, D. C.

—*Expld.* *Samuels v. Pittfield* (1888), 58 L. T. 108; *Anderson v. Vicary*, [1900] 2 Q. B. 287. *Consd.* *May v. Waters*, [1910] 1 K. B. 431; *Leworthy v. Hicks* (1913), 109 L. T. 244. *Reid.* *Waters v. Phillips*, [1910] 2 K. B. 465.

SECT. 3.—USE OF POISON.

See Game Act, 1831 (c. 32), s. 3; Poisoned Grain Prohibition Act, 1863 (c. 113); Poisoned Flesh Prohibition Act, 1864 (c. 115); Ground Game Act, 1880 (c. 47), s. 6.

14. By occupying owner — Ground Game Act, 1880 (c. 47), s. 6.—*SMITH v. HUNT*, No. 13, *ante*.

PART II. SECT. 1.
Offences — “ Killing ” in
[]—Deft. was convicted under Game Protection Act, 1895 (B. C.) s. 15, for having shot deer within the

period prohibited by the Act. Deft. resided upon & managed a farm as agent for the owner who was then absent, & the deer came upon & depastured a cultivated field, part of the

farm, when deft. killed it:—*Held*: deft. in killing was within the exemption of sect. 16 of the Act.—*R. v. SYMINGTON* (1895), 4 B. C. R. 323.—**CAN.**

SECT. 4.—USE OF SPRING TRAPS.

See Ground Game Act, 1880 (c. 47), s. 6; Ground Game (Amendment) Act, 1906 (c. 21).

15. By occupying owner.]—SMITH v. HUNT, No. 13, *ante*.

16. —.]—By Ground Game Act, 1880 (c. 47), s. 6, no person having a right of killing ground game under the Act "or otherwise" shall, for the purpose of killing ground game, employ spring traps except in rabbit holes:—*Held*: the provisions of this sect. apply only to occupying tenants & those authorised under the Act by such tenants to kill & take ground game, & do not apply to an occupying owner or the person authorised by him to kill ground game on the land; & consequently, where an owner occupying his own land sells to another person the right to kill & take the rabbits on the land, such other person is not subject to the restrictions imposed by the section as to employing spring traps except in rabbit holes.—LEWORTHY v. REES (1913), 109 L. T. 244; 77 J. P. 268; 29 T. L. R. 408; 23 Cox, C. C. 522, D. C.

17. By occupying tenant—With shooting rights.]—A tenant of land who is under his agreement entitled to the game & right of shooting thereon is liable to a penalty, under Ground Game Act, 1880 (c. 4), s. 6, for employing spring traps in the open for the purpose of killing ground game.—SAUNDERS v. PITFIELD (1888), 58 L. T. 108; 52 J. P. 694; 4 T. L. R. 233; 16 Cox, C. C. 369, D. C.

Annotations:—*Folld.* Waters v. Phillips, [1910] 2 K. B.

465. *Consd.* May v. Waters, [1910] 1 K. B. 431; Leworthy v. Rees (1913), 109 L. T. 244.

18. —.]—Ground Game Act, 1880 (c. 47), s. 6, after providing that no person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between certain hours, proceeds to enact that "no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes":—*Held*: this enactment applies to an occupier of land who, by reason of the owner not having reserved the sporting rights, has the right, apart from the Act, of killing & taking game upon the land.—WATERS v. PHILLIPS, [1910] 2 K. B. 465; 79 L. J. K. B. 1062; 103 L. T. 288; 74 J. P. 343; 26 T. L. R. 564, D. C.

19. By shooting tenant—Not in occupation.]—Ground Game Act, 1880 (c. 47), s. 6, after providing that no person having a right of killing ground game under the Act or otherwise shall use any firearms for the purpose of killing ground game between certain hours, proceeds to enact that no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes:—*Held*: this enactment does not apply to a grantee of the right to kill & take ground game where the grantee is not the occupier of the land over which the right is granted.—MAY v. WATERS, [1910] 1 K. B. 431; 79 L. J. K. B. 250; 102 L. T. 180; 74 J. P. 125; 26 T. L. R. 239, D. C.

Annotations:—*Consd.* Leworthy v. Rees (1913), 109 L. T. 244. *Refd.* Waters v. Phillips, [1910] 2 K. B. 465.

20. —.]—LEWORTHY v. REES, No. 16, *ante*.

Part III.—Private Rights over Game.

SECT. 1.—PROPERTY IN GAME.

SUB-SECT. 1.—LIVE GAME.

21. Acquisition.]—BLADES v. HIGGS, No. 1, *ante*.

22. Nature & extent—Grouse.]—(1) The property in wild grouse is not absolute in any one; it is a wild bird *feræ naturæ*. As long as the grouse is on a man's land he has a possessory title in it, but as soon as it flies or goes off his land, his property is gone (MARTIN, B.).

(2) Where a man pursues game in B.'s land & kills it in B.'s land, the bird or the deer that is killed is the property of B., since he has a possessory though not an absolute right in it while it is upon his domain (PLATT, B.).—LONSDALE (EARL) v. RIGG (1856), 11 Exch. 654; 25 L. J. Ex. 73; 26 L. T. O. S. 242; 20 J. P. 118; 156 E. R. 902;

affd. sub nom. RIGG v. LONSDALE (EARL) (1857), 1 H. & N. 923, Ex. Ch.

Annotations:—As to (1) *Consd.* Blades v. Higgs (1865), 20 C. B. N. S. 214. As to (2) *Refd.* Read v. Edwards (1864), 17 C. B. N. S. 245; R. v. Townley (1871), L. R. 1 C. C. R. 315; Fitzhardinge v. Purcell, [1908] 2 Ch. 139. *Generally*, *Mentd.* Bruce v. Helliwell (1860), 5 H. & N. 609; Bird v. G. E. Ry. (1865), 13 W. R. 989.

23. —.]—The law recognises in the proprietor of land a qualified right to game whilst it is upon the land.—READ v. EDWARDS (1864), 17 C. B. N. S. 245; 5 New Rep. 48; 34 L. J. C. P. 31; 11 L. T. 311; 144 E. R. 99.

Annotations:—*Refd.* Lee v. Riley (1865), 18 C. B. N. S. 722. *Mentd.* Manton v. Brocklebank, [1923] 2 K. B. 212; Gayler & Pope v. Davies, [1924] 2 K. B. 75.

24. —.]—BLADES v. HIGGS, No. 1, *ante*.

Property in live animals *feræ naturæ* generally.]—See ANIMALS, Vol. II., pp. 205–211.

PART II. SECT. 4.

d. "In rabbit holes."—The term "rabbit holes" in Ground Game Act, 1880, s. 6, mean that part of the burrow which is inside the ground & covered by a roof, & it is contrary to the sect. to lay spring traps on the scrape or run which is not covered.—BROWN v. THOMSON (1882), 9 R. (Ct. of Sess.) 1183.—SCOT.

e. —.]—Holes made by rabbits in

order to get under a wire-netting not rabbit holes in the sense of Ground Game Act, 1880, s. 6.—FRASER v. LAWSON (1882), 10 R. (Ct. of Sess.) 396.—SCOT.

f. By shooting tenant.]—The tenant of a farm brought a complaint against the sporting tenant of shootings charging him with having set steel traps, not in rabbit holes, contrary to Ground Game Act, 1880, s. 6. The traps were set close to openings in a

stone dyke dividing the lands occupied by the shooting tenant from the farm, & complainant averred that by this illegal method of capture rabbits were, to his loss, prevented from coming upon his farm:—*Held*: assuming sect. 6 to be universal in its application, complainant as a private individual had no title to prosecute.—BEDFORD v. KERR (1893), 20 R. (Ct. of Sess.) 30 So. L. R. 642; 1 S. L. T. 32, J.—SCOT.

SUB-SECT. 2.—DEAD GAME.

25. Rights of landowner — Game killed by trespasser—Pursued on to landowner's property from elsewhere.]—A man has a property *ratione loci* in animals which are *feræ naturæ* on his land. But this property ceases, when they quit or are hunted off the land. The right of the owner of a forest or warren in the animals of the forest or warren continues after they are hunted out of the forest or warren; but not after they voluntarily quit.

If A. starts a hare in the ground of B. & hunts it, & kills it there, the property continues all the while in B. But if A. starts a hare in the ground of B. & hunts it into the ground of C., & kills it there, the property is in A., the hunter; but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C. But if A. starts a hare, etc., in a forest or warren of B., & hunts it into the ground of C., & there kills it, the property remains all the while in B., the proprietor of the warren, because the privilege continues.—**SUTTON v. MOODY** (1697), Comb. 458; 1 Com. 34; Holt, K. B. 608; 1 Ld. Raym. 250; 5 Mod. Rep. 375; 12 Mod. Rep. 144; 2 Salk. 556; 3 Salk. 290; 90 E. R. 590.

Annotations:—Consd. *Deane v. Clayton* (1817), 7 Taunt. 489. *Apld.* *Lonsdale v. Rigg* (1856), 11 Exch. 654. *Folld.* *Read v. Edwards* (1864), 17 C. B. N. S. 245; *Blades v. Higgs* (1865), 11 H. L. Cas. 621. *Refd.* *Keeble v. Hickeringill* (1706), Holt, K. B. 14; *Hannam v. Mockett* (1824), 4 Dow. & Ry. K. B. 518; *Graham v. Ewart* (1855), 11 Exch. 326.

26. ———.]—Pltf.'s dogs having hunted & caught, on deft.'s land, a hare started on the land of another, the property is thereby vested in pltf., who may maintain trespass against deft. for afterwards taking away the hare, & so it would be though the hare, being quite spent, had been caught up by a labourer of deft. for the benefit of the hunters.—**CHURCHWARD v. STUDDY** (1811), 14 East, 249; 104 E. R. 506.

Annotations:—Consd. *Blades v. Higgs* (1865), 11 H. L. Cas. 621. *Refd.* *Deane v. Clayton* (1817), 7 Taunt. 489; *Graham v. Ewart* (1855), 11 Exch. 326; *Lonsdale v. Rigg* (1856), 11 Exch. 654.

27. ———.]—**LONSDALE (EARL) v. RIGG**, No. 22, *ante*.

28. ———.]—**BLADES v. HIGGS**, No. 1, *ante*.

29. ———.]—**HOOPER v. CLARK**, No. 94, *post*.

Property in dead animals feræ naturæ generally.]—See **ANIMALS**, Vol. II., pp. 211, 212.

SECT. 2.—RIGHT TO GAME RATIONE PRIVILEGII.

30. Acquisition — Franchise from Crown—Proof that charter acted upon.]—*Prima facie* this is a case of trespass in search of game, & the only answer to the charge is a claim under a charter from the Crown, but that alone is not sufficient without proof that the charter has been acted on; the charter standing alone is not enough to establish the right (**LORD CAMPBELL, C.J.**).—**POTTER v. BERRY** (1857), 6 W. R. 71; 21 J. P. Jo. 756; *sub nom.* *R. v. BURY*, 30 L. T. O. S. 133.

31. ———.]—**BLADES v. HIGGS**, No. 1, *ante*.

Grants of franchises, generally, see **CONSTITUTIONAL LAW**, Vol. XI., pp. 578, 579.

32. Nature & extent.]—When a man has savage beasts *ratione privilegii* as by reason of a park, warren, etc., he has not any property in the deer or conies or pheasants or partridges (*per CUR.*).—**CASE OF SWANS** (1592), 7 Co. Rep. 15 b; 77 E. R. 135.

Annotations:—*Refd.* *Lyster v. Home* (1639), Cro. Car. 544; *Hannam v. Mockett* (1824), 4 Dow. & Ry. K. B. 518; *R. v. Robinson* (1859), 8 Cox, C. C. 115; *Blades v. Higgs* (1865), 11 H. L. Cas. 621. *entd.* *Davies v. Powell* (1738), Cooke, Pr. Cas. 146.

33. ———.]—**BLADES v. HIGGS**, No. 1, *ante*.

Rights of lord of manor.]—See **COMMONS**, Vol. XI., pp. 42, 43; **COPYHOLDS**, Vol. XIII., p. 83, Nos. 1010, 1041.

Over inclosed waste land.]—See **COMMONS**, Vol. XI., pp. 26, 59-61, 71, Nos. 320, 880, 887, 942.

Rights of commoners.]—See **COMMONS**, Vol. XI., pp. 41, 48, 49, Nos. 573, 695, 701.

34. Warren — Origin — Privilege.]—There is no privilege to make a fish pond as there is in case of a warren (**HOLT, C.J.**).—**ANON.** (1704), 6 Mod. Rep. 183; 87 E. R. 939.

35. ——— Nature — Private nature.]—A warren is of a private nature. —**LOWTHER'S CASE** (1725), 2 Ld. Raym. 1409; 92 E. R. 417; *sub nom.* *R. v. LOWTHER*, 1 Stra. 637.

Annotation:—*Refd.* *R. v. Speyer*, *R. v. Cassel*, [1916] 1 K. B.

36. ——— Free warren — Whether ejectment lies in respect of.]—Ejectment will not lie of a free warren (*per CUR.*).—**TREMAIN v. SANDS** (1603), 1 Keb. 500; 83 E. R. 1076.

Right of free warren.]—See **COMMONS**, Vol. XI., pp. 26, 28.

PART III. SECT. 1. SUB-SECT. 2.

g. Rights of landowner—Theft of disabled pheasant—On turnpike road.]—A conviction obtained upon a summary complaint before the sheriff, which

charged the theft from a turnpike road of "a dead pheasant, or a pheasant totally disabled by a shot, & the property or in the lawful possession of A." D. suspended on the ground that the charge being a theft of a wild

animal, the complaint ought to have shown how it became the property of A. **WILSON v. DYKES** (1872), 2 Q. B. 183; 10 Macph. (CL. of 444; 44 Sc. Jur. 251. — **SCOT.**

Part IV.—Persons having Rights over Game.

SECT. 1.—OWNER OF LAND.

SUB-SECT. 1.—IN OCCUPATION.

See Ground Game Act, 1880 (c. 47).

37. Right to kill ground game—“Occupier of d.”—An owner occupying his own land is an occupier of land within the meaning of Ground Game Act, 1880 (c. 47), s. 1. The owner of land granted to pltf. a lease of the exclusive right of sporting upon the land, & subsequently, during the currency of the lease, sold & conveyed the land to deft. who entered into occupation of the land. Deft. caused the rabbits on the land to be trapped, claiming as occupier a right to do so under the provisions of Ground Game Act, 1880 (c. 47), whereupon pltf. brought an action against deft. for infringement of pltf.'s exclusive right of sporting:—*Held*: deft., being the occupier, was entitled under Ground Game Act, 1880 (c. 47), to kill the ground game, none the less because he happened to be also the owner.—*ANDERSON v. VICARY*, [1900] 2 Q. B. 287; 69 L. J. Q. B. 713; 11 L. T. 15; 48 W. R. 593; 16 T. L. R. 421, C. A. *Annotations*: *Expld.* *Waters v. Phillips*, [1910] 2 K. B. 465. *Reid.* *May v. Waters*, [1910] 1 K. B. 431.

38. — As against grantee of sporting rights.—*ANDERSON v. VICARY*, No. 37, *ante*.

— **Use of firearms by night.**—See No. 13.

— **Use of poison.**—See No. 13.

— **Use of exposed spring traps.**—See Nos. 16, *ante*.

2. NOT IN OCCUPATION.

A. In General.

39. Breach of covenant by shooting tenant—Right of owner to recover damages—Impossibility of performance caused by acts of owner.—Declaration, that pltf. & other persons, by indenture, demised to deft. certain lands of pltf., & also the sole right of shooting, etc., in, upon, & within all the lands of pltf. in H., for twenty-one years, & deft. by the deed covenanted with pltf. that he would not permit the rabbits to become so numerous as to cause damage to any of the farm tenants of the lands. Breach assigned, that deft., after the indenture & during the term, did contrary to the covenant, permit the rabbits to become so numerous as to cause damage to divers of the farm tenants, whereby they were greatly damaged, & pltf. became liable to them for such damage, etc. Plea, that at the time of the demise, & thence hitherto, parts of the lands, in, upon, & within which pltf. & the other persons demised to pltf. the sole right of shooting, etc., as in the declaration mentioned, were & have been respectively held by & in the possession of certain persons, as tenants to pltf. & the other persons, without there being reserved to pltf. & the other persons or any of them, the right of shooting, etc., or otherwise

killing rabbits, in, upon, or within same respectively, & pltf. & the other persons had not, nor had any of them, at the time of the demise or at any time since, any right or power to demise to deft. the right of shooting, etc., rabbits on the parts of the lands; & that deft. has never had, or been able to have or enjoy, the right of shooting, etc., rabbits in, upon, or within the parts of the lands, & has been wholly hindered & prevented, by the respective tenants thereof, from shooting, etc., rabbits in, upon, & within same, & that the alleged breaches of covenant in the declaration assigned, are breaches arising from & consequent upon rabbits being permitted, by the respective tenants of the lands, to become so numerous as to cause damage as in the declaration alleged, & not from any default by or on the part of deft.:—*Held*: to be a good plea in answer to pltf.'s action. Pltf. not having, in the leases to his tenants, reserved the right of shooting over the lands, had no power to authorise deft. to enter thereon for the purpose of shooting, & so was himself the cause of deft.'s breach of covenant, by having rendered it impossible for deft. to enter upon the lands for the purpose of performing it.—*CORNEWALL v. DAWSON* (1871), 24 L. T. 664.

40. — Duty of owner to protect agricultural tenant.—*GWYDYR (LORD) v. LAKE-MAN* (1874), 38 J. P. Jo. 260.

Annotation:—*Folld.* *Gooch v. Dudley* (1877), 41 J. P. Jo. 206.

41. — Owner not liable to compensate agricultural tenant.—A lease was made between pltf. & deft. by which pltf. granted exclusive rights of sporting over his estate to deft. who covenanted that he would during the term keep down & destroy the rabbits on the estate, so that no appreciable damage might be done to the crops thereon. Appreciable damage was done to the crops of an occupier of the land by rabbits on the estate, but pltf. never was under any liability to compensate the occupier for any such damage, & paid him no sum whatever in respect thereof. In an action for breach of covenant:—*Held*: pltf. having suffered no damage himself, & not being in the position of a trustee for the occupier, was entitled only to nominal damages.—*WEST v. HOUGHTON* (1879), 4 C. P. D. 197; 40 L. T. 364; 43 J. P. 607; 27 W. R. 678, D. C.

Annotations:—*Mentd.* *Lloyd's v. Harper* (1880), 16 Ch. D. 290; *Re Flavell*, *Murray v. Flavell* (1883), 25 Ch. D. 89; *Leopold Walford (London) v. Affreteurs Reunis Soc. Anon.*, [1918] 2 K. B. 498.

42. — Whether arbitration condition precedent.—A lessee covenanted with the lessor that he would keep such a number only of hares & rabbits as would do no injury to the crops, & in case he kept such a number as should injure the crops, he would pay a fair & reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators, or an umpire. The lessor having brought an action for breach of covenant, alleging that the lessee had not kept such a number only of hares & rabbits as would do no injury, but had kept such

PART IV. SECT. 1. SUB-SECT. 2.—A.

a. General rule—Scottish law.—By the Scottish law if an

is silent as to hunting, shooting, or other similar sports, the right to these enjoyments does not pass to the lessee, but remains in the

landlord by law, without any express or special reservation.—*COPLAND v. MAXWELL* (1871), L. R. 2 Sc. & Div. 103.—*SCOT.*

a number as did injury & had neglected to pay any compensation:—*Held*: upon the true construction of the lease the covenant to refer the amount of compensation was a collateral & distinct covenant, & the action was maintainable, although there had been no arbn.—*DAWSON v. FITZGERALD* (1876), 1 Ex. D. 257; 45 L. J. Q. B. 893; 35 L. T. 220; 24 W. R. 773, C. A.; *revers.*, L. R. 9 Ex. 7.

Annotations:—*Const.* *Farrowby v. Leicester Corpn.* (1915), 85 L. J. Ch. 150. *Reid.* *Babbage v. Coulburn* (1882), 9 Q. B. D. 235; *Viney v. Bignold* (1887), 20 Q. B. D. 172; *Hallen v. Spaeth*, [1923] A. C. 684. *Mentd.* *Edwards v. Aberayron Mutual Ship Insee. Soc.* (1876), 1 Q. B. D. 563; *West London Dalry Soc. v. Abbott* (1881), 44 L. T. 376.

43. ———.]—*GOOCH v. DUDLEY* (1877), 41 J. P. Jo. 260.

——— *Right of assignee of reversion to sue.*—*See* No. 95, *post*.

B. Reservation of Rights.

Game Act, 1831 (c. 32), s. 8.

44. *How made*—*By parol*—*Parol demise.*]—A yearly tenant occupied pasture land under a parol demise, the lessor reserving to himself the right to enter & kill & take the game. The ratable value of the land, assuming it to be held as pasture land only, was £11 5s. 8d.; &, assuming that the occupier exercised the right to kill & take the game, was £26 19s. 8d. On an appeal by the tenant against a poor rate in which he was rated upon the greater amount, the sessions reduced the rate to a rate upon the lesser amount. Upon a case stated:—*Held*: the reduction was right; the effect of the reservation in the demise, taken together with Game Act, 1831 (c. 32), being to separate the right of killing & taking the game from the lessee's occupation.—*R. v. THURLSTONE (INHABITANTS)* (1859), 1 E. & E. 502; 28 L. J. M. C. 106; 32 L. T. O. S. 275; 23 J. P. 505; 5 Jur. N. S. 820; 7 W. R. 192; 120 E. R. 997.

Annotations:—*Reid.* *Sunderland Overseers v. Sunderland Union Grdns.* (1865), 18 C. B. N. S. 531; *R. v. Battle Union* (1866), L. R. 2 Q. B. 8; *R. v. Dowlais Iron Co.* (1868), 10 B. & S. 208; *R. v. Rhymney Ry.* (1869), L. R. 4 Q. B. 276; *Coleman v. Bathurst* (1871), 40 L. J. M. C. 131; *Worcester Corpn. v. Droitwich Assmt. Com.* (1876), 2 Ex. D. 49; *Kenrick v. Gullfield Churchwardens & Overseers* (1879), 49 L. J. M. C. 27.

45. ———.]—A landlord, who on letting a farm verbally has reserved the game to himself, has thereby a sufficient authority to give leave to a person to kill game on such farm to prevent any such person from being a trespasser thereon in pursuit of game within Game Act, 1831 (c. 32), s. 30.

There may be such a thing as a parol reservation of game upon a parol demise (*LINDLEY, J.*).—*JONES v. WILLIAMS & ROBERTS* (1877), 46 L. J. M. C. 270; 36 L. T. 559; 41 J. P. 614, D. C.

Annotation:—*Mentd.* *Colquhoun*, [1904] 1 K. B.

46. *Lease in writing.*]—L. wrote a letter to the owner, offering to take a farm on certain terms stated, nothing being said as to game. The letter was not signed by either party, but a copy was exchanged, & L. entered into possession. L. having afterwards shot a hare on the farm, was summoned by the landlord; but

the justices held that as the lease was in writing, nothing could be added to it by parol evidence, & refused to hear evidence as to other terms alleged by the landlord to have been agreed upon. The information was dismissed:—*Held*: as there was some evidence of an agreement in writing, the effect of which was to leave the tenant the right of sporting, the decision of the justices could not be interfered with.—*BUTLER v. LORD* (1860), 24 J. P. 390.

47. ———.]—A verbal agreement that the game should be reserved to the landlord is a valid reservation of the game. Where a tenant shot game in such circumstances, he could be convicted of trespassing in pursuit, etc.—*LIVERSEDGE v. WHITEOAK* (1893), 57 J. P. Jo. 602, D. C.

48. *What amounts to*—“*Liberty to hawk, hunt, set & fowl in & upon premises*”—*Whether concurrent right in tenant.*]—In an old lease dated 1794 for ninety-nine years, the landlord reserved to himself “liberty to hawk, hunt, set, & fowl in & upon the premises.” The tenant's son being summoned for trespassing in pursuit of game, he set up a claim of right:—*Held*: as it was not clear whether the tenant had not a concurrent right of killing the game under the lease, the justices ought to have stayed their hands on this claim of right being made.—*R. v. KAYLEY, KIDDLE v. KAYLEY* (1864), 10 L. T. 339; 28 J. P. 805.

49. ——— *Agreement by tenant not to destroy game.*]—An agreement, under which a tenant held, contained a stipulation that he would not destroy any game, & would endeavour to preserve all game bred & being on the farm. He was convicted under Game Act, 1831 (c. 32), s. 12, for that he, being the occupier of certain land, the right of killing the game on such land being reserved to his landlord, did unlawfully kill upon such land certain game:—*Held*: the stipulation in the agreement could not be construed as a reservation of game to the landlord, & the conviction ought to be quashed.—*COLEMAN v. BATHURST* (1871), L. R. 6 Q. B. 366; 40 L. J. M. C. 131; 24 L. T. 426; 35 J. P. 630; *sub nom.* *R. v. WILTSHIRE JJ., COLEMAN v. BATHURST*, 19 W. R. 848.

50. *Construction of terms*—“*Liberty of hawking & hunting*”—*Shooting of feathered game.*]—An exception in a conveyance, made in 1655, of the free liberty of hawking & hunting, does not include the liberty of shooting feathered game with a gun.—*MOORE v. PLYMOUTH (EARL)* (1817), 7 Taunt. 614; 1 Moore, C. P. 346; 120 E. R. 245; *on appeal* (1819), 3 B. & Ald. 66.

Annotations:—*Mentd.* *Dickenson v. Teague* (1833), 4 Tyr. 450; *Price v. Williams* (1836), 1 M. & W. 6.

51. ——— “*Except & reserved all royalties*”—*Killing & taking birds of warren.*]—In trespass for breaking & entering the closes of A., pltf., it was pleaded that B., deft., being seized in fee of the closes, & of the manor of M., whereof the closes were parcel, demised the closes to C. for ninety-nine years; & that afterwards, by indenture made between B. of the one part, & C. of the other part, C. granted to deft. the sole & exclusive right to pursue, kill, & take all birds of warren at any

PART IV. SECT. 1, SUB-SECT. 2.—B.
k. *Validity*—*Reservation as to game & shooting*—*Agreement not under seal.*]—By agreement in writing, not under seal, C. agreed to let to pltf.

part of the lands of A. & B., reserving the exclusive right to game & the right of shooting upon the premises, for one year, & further agreed that pltf. should, for

ten years from the date of the agreement, have the right of shooting over all the lands of A. & B., & full authority to use proper means for the preservation of the game on the lands. The

58. —.]—A statement of claim alleged that pltf. became tenant to deft. of a farm, induced by a promise that, if pltf. left the ground game unshot for deft.'s benefit, deft. would compensate the pltf. for damage done to pltf.'s crops by the ground game; that the pltf. allowed the ground game to go unshot, & deft. shot over the farm; & the growing crops of the pltf. were damaged by the ground game, & pltf. claimed compensation. Deft. pleaded that the agreement was void in law by reason of Ground Game Act, 1880 (c. 47), s. 3, & the statement of claim disclosed no cause of action. On argument of the point raised on the pleadings:—*Held*: the agreement purported to alienate the right given by the Act to the occupier to kill & take the ground game, & purported to give the occupier an advantage in consideration of his forbearing to exercise his right within sect. 3, & was therefore void, & pltf. was not entitled to recover.—*SHERARD v. GASCOIGNE*, [1900] 2 Q. B. 279; 69 L. J. Q. B. 720; 82 L. T. 850; 48 W. R. 557; 16 T. L. R. 432; 44 Sol. Jo. 517, D. C.

59. Whether severable—Ground game & winged game.]—*STANTON v. BROWN*, No. 57, *ante*.

60. Effect—Liability of tenant to be convicted for trespassing—Killing game.]—*LIVERSEDGE v. WHITEOAK*, No. 47, *ante*.

61. ——— Killing rabbits.]—The tenant of a farm, the right of sporting over which was reserved to the landlord, employed appls. to kill rabbits upon the farm. They were proceeded against under Game Act, 1831 (c. 32), s. 30, & were convicted:—*Held*: the tenant himself could not be so convicted; appls. having acted by his directions, had same rights as he had, & therefore the conviction was bad.—*SPICER v. BARNARD* (1859), 1 E. & E. 874; 28 L. J. M. C. 176; 33 L. T. O. S. 121; 23 J. P. 311; 5 Jur. N. S. 961; 7 W. R. 467; 120 E. R. 1139.

Annotations:—*Apld.* Padwick v. King (1859), 7 C. B. N. S. 88. *Refd.* Frogley v. Lovelace (1859), John. 333.

62. —.]—K., a servant of a tenant who occupied land under a lease which reserved to the landlord the right of sporting over the land, & also gave the tenant the right of sporting over it, being, by his master's authority, in pursuit of rabbits upon the land, was charged with committing a trespass under Game Act, 1831 (c. 32), s. 30:—*Held*: the tenant having the right to kill rabbits upon his land, had a right to employ a person to do so for him; & this was different from a tenant authorising a stranger to sport over the land.—*PADWICK v. KING* (1859), 7 C. B. N. S. 88; 29 L. J. M. C. 42; 1 L. T. 98; 23 J. P. 776; 6 Jur. N. S. 274; 8 W. R. 60; 141 E. R. 748.

63. Right of owner to authorise third party to take game.]—G., the owner of land, granted a lease under seal for twenty-one years, "reserving unto G., his heirs & devisees, & also to A., B., C., & D., the full liberty of hunting, fishing, & shooting, & to carry away the fish & game killed on such days as the four parties should name, on giving seven days' notice to the tenant." G. gave to P. leave to take the game, & P. entered & killed game without any notice to the tenant, & for which he was charged under Game Act, 1831 (c. 32), s. 30:—*Held*: (1) G. had a licence of profit, & could give authority to any person he pleased to take the game at any time; (2) A., B., C., & D. only required to give the seven days' notice, but G. need not give it.—*OWEN v. PARSONS* (1874), 38 J. P. 614.

SECT. 2.—SHOOTING TENANT.

SUB-SECT. 1.—NATURE OF SPORTING RIGHTS.

64. Incorporeal hereditament.]—Declaration, in *assumpsit*, alleged that pltf. agreed to grant & let, & deft. to take, a messuage at D., in the parish of M., with exclusive licence to shoot & sport over the manor of D., in the parishes of M. & L., & to fish in the waters thereof, during the term; to hold the messuage, right, liberties, & premises, for the term, at a rent, mutual promises; & that pltf. let the messuage, right, liberties, & premises to deft., who entered into & upon same, & became & was possessed thereof for the term; breach, non-payment of rent:—*Held*: bad, on general demurrer, inasmuch as the agreement showed a demise of an incorporeal hereditament, which could only be by deed; & the letting as subsequently alleged, if otherwise available to support the action, should have appeared to be by deed.—*BIRD v. HIGGINSON* (1837), 6 Ad. & El. 824; 6 L. J. Ex. 282; 1 J. P. 322; 112 E. R. 316, Ex. Ch.; *affg.* (1835), 2 Ad. & El. 696.

Annotations:—*Consd.* Thames Haven Dock Co. v. Brymer (1850), 5 Exch. 696. *Refd.* Doe d. Morgan v. Powell (1844), 7 Man. & G. 980; *Brown v. Peto*, [1900] 2 Q. B. 653. *Mentd.* Worley v. Harrison (1835), 3 Ad. & El. 669; *Hayelden v. Staff* (1836), 6 Nev. & M. K. B. 659; *R. v. Hockworthy* (1837), 7 Ad. & El. 492; *Upward v. Knight* (1839), 21 Scott, 311; *Ratton v. Davis* (1841) 1 Gal. & Dav. 21; *Thomas v. Fredricks* (1847), 10 Q. B. 775; *Callander v. Howard* (1850), 10 C. B. 290.

65. —.]—Declaration on a written agreement not under seal by pltf. to let land to deft. with right of sporting, deft. to make satisfaction to pltf.'s tenants for damage done by game on their farms, the amount to be ascertained by a valuer to be chosen by each party & an umpire; averment that deft. entered, & preserved the game which did damage to the tenants; that deft. was requested by pltf. to appoint a valuer; breach, that, although within a reasonable time a valuer was appointed by pltf. & notice thereof given to deft., & pltf. requested him to give the name of a referee on his part & fix a time, etc., of meeting to ascertain the damage, etc., in default of which pltf.'s valuer would alone ascertain the damage done, yet deft. did not give notice to pltf. of any valuer chosen by him nor has ever made satisfaction, etc.:—*Held*: (1) after verdict it must be taken that the declaration alleged a refusal by deft. to appoint a valuer; (2) although the right to shoot did not pass under this contract being an incorporeal hereditament, yet the agreement to make compensation was valid & good ground for an action, deft. having had the full benefit of such agreement.—*THOMAS v. FREDRICKS* (1847), 10 Q. B. 775; 16 L. J. Q. B. 393; 11 Jur. 942; 116 E. R. 294.

Annotation:—*Generally*, *Mentd.* Knowlman v. Bluett (1874), L. R. 9 Exch. 307.

66. —.]—*HOOPER v. CLARK*, No. 94, *post*.

67. —.]—(1) A lessor purported to lease certain shooting rights for one year from Mar. 25, 1895, by an instrument not under seal. On Dec. 31, 1895, the lessor consented to a future reduction of rent in a letter addressed to the lessee. Subsequently to Mar. 25, 1896, the lessee continued for some years longer in tacit possession of the shooting at the reduced rent, but nothing further was agreed between the parties as to the nature or duration of such tacit possession.—On Feb. 26, 1901, the lessor determined the possession by verbal, & on Mar. 23, by written, notice, as from Mar. 25 then instant:—*Held*: the possession of the lessee subsequent to Mar. 25, 1896, was not that of a mere licensee. But the agreement of

Sect. 2.—Shooting tenant: Sub-sects. 1 & 2, A. & B.; sub-sect. 3.]

May 14, 1895, was more than a mere licence. It conferred a right to shoot & carry away game when shot, & it was not revocable at will (COZENS-HARDY, J.).

(2) The common-law rule as to the necessity of giving six months' notice to determine a tenancy from year to year in a corporeal hereditament does not apply in the case of an incorporeal hereditament such as the one now in question; & assuming that defts. were entitled to "reasonable notice," that "reasonable notice" had in fact been given in the circumstances.—*LOWE v. ADAMS*, [1901] 2 Ch. 598; 70 L. J. Ch. 783; 85 L. T. 195; 50 W. R. 37; 17 T. L. R. 763.

Annotations:—*Generally*, *Mentid*, *Jones v. Tankerville*, [1909] 2 Ch. 440; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1.

68. Profit à prendre.]—*WICKHAM v. HAWKER*, No. 55, *ante*.

69. —.]—The right of hunting, shooting, etc., is an interest in the realty, & a grant of it is a licence of a *profit à prendre*.

This right was in the owner of a manor. There was no right of free warren in the manor. An Act of Parliament, reciting that "there is within & parcel of the manor a certain stinted pasture, called Bailey Hope," that J. as lord of the manor, was owner of the soil thereof, & was "entitled to all mines & minerals within & under same, & to other rights, royalties, liberties, & privileges in & over same," that he & all the owners of tenements thereon were entitled to cattle-gates & rights of turbary thereon; & that for the purposes of improvement it was desirable to allot the stinted pasture, in severalty, among the persons entitled to the cattle-gates, enacted that it should be so allotted; & made each allotment "freehold to all intents & purposes," but, provided that nothing therein contained, shall prejudice, etc., the rights, etc., of J., his heirs & assigns, lords of the manor of N., to any seignories, etc., belonging to such manor: "but that the said J. his heirs & assigns, shall, & may at all times hereafter enjoy all rents, services, etc., & also all right of hunting, shooting, fishing & fowling, on, through, & over the stinted pasture, & every part & allotment thereof, & all other seignories, royalties & privileges to the lord of the manor of N., for the time being, incident or belonging, other than those declared to be barred by this Act, in as full a manner as if this Act had not been passed"—*Held*: this proviso did not apply to mere manorial rights, but the exclusive right of hunting & shooting over the allotments was thereby reserved to J.—*EWART v. GRAHAM* (1859), 7 H. L. Cas. 331; 29 L. J. Ex. 88; 33 L. T. O. S. 349; 23 J. P. 483; 5 Jur. N. S. 773; 7 W. R. 621; 11 E. R. 132, H. L.; *affg.* S. C. *sub nom.* *GRAHAM v. EWART* (1856), 1 H. & N. 550, Ex. Ch.

Annotations:—*Consd.* *Bruce v. Helliwell* (1860), 5 H. & N. 609; *Jeffries v. Evans* (1865), 19 C. B. N. S. 246; *Hilton & Walkerfield Overseers v. Bowes Overseers* (1866), L. R. 1 Q. B. 359; *Sowerby v. Smith* (1874), L. R. 9 C. P. 524; *Devonshire v. O'Connor* (1890), 24 Q. B. D. 468. *Refd.* *Blades v. Higgs* (1865), 20 C. B. N. S. 214; *Leconfield v. Dixon* (1867), L. R. 3 Exch. 30; *Musgrave v. Forster* (1871), L. R. 6 Q. B. 590; *Rogers v. St. Germans Union* (1876), 35 L. T. 332; *Fitzhardinge v. Purcell* (1908), 99 L. T. 154.

70. —.]—*Semble*: the right to shoot wild-fowl is a profit à prendre, & a custom for all the inhabitants of a locality, being wildfowlers by trade, to shoot wildfowl on certain lands would therefore be bad in law.—*FITZHARDINGE (LORD)*

v. PURCELL, [1908] 2 Ch. 139; 77 L. J. Ch. 529; 99 L. T. 154; 72 J. P. 276; 24 T. L. R. 564.

Annotation:—*Mentid*, Secretary of State for India v. Sri Rajah Chellikani Ram Rao (1916), 85 L. J. P. C. 222.

— **Claim by custom.]—***See EASEMENTS*, Vol. XIX., p. 205, Nos. 1569, 1570.

71. Interest in land—Statute of Frauds, s. 4.]—A grant of a right to shoot over land & to take away a part of the game killed is a grant of an interest in land & within above sect.—*WEBBER v. LEE* (1882), 9 Q. B. D. 315; 51 L. J. Q. B. 485; 47 L. T. 215; 47 J. P. 4; 30 W. R. 866, C. A. **Annotation:—***Refd.* *Il. v. Surrey County Court Judge*, [1910] 2 K. B. 410.

— **Lands Clauses Consolidation Act, 1845 c. 18.]—***See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 125, No. 153.

Rating of sporting rights.]—*See RATES & RATING*.

SUB-SECT. 2.—ACQUISITION OF RIGHTS.

A. Lease.

72. Necessity for deed.]—*BIRD v. HIGGINSON*, No. 64, *ante*.

73. — Enjoyment of right—Tenant estopped from setting up want of seal.]—*THOMAS v. FREDRICKS*, No. 65, *ante*.

74. — — —.]—By Scottish law an instrument under seal is not necessary for the conveyance of a sporting right, & therefore the stipulations of an unsealed lease made between Englishmen in England of a sporting right over land in Scotland may be enforced by action in the English cts., as the provision of the law of England that an instrument under seal is necessary for the conveyance of a right to an incorporeal hereditament, is not part of the *lex fori*. Even if such lease were invalid for want of a seal, the lessee, after having had an enjoyment of the right, could not set up the invalidity as a defence to an action for breach of a stipulation in the lease to leave a good breeding stock of game on the ground at the termination of the lease.—*ADAMS v. CLUTTERBUCK* (1883), 10 Q. B. D. 403; 52 L. J. Q. B. 607; 48 L. T. 614; 31 W. R. 723.

75. —.]—*FROGLEY v. LOVELACE (EARL)*, No. 99, *post*.

76. —.]—B., by memorandum, not under seal, agreed to take the sporting over C.'s farm at an annual rent of £40, & C. received £30 part thereof. But C. gave notice thereafter to B., not to shoot. B., having continued to shoot, was summoned for trespassing, & he set up a claim of right:—*Held*: the justices were right in holding that the agreement not being under seal, was revoked by the notice, & therefore, the *bond fide* belief of B. was not equivalent to a claim of right, & their jurisdiction was not ousted thereby.

Now the justices properly held that as the agreement was not under seal, it did not convey the right to the game (*BLACKBURN, J.*).

If a mere *bond fide* belief is shown in deft. that is not enough, unless based on a question of title (*MELLOR, J.*).—*BRIGSTOCKE v. RAYNER* (1875), 40 J. P. 245.

77. Lease of part of land with liberty of sporting over whole—Validity—Lessor acting under power to make leases of "estates, hereditaments &

premises.”]—Estates, hereditaments, & premises were devised to R. for life, with power to the tenant for life to make any lease of the several estates, hereditaments, & premises, or any part or parts thereof, for twenty-one years, reserving the most improved yearly rent with a condition for re-entry on nonpayment, so that there should be no clause giving the lessee power to commit waste, & so as the rent should be incident to, & go along with, the reversion:—*Held*: this power did not authorise a lease of part of the land, with liberty to sport over the rest.

The lease is of a part of the premises, with a liberty to sport over the remainder. It is not like the right even of a lord of the manor, though he had little enough; nor is it like a free warren. The right can arise in this instance only out of the possession of the land; & the power does not contemplate the separation of the incident from the land (PATTESON, J.).—*DAYRELL v. HOARE* (1840), 12 Ad. & El. 356; 4 Per. & Dav. 114; 9 L. J. Q. B. 299; 113 E. R. 847.

Annotations:—*Consd.* Brown v. Peto, [1900] 2 Q. B. 653. *Refd.* Jegen v. Vivian (1865), L. R. 1 C. P. 9; *Re* Gladstone Gladstone v. Gladstone, [1900] 2 Ch. 101; *Re* Newell & Nevill's Contract, [1900] 1 Ch. 90; *Re* Rutland's S. E. Rutland v. Bristol, [1900] 2 Ch. 206. *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824.

78. Proof—Necessity for production of deed—On prosecution of occupying tenant.—The tenant of P. shot game upon land which was occupied by him as tenant. Before the commencement of the tenancy P. had granted the right of shooting over the land to G. by deed. The tenant having been summoned before justices was convicted of killing game upon the evidence of G. that he had the exclusive right of shooting over the land; that he preserved the game there; that he had given no permission to the tenant to shoot; & that the tenant had killed game at the time in question:—*Held*: upon this evidence the justices ought not to have convicted the tenant, inasmuch as there was not sufficient evidence that the right of shooting was in G. without the production of the deed.—*BARKER v. DAVIS* (1865), 34 L. J. M. C. 140; 29 J. P. 501; 11 Jur. N. S. 651.

Annotation:—*Distd.* Taylor v. Jackson (1898), 78 L. T. 555.

Agreement for lease.—*See* LANDLORD & TENANT.

B. Licence.

See Game Act, 1831 (c. 32), s. 30, & generally, REAL PROPERTY; TRESPASS.

79. Licence of pleasure & licence of profit distinguished—Licence of pleasure personal.—*NORTHFOLK (DUCHESS) v. WISEMAN* (1497), Y. B. 12 Hen. 7, fo. 25, pl. 5; *subsequent proceedings* (1498), Y. B. 13 Hen. 7, fo. 13, pl. 2.

Annotations:—*Consd.* Wickham v. Hawker, Heath Rolph (1840), 10 L. J. Ex. 153; *Walsh v. Southwell* (1851), 4 New Sess. Cas. 546. *Refd.* Shrewsbury's Case (1610), 9 Co. Rep. 46 b; *Liford's Case* (1615), 11 Co. Rep. 46 b; *Web v. Paternoster* (1620), Palm. 71; *Sechover v. Dale* (1627), Poph. 193. *Mentd.* R. v. Carter (1721), 11 Mod. Rep. 370.

80. ————A grant or authority to come upon my lands & to hunt there is but a licence & no more; but if it is to take the profits, it is a lease at will; so if it is to take the profits for a year,

it is a lease for a year, for this passes an interest; the other is only an authority to do particular acts (*per* CUR.).—*ANON.* (1705), 3 Salk. 223; 91 E. R. 789.

81. Who may grant leave or licence—Liability of person giving unauthorised leave or licence.—If A. gives B. leave to go on a field, in which A. has no right, & B. goes there, this will not make A. liable as a co-trespasser with B.; but if A. orders & authorises B. to go on the field, & he does so, A. is a joint trespasser with B.; the latter being an authority, the former a leave & license only. A. ordered & authorised B. to sport over the lands of C., which he did. D., by the assent of C., laid an information before a magistrate against B. for this trespass under Game Act, 1831 (c. 32), s. 30. The magistrate dismissed the complaint. In an action by C. against A. & B. for this trespass: *Held*: the proceedings before the magistrate were a bar to the action both as to A. & B., under sect. 46 of the Act; & to be a bar, it was not necessary that the magistrate should convict of the trespass, it being sufficient if he adjudicated between the parties.—*ROBINSON v. VAUGHTON* (1838), 8 C. & P. 252.

82. ————Reservation of shooting rights.—D., with the leave of J., the tenant, & not being the servant of or employed by J., went on J.'s lands to kill rabbits in the daytime. J.'s lease reserved the shooting to the lessor, D. being charged under Game Act, 1831 (c. 32), s. 30:—*Held*: D. could not set up the leave of J., & ought to have been convicted.—*PRYCE v. DAVIES* (1872), 36 J. P. 214.

83. —————*JONES v. WILLIAMS & ROBERTS*, No. 45, *ante*.

84. ————In dispute—Question of fact for justices.—A trespasser in search of game set up as a defence, under Game Act, 1831 (c. 32), s. 30, the leave & licence of the occupier under a parol lease. The occupier denied that the game was reserved; evidence was given to show that it was. Upon evidence held the defence was not *bond fide*, & therefore, the jurisdiction of the justices was not ousted.

Semble: if there is any evidence to show that the game is reserved, it becomes a question of fact to be decided by the justices.—*R. v. CRITCHLOW* (1878), 26 W. R. 681.

85. What amounts to licence.—*LOWE v. ADAMS*, No. 67, *ante*.

Revocation of licence.—*See* TRESPASS.

Claim by custom.—*See* EASEMENTS, Vol. XIX., p. 205, Nos. 1509, 1570.

Effect of licence—Defence to legal proceedings.—*See* Part VI., Sect. 1, sub-sect. 2, *post*.

SUB-SECT. 3.—EXTENT OF RIGHTS.

86. Right of owner to demise part of land.—Deft. demised to pltf. for twenty-one years, a mansion house & land, with the sole licence of shooting & sporting over all other the lands, plantations, & coverts of deft. subject to the

PART IV. SECT. 2, SUB-SECT. 3.

1. Grant of "shooting of every description"—Whether landlord ex-

cluded.—A game lease gave the tenant the whole game & shooting of every description, upon certain lands,

with the sole & exclusive hunting for & killing the same, of law:—*Held*: this included the

Sect. 2.—Shooting tenant: Sub-sects. 3 & 4, A. & B.; sub-sect. 5.]

liberty for each tenant on his farm to kill rabbits, with ferrets only. Deft. covenanted for quiet enjoyment, & that, if any of the tenants of such plantations, coverts, etc., should obstruct pltf. in the enjoyment of his licence, or should destroy the game, rabbits, etc., then deft. would, upon the requisition of pltf. give notice to quit to such tenants, & enforce the notice by such legal measures as should be necessary. Breach, that deft. demised to R., for the term of twelve years, one hundred acres of the plantations on which the exclusive right of killing rabbits had been granted to pltf., without any clause in the demise to prevent R. from obstructing pltf. in the enjoyment of the licence, or from destroying rabbits, & without reserving to deft. the power of giving R. notice to quit, or of enforcing such notice by such legal measures as should be necessary, the plantations not being at the time of the demise to pltf. parcel of any farm; & that R. afterwards killed & destroyed rabbits. Deft. pleaded, that the rabbits so killed by R. were killed by him on his own farm, with ferrets only:—*Held*: (1) the exception as to killing rabbits extended not only to farms existing at the time of demise to pltf. but also to farms subsequently created; (2) the declaration was bad, as not containing any breach, the demise to R. not constituting any breach of deft.'s covenant.—*NEWTON v. WILMOT* (1841), 8 M. & W. 711; 10 L. J. Ex. 476.

Annotation:—*Generally*, *Mentd.* *Turquand v. Hennet* (1849), 7 C. B. 179.

87. No obligation on owner to keep up quantity of game.]—When a person takes a right of shooting or fishing he takes it as the game or fish may be there; there is no contract on the part of the person letting the right that he will keep up the quantity of game or fish (*ERLE, C.J.*).—*BIRD v. GREAT EASTERN RY. CO.* (1865), 19 C. B. N. S. 268; 34 L. J. C. P. 366; 13 L. T. 365; 11 Jur. N. S. 782; 13 W. R. 989; 144 E. R. 790.

Annotations:—*Reid*, *Wright v. Shrubbs* (1887), 4 T. L. R. 32. *Mentd.* *Warr v. L.C.C.* (1903), 88 L. T. 689.

88. No implied covenant against alteration of land.]—*JEFFRIES v. EVANS*, No. 53, *ante*.

89. Right to prevent cutting of timber—By occupying tenant.]—Pltf. under an agreement not under seal with deft. for a lease of a house & land, & the right to sport during the term over other lands, entered into possession & enjoyed the right of sporting in accordance with the terms of the agreement. Towards the end of the term, the coverts on the lands on which pltf. had leave to sport were destroyed by P., who was a tenant under deft. of part of such lands, & their agent as to the remainder. Upon bill filed for the execution of a lease by deed for the purpose of enabling pltf. to bring an action at law for damages, & praying for an injunction, & for an inquiry as to damages in lieu of specific performance:—*Held*: the term having then expired, pltf. had had the enjoyment of all that he had contracted for & the ct. would not decree the execution of the lease, & bill dismissed accordingly.

The bill charges that deft. ought to be restrained from felling or clearing any plantations which are of use as a protection to the game, & that he is

entitled to an inquiry as to damages for what has been already done in that respect. I am clearly of opinion that he has no such right. If he wished to be thus protected it was incumbent upon him to take a covenant to that effect (*MALINS, V.-O.*).—*TURNER v. CLOWES* (1869), 20 L. T. 214; 17 W. R. 274.

90. — By owner—Damage to shooting.]—An ordinary grant of the right of shooting over an estate does not prevent the owner of the estate from cutting down trees, although the cutting of the trees may prejudice the shooting.

The right of shooting is a right to shoot over the lands as they may happen to be at the time, the landlord, of course, not doing anything for the express purpose of destroying the right (*MALLISH, J.*).—*GEARNS v. BAKER* (1875), 10 Ch. App. 355; 44 L. J. Ch. 334; 33 L. T. 86; 39 J. P. 564; 23 W. R. 543, L.J.J.

Annotation:—*Folld.* *Dick v. Norton* (1916), 85 L. J. Ch. 623.

91. — — —.]—A shooting tenant is not entitled to an injunction restraining his landlord from felling timber on the estate.—*DICK v. NORTON* (1916), 85 L. J. Ch. 623; 114 L. T. 548; 32 T. L. R. 306; 60 Sol. Jo. 321.

92. Right of owner to sell part of land for building.]—In order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, pltf. must show that the act must result in a violation of such right. The owner of an estate, the shooting over which had been let for a term of years, issued particulars of sale of the estate in thirteen lots, stating that the estate contained several plots of accommodation & building land suitable for the erection of villas & residences, & describing one lot in particular as well situated for the erection of a house. The particulars showed that it was intended to make a road through the estate & dedicate it to the public; but gave full notice of the right of shooting:—*Held*: the ct. would not, at the instance of the owner of the right of shooting, interfere to prevent the intended sale.—*PATTISSON v. GILFORD* (1874), L. R. 18 Eq. 259; 43 L. J. Ch. 524; 22 W. R. 673.

Annotations:—*Consd.* *Goodhart v. Hyett* (1883), 25 Ch. D. 182. *Reid*, *Wright v. Shrubbs* (1887), 4 T. L. R. 32.

SUB-SECT. 4.—EXERCISE OF RIGHTS.

A. In General.

93. Must be reasonable.]—A person having an agreement for shooting over a farm has only a right to do so in the usual & reasonable way, & not to tread over fields of standing crops at a time when it is not usual or reasonable, & whether the occupier standing by is evidence of actual leave & licence, depends on all the circumstances. He has no right to turn rabbits on to the farm, without express leave to do so, & he is liable to the occupier for damage done to the crops by rabbits, or the progeny of rabbits, thus turned on by his express or implied authority, & without the occupier's licence.—*HILTON v. GREEN* (1862), 2 F. & F. 821, N. P.

— **Overstocking land with game.]**—*See* Sub-sect. 4, B., *post*.

Liability—To owner—Failure to keep down ground game.]—*See* Nos. 39–43, *ante*.

94. — To assignee of reversion—Breach of covenant—To leave land well stocked with game.]—(1) C. granted & demised the exclusive right & licence to take & kill game on certain land, with the use of a cottage, to deft. for a term; & deft. covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise. C. assigned his reversion in the land & hereditaments to pltf.; & they brought an action, at the end of the term, against deft. for a breach of his covenant:—*Held*: the demise was not a mere licence, but the grant of an incorporeal hereditament; the covenant touched the hereditament demised, & by 32 Hen. 8, c. 34, the assignees of the reversion could sue upon it.

(2) Game found & killed upon land by a trespasser is the property of the owner of the land (COCKBURN, C.J.).—*HOOPER v. CLARK* (1867), L. R. 2 Q. B. 200; 8 B. & S. 150; 36 L. J. Q. B. 79; 31 J. P. 228; 15 W. R. 347; *sub nom.* *HOOPER v. LANE*, 16 L. T. 152.

95. — Not to commit offences against game laws.]—A lease contained a proviso for re-entry in case the lessee, his exors., administrators, or assigns or any tenant, undertenant or occupier of the premises demised, should at any time during the term thereby granted, be lawfully convicted of any offence against any of the present or future game laws. The occupier of the premises having been convicted of killing game without a game certificate, the assignee of the reversion brought ejectment:—*Held*: he could not maintain the action.—*STEVENS v. COPP* (1868), L. R. 4 Exch. 20; 38 L. J. Ex. 31; 19 L. T. 454; 33 J. P. 87; 17 W. R. 166.

Annotation:—*Reid*. *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79.

— **To occupying tenant—For damage to crops.]** *See* Sect. 3, sub-sect. 2, *post*.

Position under Ground Game Act, 1880 (c. 47), s. 6.]—*See* Part II., Sect. 4, *ante*.

B. Liability for Over-Stocking.

96. No right to overstock—Landlord may keep down excess.]—A demise of the exclusive right of

sporting over a farm does not justify the [shooting] lessee in turning out on it game not bred thereon in the ordinary way. *Semble*: in such a case, the lessor is justified in keeping down the excess.—*BIRKBECK v. PAGET* (1862), 31 Beav. 403; 54 E. R. 1194.

Annotation:—*Fold*. *Farrer v. Nelson* (1885), 15 Q. B. D. 258.

97. Damage caused by overstocking—Liability for.]—In an action by a farmer against a gentleman, who was member, not master, of a hunt, who had taken the shooting, etc., on pltf.'s farm, for trespass in hunting & also for laying down rabbits, etc., there being evidence of a licence to lay down some:—*Held*: he was not liable for damage done by rabbits or birds, unless he had laid down an unreasonable & excessive number.—*PAGET v. BIRKBECK* (1863), 3 F. & F. 683.

98. — —.]—Pltf. was the tenant of a farm over which the shooting rights were reserved to the landlord. Defts. were lessees of the shooting rights over the estate of which pltf.'s farm formed part. Pltf. brought his action in the county ct. against defts. for compensation for injury done to his crops by pheasants brought into a coppice adjoining his farm. It was proved at the trial that defts. had brought from another part of the estate four hundred & fifty pheasants, & turned them down in the coppice adjoining pltf.'s farm, & the pheasants came out from the wood & did damage by feeding on the crops in his field, which was contiguous to the coppice. The amount of the damage done was not disputed:—*Held*: (1) pltf. was entitled to recover as the damage complained of had been done by reason of an undue quantity of game having been brought near to his farm; (2) the sporting rights of defts. had been exercised in an unreasonable manner.—*FARRER v. NELSON* (1885), 15 Q. B. D. 258; 54 L. J. Q. B. 385; 52 L. T. 766; 49 J. P. 725; 33 W. R. 800; 1 T. L. R. 483.

Annotation:—*Generally*, *Mentd*. *Stearn v. Prentice*, [1919] 1 K. B. 394.

SUB-SECT. 5.—PROTECTION OF RIGHTS.

99. Injunction—Infringement of rights by landlord—Agreement not under seal.]—Landlord

PART IV. SECT. 2, SUB-SECT. 4.—B.

97 i. Damage caused by overstocking—Liability for.]—R., holder of a judicial tenancy under D., occupied a farm marching upon the demesne belonging to M., in which M. preserved pheasants & other game. Action by R. for damages for injuries done to crops on his land by pheasants from M.'s demesne:—*Held*: the number of pheasants bred by M. in proportion to the acreage of his demesne was not an unreasonable or non-natural user of his lands, & therefore M. was not liable for damage to crops done by pheasants escaping from his demesne on to lands adjoining.—*ROBSON v. LONDONDERRY (MARQUESS)* (1900), 34 L. L. T. 88.—*IR*.

97 ii. — —.]—Where the game on a farm has been increased by the landlord beyond the fair average stock the tenant is entitled to damages for the extraordinary injury thus done.—*WEMYSS v. WILSON* (1849), 20 Sc. Jur. 51.—*SCOT*.

97 iii. — —.]—An agricultural lease reserved game, but not rabbits, to the landlord. Thereafter the landlord let the game to a tenant, the lease containing a clause that the stock of

game should be kept up, but so as not to injure the tenants. The rabbits increased, prior to the game tenant's lease & for a short time after, beyond a reasonable stock, & injured the crops, but were afterwards kept down:—*Held*: the landlord was liable to the agricultural tenant for the injury caused.—*INGLIS v. HAY OR MOIR, MOIR'S TUTORS, ETC.* (1871), 44 Sc. Jur. 123.—*SCOT*.

97 iv. — —.]—A tenant under a lease by which he was entitled to kill rabbits could not recover damages from the landlord for injury done by rabbits to the waygoing crops, unless he showed that he had been prevented from killing them.—*WOODS v. FATON* (1874), 11 Sc. L. R. 332; 1 R. (Ct. of Sess.) 868.—*SCOT*.

97 v. — —.]—An agricultural lease reserved to the landlord the sole right to the game & rabbits, with power to himself & his game tenant to shoot & sport on the farm without liability for damages. The landlord let the game to a tenant without express limitations of the amount of game & rabbits to be kept on the lands. In an action by the agricultural tenant against the landlord:—*Held*: the

landlord was liable for damages to crops arising from an excessive stock of rabbits.—*KIND v. BYRNE, BYRNE v. JOHNSON* (1875), 3 R. (Ct. of Sess.) 255.—*SCOT*.

97 vi. — —.]—A lease of shooting gave the tenant the exclusive right to the game including hares & rabbits, & bound the tenant to relieve the landlord of all claims which might be made by any of the agricultural tenants on account of damage sustained from the game, including hares & rabbits. In an action by the landlord against the shooting tenant for damage alleged to have been caused to the estate by the tenant permitting an excessive stock of rabbits to remain upon it, pursuer did not allege that any claims had been made against him by the agricultural tenants:—*Held*: the action was not relevant.—*ELLIOTTS' TRUSTEES v. ELLIOTT* (1894), 21 R. (Ct. of Sess.) 858; 31 Sc. L. R. 753; 2 S. L. T. 65.—*SCOT*.

PART IV. SECT. 2, SUB-SECT. 5.

m. Non-repair of fences around plantation.]—Under a lease of a mansion-house & policies, with the right of shooting over the estate, there

Sect. 2.—Shooting tenant: Sub-sects. 5 & 6. Sect. 3: Sub-sects. 1 & 2.]

restrained by injunction from interfering with his tenant in the exercise of the exclusive right of sporting & killing game according to an agreement not under seal, until a lease should be executed under seal according to such agreement pursuant to the decree in the cause.

Qu.: whether the ct. would have interfered by injunction, in case the agreement had been already entered into by an instrument under seal.

The memorandum is a mere writing not under seal & in order to acquire a right such as that which is here claimed by *pltf.*, an instrument under seal is necessary & at law, an instrument purporting to grant such a right, though given for a valuable consideration, is revocable at any time, & without paying back the money (*PAGE WOOD, V.-C.*).—*FROGLEY v. LOVELACE (EARL)* (1859), *John*. 333; 70 E. R. 450.

Annotations:—*Mentd.* *Jones v. Tankerville*, [1909] 2 Ch. 440; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1.

100. Agreement under seal.—*FROGLEY v. LOVELACE (EARL)*, No. 99, *ante*.

101. — Destruction of coverts—Agreement not under seal—Expiry of shooting tenant's term.—*TURNER v. CLOWES*, No. 89, *ante*.

102. — Disturbance of coverts—Entry of hounds & huntsmen—No right claimed by master of hounds.—Where hounds & horsemen had passed through a game covert & no right was claimed by the master of the hounds, the ct. refused to restrain him from disturbing the game by hunting at the instance of the lessee of the shooting.—*WRIGHT v. SHRUBB* (1887), 4 T. L. R. 32.

— **Partition of estate into building lots.**—*See* No. 92, *ante*.

— **Cutting of timber.**—*See* Nos. 89–91, *ante*.

Remedies for infringement of rights generally.—*See* Part VI., *post*.

103. On outbreak of fire.—If a fire breaks out on land, the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may in the circumstances be necessary for the preservation of his sporting rights.—*COPE v. SHARPE*, [1910] 1 K. B. 168; 79 L. J. K. B. 281; 102 L. T. 102; 26 T. L. R. 172, D. C.; *subsequent proceedings*, [1911] 2 K. B. 837, D. C.; [1912] 1 K. B. 496, C. A.

104. — Justification of trespass.—If a fire breaks out on land, the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may in the circumstances be necessary for the preservation of his sporting rights. The justification of a trespass for that purpose depends on the state of things at the moment of interference, & not upon the inference as to necessity to be drawn from the event. It is not therefore the law that the inter-

vention of the tenant should be proved by the event to have been in fact necessary for the preservation of the property in the sense that, but for that intervention, his property would have been destroyed or injured; it is a good defence in law if, there being a real & imminent danger, the means taken by the tenant to avert it were reasonably necessary in the sense that they were acts which in all the circumstances of the case a reasonable man would do to meet such a real danger.

Pltf., an owner of land, let the shooting rights over the land to one C., whose bailiff & head gamekeeper deft. was. A fire broke out on the land, & while men in the employ of *plts.* were endeavouring to beat it out deft. set fire to strips of heather between the fire & a part of the shooting where were some nesting pheasants, the property of his master. Shortly afterwards *pltf.*'s men succeeded in extinguishing the fire. *Pltf.* brought an action of trespass in the county ct. & the jury were asked two questions: (a) "Was the method adopted by deft. in fact necessary for the protection of his master's property?" (b) "If not, was it reasonably necessary in the circumstances?" They answered the first question in the negative, the second in the affirmative. The county ct. judge gave judgment for deft. —*Held*: upon the findings of the jury deft. was entitled to judgment. —*COPE v. SHARPE* (No. 2), [1912] 1 K. B. 496; 81 L. J. K. B. 346; 106 L. T. 57; 28 T. L. R. 157; 56 Sol. Jo. 187, C. A.

Annotation:—*Mentd.* *Kirby v. Chessum* (1913), 30 T. L. R. 15.

Arrest of poachers—By servants of shooting tenant.—*See* Nos. 320–332, *post*.

105. Seizure of game—In possession of trespasser—Game Act, 1831 (c. 32), s. 36.—Evidence that a party has exercised the right of killing game for seven years upon land is *prima facie* evidence of the right under above sect., which makes it lawful for any person having the right of killing the game upon any land, to seize game recently killed, found in the possession of any person upon such land in pursuit of game.—*R. v. WALL* (1847), 9 L. T. O. S. 496; 2 Cox, C. C. 288.

Prevention of infringement of rights generally.—*See* Part V., *post*.

SUB-SECT. 6.—TERMINATION OF RIGHTS.

106. Notice—Agreement not under seal.—*BRIGSTOCKE v. RAYNER*, No. 76, *ante*.

107. — Tenant in tacit possession—After expiry of lease.—*LOWE v. ADAMS*, No. 67, *ante*.

SECT. 3.—AGRICULTURAL TENANT.

SUB-SECT. 1.—IN GENERAL.

Reservation of shooting rights by owner—No right to kill game.—*See* No. 47, *ante*.

is no implied obligation upon the landlord to keep the fences round the plantations in such state of repair as to be effectual to exclude live stock.—*PATRICK v. HARRIS' TRUSTEES* (1904), 6 F. (Ct. of Sess.) 985; 41 Sc. L. R. 820; 12 S. L. T. 256.—*SCOT*.

PART IV. SECT. 2, SUB-SECT. 6.

a. Ground Game Act, 1880 (c. 47)
—*Grant of lease before Act came into*

force.—By lease dated Sept. 4, 1865, H. demised to L. the shooting & game of the lands of P. for twenty years from Nov. 1863. In 1874, L. assigned to B. & W., who, after the expiration of the lease, continued to hold the right of shooting as tenants from year to year. By lease dated June 28, 1869, H. demised to C. the lands of P. for the term of sixty years, reserving to the landlord the game.—*Held*: the case came within sects. 4 & 5 of the above

Act, & C. was not entitled, on the expiration of the lease of 1865, to take & kill ground game.—*HASSARD v. CLARK* (1884), 13 L. R. 391.—*IR*.

PART IV. SECT. 3, SUB-SECT. 1.

a. Right to scare away game.—A tenant, with the view of scaring the game off his farm, was in the habit of sending muzzled dogs over it, to hunt the game away, & also employed a

Right to kill rabbits.]—*See* Nos. 61, 62,

SUB-SECT. 2.—COMPENSATION.

108. Damage by ground game—Liability of landlord—Breach of parol agreement.]—In a conversation between a person who subsequently became the tenant, & the steward of the landlord, the former said, "I have no objection to take the farm, if the game is destroyed. I don't care so much about the birds as the hares & rabbits." To which the latter said, "Why, you are a man who keeps no dog, & uses no gun, & you ought not to be annoyed with rabbits & hares: you must let the keepers know, & they must kill them," upon which the tenant said, "then upon these terms I will take the farm":—*Held*: sufficient evidence for the jury to infer a contract on the part of the landlord to kill the hares & rabbits; & the landlord was liable to damages committed by the hares & rabbits on the tenant's farm.—**BARROW v. ASHBURNHAM (LORD) (1835), 4 L. J. K. B. 140.**

109. -.]—A tenant entered on lands on the understanding that a lease should be signed at a future time. When the lease was presented to him for signature he refused to sign unless the landlord would undertake to destroy the rabbits. This the landlord by word of mouth promised to do, & the tenant thereupon signed. The lease contained a clause by which the tenant agreed not to shoot, hunt, or sport on the demised land, or destroy any game, but to use his best endeavours for preservation of same, & to allow his landlord or friends at any time to hunt, shoot, & sport on the land. In an action by the tenant against the landlord for breach of agreement in not destroying the rabbits :—*Held* : evidence of such agreement was admissible in & supported an action for damage accruing from the failure by the landlord to destroy the rabbits.—*MORGAN v. GRIFFITH* (1871), L. R. 6 Exch. 70 ; 40 L. J. Ex. 46 ; 23 L. T. 783 ; 19 W. R. 957.

Annotations.—**Fold.** Erskine v. Adeane (1873), 8 Ch. App. 756. **Mentd.** Angell v. Duke (1775), L. R. 10 Q. B. 174; Heseltine v. Shummons [1892] 275; B. 547. **Flight.** Provident Assoc. of London (1895), 11 L. R. 391. **De Lassalle v. Guildford**, [1901] 2 K. B. 215. **Lloyd v. Sturgeon Falls Pulp Co.** (1901), 85 L. T. 162; **Boston v. Boston** (1903), 73 L. J. K. B. 17; **Bristol Tramways Etc. Carriage Co. v. Fiat Motors**, [1910] 2 K. B. 831; **Michael v. Phillips** (1923), 130 L. T. 142; **Jacobs v. Batavia & General Plantations Trust**, [1924] 1 Ch. 287.

number of men to perambulate the farm, who discharged firearms loaded with wild cartridges in the close vicinity of the game, or the like purpose of driving them off. He also set snares for rabbits, which were alleged to be calculated to destroy game. *Held*: these proceedings were illegal, & interdict granted, notwithstanding that there was a great increase beyond the average quantity of game.—**WEMYSS v. GULLAND** (1847), 10 Duml. (Ct. of Sess.) 204; 20 Sc. Jur. 55.—**SCOT.**

p. Right to destroy rabbits.—Where there is no stipulation to the contrary in his lease, an agricultural tenant is entitled at common law, by himself or by any one authorised by him, to destroy rabbits upon his holding as an ordinary agricultural operation for the protection of his crops; & that irrespective of whether at the time there is any particular crop which requires to be protected. —CRAWSHAY v. DUNCAN, [1915] S. C. (J.) 64.—SCOT.

110. —————.] — A farmer being in treaty for a lease of a farm, declined to take it on account of the quantity of game. The lessor promised he would kill down the game, & would not let the shooting, but refused to allow the promise to be inserted in the lease. The tenant executed a lease prepared by the lessor's solr., in which the right to kill game was reserved to the lessor, his friends & servants. The lessor afterwards let the shooting, & did not kill down the game:—*Held*: there was a binding collateral agreement to kill down the game; & the tenant was entitled to compensation for damage done by the game.—*ERSKINE v. ADEANE* (1873), 8 Ch. App. 756; 29 L. T. 234; 21 W. R. 802; *sub nom.* *ERSKINE v. ADEANE*, *BENNETT'S CLAIM* (No. 2), 42 L. J. Ch. 849, L. JJ.

Annotations:—Mentd. Llanelly Ry. & Dock Co. v. L. & W. Ry. (1873), 3 Ch. App. 842; Crowhurst v. Amersham Bural Board (1878), 4 Ex. D. 5; Sencer v. Bilton (1878), 7 Ch. D. 815; Caterer v. Salmons (1890), 43 L. R. 490; Heseltine v. Simmons, (892) 2 Q. B. 20; Ashman (1894), 10 T. L. R. 213; Flight v. Prudent Assocn. of London (1895), 11 T. L. R. 391; De Lassalle v. Guildford, (1901) 2 K. B. 215; Lloyd v. Sturgeon Falls Pulp Co. (1901), 85 L. T. 162; Bailly v. British Equitable Assoc., [1904] 1 Ch. 374; Bristol Tramways Etc. Carriage Co. v. Fiat Motors, (1910) 2 K. B. 831; Cheater v. Cater, [1918] 1 K. B. 247; Michael v. Phillips (1923), 130 L. T. 142; Jacobs v. Batavia & General Plantations Trust, [1924] 1 Ch. 287.

111. — — — Agreement for compensation in consideration of ground game being unshot—Ground Game Act, 1880 (c. 47), s. 3.]—SHERRARD v. GASCOIGNE, No. 58, *ante*.

112. Liability of landlord's estate—Death of infant landlord.—An infant tenant in tail, for purposes of shooting turned loose a large number of rabbits upon the farms of his tenants, who held their lands from year to year under a verbal agreement that the shooting should be preserved. The rabbits occasioned considerable damage to the crops, & the tenants claimed to have the amount of the damage deducted from their rent; but pending the consideration as to how much should be deducted, the tenant in tail died. After his death his personal representative refused to allow the tenants' claim :—*Held*: the claim could not be sustained.—*HARRINGTON v. HARRINGTON* (1869), 20 L. T. 512.

113. - Liability of shooting tenant.]—HILTON
v. GREEN, No. 93, ante.

114. Damage by overstocking land with game—

PART IV. SECT. 3, SUB-SECT. 2.

9. *Damage by ground game—Liability of landlord.* The lease of a farm reserved to the landlord the whole game & rabbits, & bound the tenant to preserve them to the utmost of his power. It also contained a stipulation that the tenant should have no claim whatever for any damage he might sustain from game during the lease, this being held to have been calculated upon & allowed for by him in offering for the farm. In an action of damages by the tenant for injury alleged to have been done to his crops by an excessive increase of rabbits:—*Held*: the tenants' claim was not excluded by the clause in the lease above quoted.—*CADZOW v. LOCKHART* (1876), 3 Ll. (Cl. of Sess.) 666; 13 Sc. L. R. 144.—**SCOT.**

r. ———.]—At the beginning of a lease the lands let were separated from a plantation, which also was the landlord's property, & was full of ground game by a fence lined with wire-netting. The landlord some time

after the beginning of the lease removed the netting:—*Held*: the tenant was entitled to have the netting restored, & to recover damages for injury done to his crops by ground game coming out of the plantation after the removal of the netting.—*CAMERON v. DRUMMOND* (1888), 15 lt. (Ct. of Sess.) 489.—*SCOT*.

■. J.—The lease of an agricultural farm, dated in 1875, after reserving to the proprietor the exclusive right to game, hares & rabbits, provided as follows:—“It is agreed that there shall be no claim on the tenant for damages done by the rabbits on the farm in any one year, unless the actual damage to his green & white crops exceeds £10, but when it does exceed this sum, then the question of damage shall be referred to arbn. The tenant having brought an action against the landlord for £71 of damages done by rabbits on the farm:—**Held**: the arbn. clause in the lease applied the tenant's right to damages was not restricted by the lease to the excess of

Sect. 3.—Agricultural tenant: Sub-sects. 2 & 3.
Sect. 4. Part V.]

Liability of shooting tenant.]—FARRER v. NELSON, No. 98, ante.

See, now, Agricultural Holdings Act, 1908 (c. 28), s. 10.

115. Recovery of damages awarded—After refusal of shooting tenant to nominate arbitrator.]—THOMAS v. FREDRICKS, No. 65, ante.

SUB-SECT. 3.—UNDER GROUND GAME ACTS.

See Ground Game Act, 1880 (c. 47); Ground Game (Amendment) Act, 1906 (c. 21).

116. Right to kill ground game—Right “vested” in another at date of passing of Ground Game Act, 1880 (c. 47)—Agreement for lease reserving right to landlord.]—When at the date of the passing of above Act, land is in the occupation of a tenant with a legal interest, as tenant from year to year, expiring after the commencement of the Act, but also with an equitable interest under an agreement prior to the Act for a lease for fourteen years to commence from the expiration of the legal interest, & reserving to the landlord the right to the ground game on the land, such right in the landlord as against the tenant is preserved by sect. 5 of above Act: the phrase “is vested” not being confined to an actual legal vesting under a lease in possession, but including an equitable vesting of the right under an agreement for a lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration.—ALLHUSEN v. BROOKING** (1884), 26 Ch. D. 559; 53 L. J. Ch. 520; 51 L. T. 57; 32 W. R. 657.**

Annotations:—Mentd. Furness v. Bond (1888), 4 T. L. R. 457; *Foster v. Reeves* (1892), 61 L. J. Q. B. 763; *Gray v. Spyer*, [1922] 2 Ch. 22.

117. —Avoidance of alienation of right—What amounts to alienation—Assignment of sporting rights to stranger.]—Pltf., who was the occupier of a farm under a lease which did not reserve to the landlord any right to the game, agreed in writing to let to deft. the sole right of shooting & killing all winged game, hares & rabbits, on the farm:—*Held*: such agreement was not an alienation of the right of the occupier as declared, given & reserved to him by Ground Game Act, 1880 (c. 47), & therefore not void under sect. 3 of that Act.

Sect. 3 only applies to prevent the occupier from surrendering to the landlord the right which is made inalienable by the Act (**DAY, J.**).

damage above £10, or to the damage done to the green & white crops.—**RODDEN v. McCOWAN** (1890), 27

t. Damage by winged game—Liability of landlord.]—THOMSON v. GALLOWAY (EARL) (1919), 56 Sc. L. R. 448.—**SCOT.**

PART IV. SECT. 3, SUB-SECT. 3.

a. Right to kill ground game—Person authorised by tenant.]—A person who had been invited by letter by a farmer to stay with him for a week & shoot rabbits was charged with an offence under Day Poaching Act as having been upon the lands of the farm without leave from the proprietor, in pursuit of game. The complaint did not set forth anything as to the terms

of the lease, nor was it put in evidence:—*Held*: accused was a person who might be authorised by the tenant under Ground Game Act to kill rabbits, & had been duly authorised.—**STUART v. MURRAY** (1884), 12 R. (Ct. of Sess.) 9, J.—**SCOT.**

b. ———.]—A person who had been found on a farm shooting ground game with the written permission of the occupier of the farm, but who was not one of the persons specified in Ground Game Act, 1880, s. 1 (1) (b), had been rightly convicted of a contravention of Day Trespass Act, 1832.—NIVEN v. RENTON** (1888), 15 R. (Ct. of Sess.) 42, J.—**SCOT.****

c. ———.]—A farmer, under a lease by which the right to kill game, including rabbits, is reserved to the landlord, cannot authorise a party who

I think the agreement ought to be read as giving the sporting tenant the whole right which the occupier had. It is doubtful whether the occupier retained a right to kill ground game himself. I should say that probably he did (**WRIGHT, J.**).—**MORGAN v. JACKSON**, [1895] 1 Q. B. 885; 64 L. J. Q. B. 462; 72 L. T. 593; 59 J. P. 327; 43 W. R. 479; 11 T. L. R. 372; 39 Sol. Jo. 451; 15 R. 411, D. C.

— **Reservation of sporting rights by owner.]—See Nos. 56–58, ante.**

No right to use exposed spring traps.]—See Nos. 17, 18, ante.

SECT. 4.—OTHER PERSONS.

118. Mortgagee in possession—Sporting rights over land mortgaged.]—The mtgees. of land, consisting of copses & of a farm which was let without the shooting, or the timber, gave notice to the tenant of the farm to pay the rent to the mtgees., & afterwards moved to restrain the mtgors. from cutting the timber:—*Held*: though the mtgees. had become mtgees. in possession of the farm, they had not become mtgees. in possession of the shooting, the copses, or the timber, so as to be liable for default.—SIMMINS v. SHIRLEY** (1877), 6 Ch. D. 173; 37 L. T. 121; 26 W. R. 25; *sub nom.* **SIMMINS v. SHIRLEY**, **SHIRLEY v. SIMMINS**, 46 L. J. Ch. 875.**

119. Mortgagor in possession—Conveyancing Act, 1881 (c. 41), s. 18.]—Above sect. enables a mtgor. in possession of land, part of which is at the date of the mtge. leased to tenants reserving sporting rights, to bind the mtgee. by a lease of the remainder of the land together with sporting rights over the whole of the land.

The lease in the present case is an “occupation lease” & falls within sect. 18 of the Act of 1881, & is a lease which the Act contemplated either a mtgor. or mtgee. should be empowered to grant (**A. L. SMITH, L.J.**).—**BROWN v. PETO**, [1900] 2 Q. B. 653; 69 L. J. Q. B. 869; 83 L. T. 303; 49 W. R. 324; 16 T. L. R. 561, C. A.

Annotations:—Mentd. King v. Bird, [1909] 1 K. B. 837; *Re Knight & Hubbard’s Underlease*, **Hubbard v. Highton**, [1923] 1 Ch. 130.

120. Trustees—Devise in strict settlement of mansion-house, gardens “& premises.”]—Testator devised real estate to trustees in strict settlement, with a proviso that it should be lawful for the trustees for the time being, if they or he should think proper, to permit the person or persons who

is not one of his regular farm servants to kill rabbits on his farm except in the way & under the limitations specified in Ground Game Act, 1880, s. 1 (1).—**RICHARDSON v. MAITLAND** (1897), 34 Sc. L. R. 426.—**SCOT.**

d. ———.]—BRUCE v. PROSSER (1898), 35 Sc. L. R. 433.—**SCOT.**

e. ———.]—Qu.: whether the common law right of the tenant of a farm verbally to authorise another to kill rabbits for the preservation of his crops was available to a tenant of pasture ground common to several tenants.—**MORRISON v. ANDERSON**, [1913] S. C. (J.) 114.—**SCOT.**

PART IV. SECT. 4.

f. Indians.]—The provisions of B. C. Game Protection Act, R. S. B. C.

might, under the trusts of his will, be entitled to a life or other greater estate in the respective portions of his S. estate, to occupy the mansion-house, gardens " & premises " without paying any rent or compensation for same, & without such person or persons being obliged, at his expense, to keep same in repair, or being at any other expense than paying the rates & taxes. The word "premises" was held to comprise a park attached to the mansion-house; but, having regard to the construction then put by the ct. upon that word,

the occupation of a farm-house contiguous to the park, but separated by it from the mansion-house, and the right of sporting over portions of the adjacent property were afterwards held not to be included in the devise. The right to the sporting was held to be in the trustees.—*LETHBRIDGE v. LETHBRIDGE* (1862), 4 De G. F. & J. 35; 31 L. J. Ch. 737; 6 L. T. 727; 8 Jur. N. S. 850; 10 W. R. 449; 45 E. R. 1095, L. JJ.

Annotation :—*Mentd.* *Hibon v. Hibon* (1863), 32 L. J. Ch. 374.

Part V.—Prevention of Infringement of Rights.

121. Setting dog-spears.—A., being the owner & occupier of certain woodland, through which are several public foot-paths, in order to preserve his hares, & to destroy dogs & foxes which might come into his woodland in pursuit of them, fixes iron spikes, called dog-spears, sharp at each end, into several trees, none of them being at a less distance than fifty yards from any of the foot-paths, with each end pointing along a hare-track, & places painted notices thereof on the outside of his woodland. B. is sporting in the land adjoining, which is divided from A.'s land only by a mound & shallow ditch, with the licence of the owner; a hare gets up, & is pursued by B.'s dog into A.'s woodland, B. using all his endeavours to call in his dog, & in the pursuit encounters one of the spikes & is thereby killed :—*Qu.* : whether A. were authorised in fixing the dog-spears, or whether he were answerable to B. in an action on the case, for the injury done to his dog.—*DEANE v. CLAYTON* (1817), 7 Taunt. 489; 1 Moore, C. P. 203; 2 Marsh. 577; 129 E. R. 196.

Annotations :—*Consd.* *Jordin v. Crump* (1841), 8 M. & W. 782. *Refd.* *Ilott v. Wilkes* (1820), 3 B. & Ald. 304; *Bird v. Holbrook* (1828), 4 Bing. 628; *Ponting v. Noakes*, [1894] 2 Q. B. 281. *Mentd.* *Lynch v. Nurdin* (1841), Q. B. 29; *Corby v. Hill* (1858), 4 C. B. N. S. 556; *Lowery v. Walker*, [1910] 1 K. B. 173; *Latham v. Johnson*, [1913] 1 K. B. 398; *Hardy v. C.L. Ity.* (1920), 124 L. T. 136.

122. —.]—Declaration in case alleged, that deft. wrongfully & unlawfully set & concealed a dog-spear, same being an engine calculated to do grievous bodily harm, as well to the liege subjects of the Queen as to their dogs happening to run upon same, among the bushes near a public footway, running through a close of deft.'s; by means whereof a dog of pltf.'s, with which he was going on foot along the footway, & which, by reason of a rabbit having crossed the footway in his view, had then, against the will of & unavoidably by pltf., begun to pursue & was in pursuit of the rabbit, ran upon the dog-spear, & was wounded, etc. Plea, that deft. set & concealed the engine for the purpose of preserving his game, & of disabling & killing dogs that might come upon his close, lest they should pursue & destroy the game,

whereof pltf. had notice :—*Held* : this plea was a good answer to the action : & it would have been so even without the allegation of notice.—*JORDIN v. CRUMP* (1841), 8 M. & W. 782; 11 L. J. Ex. 74; 5 Jur. 1113; 151 E. R. 1256.

Annotations :—*Refd.* *Ponting v. Noakes*, [1894] 2 Q. B. 281. *Mentd.* *Barnes v. Ward* (1850), 9 C. B. 392; *Corby v. Hill* (1858), 4 C. B. N. S. 556; *Bryan v. Eaton* (1875), 40 J. P. 213; *Clark v. Chambers* (1878), 3 Q. B. D. 327; *Lowery v. Walker*, [1909] 2 K. B. 433.

Setting man-traps & spring guns.—*See CRIMINAL LAW*, Vol. XV., pp. 862, 863, Nos. 9468–9472.

123. Seizing dog.—Trespass will lie for taking a greyhound coursing a hare on deft.'s land.—*ATHILL v. CORBET* (1618), Cro. Jac. 463; 79 E. R. 396.

124. —.]—The damage in respect of which trespassing animals may be distrained damage feasant is not confined to damage to the freehold, but includes injuries to other animals.

It is laid down distinctly in Rolle's "Abridgement," that you may distrain damage feasant anything animate or inanimate which is wrongfully on the land of the distraining party & is doing damage there. It is there said that you may not only distrain a greyhound running after rabbits in a warren, but also ferrets or nets which a man has brought into the warren, & has been using for the purpose of catching rabbits (*CAVE, J.*).—*BODEN v. ROSCOE*, [1894] 1 Q. B. 608; 58 J. P. 368; 42 W. R. 445; *sub nom.* *ROSCOE v. BODEN*, 63 L. J. Q. B. 767; 70 L. T. 450; 10 T. L. R. 317; 38 Sol. Jo. 291; 10 R. 173, D. C.

Distress damage feasant generally, *see* *DISTRESS*, Vol. XVIII., pp. 436 *et seq.*

125. Killing dog—Chasing deer.—A deer being in my land, I chased her with my dogs who pursue & kill her in the park; the park owner may kill the dogs.—*BARRINGTON v. TURNER* (1681), 3 Lev. 28; 83 E. R. 560.

Annotation :—*Refd.* *Protheroe v. Mathews* (1833), 5 C. & P. 581.

— **Gamekeeper's powers.**—*See* Nos. 350–355, *post*.

(1911), c. 95, do not apply to Indians when killing game on Indian reservations.—*R.* 106. *EDWARD* (1916), 22 B. C. R. 106.—*CAN.*

PART V.

g. Laying down of

Interference with shooting.—When pltf. had acquired for a term of years the sole & exclusive right of hunting game over deft.'s farm, which was 400 morgen in extent & contained on it a hotel, & had at his own expense laid down a considerable number of pheasants & partridges, & now asked for an interdict

restraining deft. from laying down a racecourse on the farm & holding quarterly race-meetings, & it appeared that the course was laid down on a portion of the farm unsuitable to game, & the evidence as to the disturbance of game by the one race-meeting already held was weak & conflicting :—

126. Forcibly preventing trespasser from trespass—Trespasser not using highway for purpose of passing along it.]—The Duke of R. was the owner of certain moors over which he had rights of shooting. These moors were intersected by certain highways the soil of which was vested in the duke as owner of the lands on each side adjoining the highways. Pltf. went on to part of the highway, not for the purpose of using the highway as one of the public, for passing & repassing, but for the express purpose of interfering with the duke's right of shooting which right was being then exercised by certain of his friends. The duke's keepers, in order to prevent that interference, seized pltf. & held him down until the shooting was over. In an action for assault, defts. pleaded justification, &, alternatively, paid 5s. into ct. as sufficient to satisfy

pltf.'s claim. The jury at the trial found a general verdict for defts. :—*Held*: the verdict & judgment in the action ought to be entered in favour of defts., upon the ground that pltf. was a trespasser, in that he was not using the highway for the purpose of passing & repassing along it according to the ordinary mode of user of a highway.—*HARRISON v. RUTLAND (DUKE)*, [1893] 1 Q. B. 142; 62 L. J. Q. B. 117; 68 L. T. 35; 57 J. P. 278; 41 W. R. 322; 9 T. L. R. 115; 4 R. 155, C. A.

Annotations:—*Refd.* *Hickman v. Maisey*, [1900] 1 Q. B. 752; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139. *Mentd.* *Allen v. Flood*, [1898] A. C. 1; *Luscombe v. G.W. Ry.*, [1899] 2 Q. B. 313; *London Land Tax Comrs. v. C. L. Ry.*, [1913] A. C. 364.

Arrest of trespasser.]—*See* Nos. 227, 234, 323-333, 335, 336, 339-341, *post*.

Part VI.—Remedies for Infringement of Rights.

SECT. 1.—CIVIL.

SUB-SECT. 1.—IN GENERAL.

127. Action for frightening away game—Defendant not on owner's property—Firing guns.]—An action on the case lies for discharging guns near the decoy pond of another, with design to damnify the owner by frightening away the wildfowl resorting thereto, by which the wildfowl were frightened away & the owner damnified.—*KEEBLE v. HICKERINGILL* (1706), 11 East, 574; 11 Mod. Rep. 130; Holt, K. B. 14; 3 Salk. 9; 103 E. R. 1127; *sub nom.* *KEBLE v. HICKERINGILL*, Kel. W. 273.

Annotations:—*Distd.* *Hannam v. Mockett* (1824), 2 B. & C. 934. *Apld.* *Ibbotson v. Peat* (1865), 34 L. J. Ex. 118. *Consd.* *Allen v. Flood*, [1898] A. C. 1. *Refd.* *Carrington v. Taylor* (1809), 11 East, 571; *Pannell v. Mill* (1846), 3 C. B. 625; *Rogers v. Rajendro Dutt* (1860), 8 Moo. Ind. App. 103; *Mogul S.S. Co. v. McGregor, Gow*, [1892] A. C. 25; *Quinn v. Leatham* (1901), 70 L. J. P. C. 76; *The Tubantia*, [1924] P. 78. *Mentd.* *Lumley v. Gye* (1853), 22 L. J. Q. B. 463; *Trollope v. London Building Trades Federation* (1895), 11 T. L. R. 228; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

128. —[Firing at wildfowl to kill & make profit of them, by one who was at the time in a boat on a public river or open creek, where the tide ebbs & flows, so near to an ancient decoy on the shore, about 200 yards as to make the birds there take flight; deft. having before fired at a greater distance from the decoy, which brought out some of the birds from thence; though he did not fire into the decoy pond; is evidence of a wilful disturbance of & of damage to the decoy, for which an action on the case is maintainable by the owner.—*CARRINGTON v. TAYLOR* (1809), 2 Camp. 258; 11 East, 571; 103 E. R. 1120.

Annotations:—*Refd.* *Hannam v. Mockett* (1824), 4 Dow. & Ry. K. B. 518; *Rogers v. Rajendro Dutt* (1860), 13 Moo. P. C. 209; *Ibbotson v. Peat* (1865), 3 H. & C. 644; *Mogul S.S. Co. v. McGregor, Gow* (1891), 66 L. T. 1; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham* (1901), 70 L. J. P. C. 76; *The Tubantia*, [1924] P. 78.

129. —& rockets.]—An individual has a perfect right to allure game from

off the land of an adjoining proprietor on to his own, & the party thus aggrieved has no right to commit a nuisance by firing off guns & rockets, & making other noises upon his own land, in order to drive off & scare away from his neighbour's land the game allured from his own, but is liable to an action for so doing.—*IBOTTSON v. PEAT* (1865), 3 H. & C. 644; 159 E. R. 684; *sub nom.* *IBBOTSON v. PEAT*, 6 New Rep. 124; 34 L. J. Ex. 118; 12 L. T. 313; 29 J. P. 344; 11 Jur. N. S. 394; 13 W. R. 691.

Annotation:—*Refd.* *Allen v. Flood*, [1898] A. C. 1.

130. Action for trespass—When maintainable—Killing rabbits.]—*SUTTON v. MOODY*, No. 25, *ante*.

131. —Taking away dead game—Pursued on to defendant's property.]—*CHURCHWARD v. STUDDY*, No. 26, *ante*.

132. —Prior proceedings before magistrate—Game Act, 1831 (c. 32), s. 46.]—*ROBINSON v. VAUGHTON*, No. 81, *ante*.

133. —[B. is a track of inclosed pasture land within the manor of X. in the county of W. B. had been from time immemorial subject to eighty customary rights called cattlegates. Pltf. was lord of the manor of X. Deft. was seised of certain cattlegates as a customary estate of inheritance. Pltf. was also owner of a cattlegate which came to his predecessor, as lord of the manor, by seizure *quousque* for nonpayment of a fine. B. is separated from B. waste by a fence which the cattlegate owners kept in repair with stones got from B. & from the adjoining waste. Each cattlegate gave the owner thereof a right of depasturing on B. a certain number of cattle & sheep from May 26 to Apr. 24, but neither cattle nor sheep were allowed to pasture there between Apr. 24 & May 26. An alteration had been made in the time of stinting by substituting May 26 for June 1; but it did not appear that the lord of the manor had any notice of the alteration, &

Held: there was nothing to show that the inevitable consequence of making the racecourse & holding races must

be to disturb the game permanently, & pltf. had not proved that any damage had actually been suffered, & conse-

quently, the interdict must be refused. —*O'BRIEN v. HANSEN & SCHRAEDER* (1896), 10 E. D. C. 153.—*S. AF.*

the ct. rolls did not contain any mention of stinting. The whole of the cattle & sheep depastured B. in common. A frithman was appointed by the cattlegate owners, whose duty it was to take care that B. was properly stinted, & he was remunerated for his trouble by the cattle owners. A cattlegate owner having a house within the manor had also a right to cut peat for consumption in his house. By a private Act, authority was given to the lord of the manor to enfranchise any copyhold or customary messuages, cottages, lands, tenements, or hereditaments, parcel of the manor; & several cattlegates were enfranchised under this Act; but there was no distinction in point of enjoyment between the enfranchised & the customary cattlegates. From time immemorial the cattlegates had been held of the lord of the manor as customary estates of inheritance by payment of fine certain, rents of small amount being payable annually for each cattlegate; & under dues, duties, suits, & services or right accustomed. On the death of a cattlegate owner, the cattlegate descended by custom to the heir-at-law, who was admitted at the lord's ct., when he paid a fine. The cattlegates also passed by customary deed, followed by admittance at the next lord's ct., or out of ct. by the steward of the manor. The deed was brought into ct. by the alienee, & was presented by the jury or homage. A fine was payable on the admittance, but there was no heriot due. On the death of the lord of the manor, the owners of cattlegates could be compelled by the custom to be admitted by the new lord, & to pay a fine. The lord was entitled to seize *quousque* for nonpayment of fines. On alienation by a *feme covert*, the woman was examined apart from her husband. The lords of the manor had always searched for, pursued, & killed grouse & other game on B., no other person having claimed to do so, or ever having done so except by their licence. Since 1819, the lords of the manor had preserved the game. In an action by pltf. against deft. for shooting on B. without pltf.'s permission, the first count was trespass for entering pltf.'s close & killing grouse & other game there; the second, trover for grouse of pltf.; the third, case for the disturbance of pltf.'s exclusive right of shooting grouse on B. Deft. pleaded: first, not guilty to the whole declaration; secondly, to the first count, that the land was not the land of pltf., thirdly, to the first count, that the land was deft.'s soil & freehold; fourthly, to third count, a traverse of pltf.'s exclusive right as claimed; upon which issues were joined. Proceedings in error having been taken on a special case stating the above facts:—*Held*: (1) the cattlegates gave the owners no right to the possession of the soil, but the ownership of the soil remained in the lord of the manor, subject to the right of several pasture upon it by the cattlegate owners, & consequently the lord might maintain trespass against a cattlegate owner for sporting over it without permission; & on those pleadings pltf. was entitled to judgment on the first & second counts; (2) the facts stated did not warrant a judgment for pltf. on the third count.—*Rigg v. LONSDALE (EARL)* (1857), 1 H. & N. 923; 26 L. J. Ex. 196; 28 L. T. O. S. 372; 21 J. P. 228; 156 E. R. 1475; *sub nom.* LONSDALE (EARL) *v.* Rigg, 3 Jur. N. S. 390; 5 W. R. 355, Ex. Ch.

Annotations:—*As to 1.* *Fold.* *Blades v. Higgs* (1865), 20 C. B. N. S. 214. *Reid.* *Bruce v. Helliwell* (1860), 5 H. & N. 609; *Read v. Edwards* (1864), 17 C. B. N. S. 245; *Bird v. G. E. Ry.* (1865), 13 W. R. 989; *R. v. Townley* (1870), L. R. 1 C. C. R. 315; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139.

Trespass by dog.—*See* ANIMALS, Vol. II., p. 227, Nos. 181–187.

134. Who liable—Defendant leading others on to plaintiff's land—Defendant himself remaining off land.—Where a person goes out sporting with his friends, & purposely leads them on to another's land, he is equally guilty of a trespass, although he may remain off the land whilst his friends go on it.—*HILL v. WALKER* (1800), Peake, Add. Cas. 234, N. P.

135. Damages—Aggravation.—In trespass for breaking & entering pltf.'s closes, & sporting there, under circumstances of aggravation, the jury gave £500 damages. The ct. refused to reduce them, though pltf. had sustained no actual pecuniary damage.—*MEREST v. HARVEY* (1814), 5 Taunt. 442; 1 Marsh. 139; 128 E. R. 761.

Annotations:—*Reid.* *Price v. Severn* (1831), 7 Bing. 316; *Whittham v. Westminster Brymbo Coal & Coke Co.*, [1896] 1 Ch. 894; *Fielden v. Cox* (1906), 22 T. L. R. 411. *Mentd.* *Spence v. Rogers* (1843), 12 L. J. Ex. 252.

See, generally, DAMAGES, Vol. XVII., pp. 120 *et seq.*

—.]—*See, generally*, TRESPASS.

136. Action of trover—When maintainable.—*RIGG v. LONSDALE (EARL)*, No. 133, *ante*.

137. ———.]—BLADES v. HIGGS, No. 1, *ante*.

—.]—*See, generally*, TROVER.

Injunction—At instance of shooting tenant.—*See* Nos. 89, 91, 99, 102, *ante*.

SUB-SECT. 2.—DEFENCES.

See Game Act, 1831 (c. 32), s. 30; & *generally*, REAL PROPERTY; TRESPASS.

138. Leave & licence—Defence of leave & licence from tenant—Not supported by leave from landlord.—If pltf. is tenant of A., & has agreed that A. shall give three persons licence to sport over the lands, & deft. has such a licence from A., such a licence will not support the plea of leave & licence by pltf.—*HAYWARD v. GRANT* (1825), 1 C. & P. 448, 677.

139. Must precede trespass—Bonâ fide belief that licence granted.—A complaint of trespass in pursuit of game, under Game Act, 1831 (c. 32), s. 30, need not be made by a person having an interest in the land. The leave & licence of the occupier, to be an answer to such complaint, must precede the act of trespass. *Semble*: the party trespassing is not the less guilty of the offence because he *bonâ fide* believes that he has the licence of the occupier to shoot over the land.

The third question is whether the *ex post facto* leave & licence would form a condonation of the offence, & be held to revert back to the time of the alleged trespass. That I think must also be answered in the negative (*WILLIAMS, J.*).

It is evidently a trespass whether there be *mens rea* or not (*WILLIAMS, J.*).—*MORDEN v. PORTER* (1860), 7 C. B. N. S. 641; 29 L. J. M. C. 213; 1 L. T. 403; 25 J. P. 263; 8 W. R. 262; 141 E. R. 967.

Annotations:—*Consd.* *Dickenson v. Fletcher* (1873), L. R. 9 C. P. 1. *Reid.* *Legg v. Pardoe* (1860), 9 C. B. N. S. 289; *Leatt v. Vine* (1861), 30 L. J. M. C. 207; *Kenyon*

Sect. 1.—Civil: Sub-sect. 2. Sect. 2: Sub-sect. 1,

v. Hart (1865), 29 J. P. 260; Adams v. Masters (1871), 24 L. T. 502; Dickinson v. Fletcher (1873), 43 L. J. M. C. 25; R. v. Prince (1875), L. R. 2 C. C. R. 154; Watkins v. Major (1875), L. R. 10 C. P. 662; Sherras v. De Rutzen, [1895] 1 Q. B. 918.

140. Act must be strictly within licence.—Leave to hunt rabbits.—Coursing hare.—By Game Act, 1831 (c. 32), s. 30, if any person trespass in the daytime in pursuit of game, he shall on conviction forfeit £5, "provided always that any person charged with any such trespass shall be at liberty to prove by way of defence any matter which would have been a defence to any action at law for such trespass." Applt. received leave from the wife of the occupier to hunt rabbits, & then coursed a hare. The sporting rights were not in the occupier:—*Held*: appls. had not brought themselves within the proviso, & it was not until they had done so that it was necessary to prove strictly, e.g. by producing the deed, that the landlord had the right as against the occupier to take game.

Qu.: whether the wife could give such leave as she had.—TAYLOR v. JACKSON (1898), 78 L. T. 555; 62 J. P. 424; 19 Cox, C. C. 62, D. C.

Compare No. 297, post.

Revocation of licence.—See TRESPASS.

SECT. 2.—CRIMINAL.

SUB-SECT. 1.—PROCEEDINGS FOR POACHING.

A. Poaching by Day.

(a) What constitutes Offence.

See Game Act, 1831 (c. 32), s. 30.

141. Whether mens rea essential.—MORDEN v. PORTER, No. 139, ante.

142. —It is not sufficient to oust the jurisdiction of the justices in regard to a charge of trespass in pursuit of game under Game Act, 1831 (c. 32), that there is an honest claim of right if such claim is absurd & impossible in point of law. The question is whether a reasonable claim of right is involved, & not one of *mens rea*, inasmuch as the statute is not a mere criminal statute, but is intended for the protection of the peculiar rights of those entitled to shoot game.—WATKINS v. MAJOR (1875), L. R. 10 C. P. 662; 44 L. J. M. C. 164; 33 L. T. 352; 39 J. P. 808; 24 W. R. 164.

Annotations:—Apld. Mann v. Nurse (1901), 17 T. L. R. 569. *Conad.* Dickinson v. Ead (1914), 111 L. T. 378. *Reid.* Watkins v. Smith (1878), 38 L. T. 525; R. v. Tolson (1889), 23 Q. B. D. 168; Philpot v. Bugler (1890), 54 J. P. 646.

143. "Entering & being upon any land"—One offence only.—In a conviction for a trespass in the daytime under Game Act, 1831 (c. 32), s. 30, the words "enter & be" constitute only one offence.—R. v. MELLOR (1833), 2 Dowl. 173; 1 Nev. & M. M. C. 264.

144. —What amounts to—Question of fact.—DYER v. PARK (1874), 38 J. P. Jo. 294.

145. Sufficiency of evidence.—G. was charged under Game Act, 1831 (c. 32), s. 30, with unlawfully trespassing in the daytime in pursuit of game. A report of a gun was heard proceeding from the land which was a wood, & G. was seen almost immediately to come out of the wood with a gun & three dogs, & run off. There was no direct evidence that he was seen in the wood in actual pursuit. The justices refused to commit, holding the evidence not to be legal:—*Held*: the justices were wrong, & there was legal or admissible evidence.—BURROWS v. GILLINGHAM (1893), 57 J. P. Jo. 357.

146. —Whether personal entry essential.—Employing or assisting persons actually entering.

Qu.: whether, under Night Poaching Act, 1828 (c. 69), s. 19, or Game Act, 1831 (c. 32), s. 30, a party can be convicted of entering or being upon land for the purpose of poaching, if he does not himself go upon the land, but is on an adjacent close, employing, assisting, & in company with, those who actually enter.—R. v. SCOTTON (1844), 5 Q. B. 493; 1 Dav. & Mer. 501; 1 New Sess. Cas. 27; 13 L. J. M. C. 58; 2 L. T. O. S. 327; 8 J. P. 409; 8 Jur. 400; 114 E. R. 1335.

Annotations:—*Mentd.* R. v. Borry (1859), 28 L. J. M. C. 86; R. v. Hughes (1879), 4 Q. B. D. 614.

147. —Sending dog on land.—P. was in the day time on a public road, carrying a gun & accompanied by a dog. The land on both sides of the road was the property of B., who was also lord of the manor; & on one side of the road was a cover in the actual occupation of B. P. waved his hand to the dog, which entered the cover; a pheasant flew out across the road; & P., being on the road, fired at it, & missed it. P. was convicted by two justices, under Game Act, 1831 (c. 32), s. 30, of committing a trespass, by being, in the daytime, on land in the occupation of B. in search of game. On appeal, a case was reserved in which the question for this ct. was, whether the evidence supported the conviction:—*Held*: (1) the road was land in the occupation of B., subject to the right of way in the public, & there was evidence that P. was not on the road in exercise of the right of way, but for another purpose, namely in search of game, & so was a trespasser, which was sufficient to support the conviction; (2) the sending in the dog into the cover, though a trespass by P., would not by itself justify a conviction, the statute requiring a personal trespass.

I think that the construction of the sect. [Game Act, 1831 (c. 32), s. 30] is that there must be a personal entering & being on the land (LORD CAMPBELL, C.J.).—R. v. PRATT (1855), 4 E. & B. 800; Dears. C. C. 502; 3 C. L. R. 686; 24 L. J. M. C. 113; 25 L. T. O. S. 65; 19 J. P. 578; 1 Jur. N. S. 681; 3 W. R. 372; 119 E. R. 319, C. C. R.

Annotations:—As to (1) *Folld.* Mayhew v. Wardley (1863), 14 C. B. N. S. 550. *Conad.* St. Mary, Newington v. Jacobs (1871), L. R. 7 Q. B. 47; Harrison v. Rutland, [1893] 1 Q. B. 142. *Reid.* Morden v. Porter (1860), 7 C. B. N. S. 641; Brown v. Turner (1862), 13 C. B. N. S. 485; Kenyon v. Hart (1865), 6 B. & S. 249; Hickman v. Maisey, [1900] 1 Q. B. 752. As to (2) *Folld.* Pratt v. Martin, [1911] 2 K. B. 90. *Reid.* Read v. Edwards (1864), 17 C. B. N. S. 245. *Generally, Reid.* Ibbotson v. Peat (1865), 12 L. T. 313. *Mentd.* Morant v. Chamberlain (1861), 30 L. J. Ex. 299; Allen v. Flood, [1898] A. C. 1.

PART VI. SECT. 2, SUB-SECT. 1.—A. (a).

141 i. Whether mens rea essential.—In order to constitute an offence under Game Act, 1890 (No. 1095), s. 15, the

person charged must be knowingly & intentionally trespassing on the land of another in search or pursuit of game.—MOFFATT v. HASSETT, [1907] V. L. R. 515.—AUS.

h. In search or pursuit of game.—A person crossing the land of another merely with the object of reaching a place at which he intends to search for or pursue game is not trespassing

148. —.]—By Game Act, 1831 (c. 32), s. 30, "If any person whatsoever shall commit any trespass by entering or being . . . upon any land in search or pursuit of game" he shall be guilty of an offence.—*Held*: a personal entry upon the land by deft. was necessary to satisfy the terms of the sect., & it was not enough to send a dog on to the land in search or pursuit of game.—*PRATT v. MARTIN*, [1911] 2 K. B. 90; 80 L. J. K. B. 711; 105 L. T. 49; 75 J. P. 328; 27 T. L. R. 377; 22 Cox, C. O. 442, D. C.

149. — *Killing game from highway.*—*R. v. PRATT*, No. 147, *ante*.

150. — — —.]—Unlawfully using a highway, "the soil of which belongs to a private owner, for the purpose of killing game, is a trespass in pursuit of game within Game Act, 1831 (c. 32).—*MAYHEW v. WARDLEY* (1863), 14 C. B. N. S. 550; 2 New Rep. 325; 8 L. T. 504; 143 E. R. 561.

Annotations:—*Apld.* *Pratt v. Martin* (1911), 27 T. L. R. 377. *Refd.* *R. v. Littlechild* (1871), L. R. 6 Q. B. 293.

151. — *Person shooting from his own land game on land of another—Entry on other's land to retrieve game shot.*—If a man, standing on his own land, shoots game on the land of another, where he has no right to shoot, & then goes & picks it up, that is such an entering & being upon land in search or pursuit of game as to bring it within Game Act, 1831 (c. 32), s. 30. A., having a licence to kill game & a right to sport on the land of B., whilst standing on B.'s land, shot a pheasant in an adjoining close, over which C. had the exclusive right of shooting, & then entered the close & picked up the bird. On information laid before justices, they dismissed the case on two grounds, the first of which was that the act did not constitute a trespass within sect. 30.—*Held*: the justices were wrong, & they ought to have convicted, as the shooting & the picking up were one continuous act within the above clause of the statute.

Qu.: whether the bird, being dead, was game within sect. 30, so as to bring the entry & picking up the dead bird within it.—*OSBOND v. MEADOWS* (1862), 12 C. B. N. S. 10; 31 L. J. M. C. 238; 6 L. T. 290; 26 J. P. 439; 8 Jur. N. S. 1079; 10 W. R. 537; 142 E. R. 1044.

Annotations:—*Distd.* *Kenyon v. Hart* (1865), 6 B. & S. 249. *Refd.* *Horn v. Raine* (1898), 78 L. T. 654.

152. — *Bird rising on shooter's land.*—Game Act, 1831 (c. 32), s. 30, which imposes a penalty for trespass in search or pursuit of game, means in search or pursuit of live game. A. standing on his own land, a pheasant rose up on it, & flew to the close of B. A. fired a gun & struck it while over that close, whereupon the bird fell dead, & A. entered & picked it up.—*Held*: this was not a trespass in search or pursuit of game within above Act, unless the facts were such as to show that the firing at the bird, the entry on the close of B., & the picking up of the bird, all formed part of one continuous transaction.—*KENYON v. HART* (1865), 6 B. & S. 249; 5 New Rep. 402; 34 L. J. M. C.

in search or pursuit of game within Game Act, 1890 (No. 1095), s. 15.—*MOFFATT v. HASSETT*, [1907] V. L. R. 515.—*AUS*.

k. Dog sent into field to retrieve—Animal unable to escape.—*NICOLL v.*

STRACHAN (1912), 50 Sc. L. R. 120.—*SCOT*.

PART VI. SECT. 2, SUB-SECT. 1.—A. (b) i.

1. Authorised person acting ille-

87; 11 L. T. 733; 29 J. P. 260; 11 Jur. N. S. 602; 13 W. R. 406; 122 E. R. 1188.

Annotation:—*Mentd.* *Clifton v. Bury* (1887), 4 T. L. R. 8.

153. —.]—T., one of a party, shooting pheasants, saw pheasants that had been shot fall into the wood of S. adjoining. Two days afterwards, T. went into S.'s wood to pick up the pheasants, believing them to be dead. T. being summoned under Game Act, 1831 (c. 32), s. 30, for trespassing in pursuit of game.—*Held*: as the game was dead there could be no offence of searching for it, & T. was not liable for any such offence.—*TANTON v. JERVIS* (1879), 43 J. P. 784, D. C.

154. — — — *Bird not retrieved at once.*—A person who, being on his own land, shoots at & kills a grouse which is on the land of another, but does not at the time enter such land to pick the bird up, commits a trespass by entering land in pursuit of game within Game Act, 1831 (c. 32), s. 30, if some hours after the bird was killed he enters such land & searches for it, even although prior to such entry the dead bird was removed from the land by another person.—*HORN v. RAINE* (1898), 67 L. J. Q. B. 533; 78 L. T. 654; 62 J. P. 420; 19 Cox, C. O. 119, D. C.

155. "In search or pursuit of game"—Must be live game.—*OSBOND v. MEADOWS*, No. 151, *ante*.

156. — — —.]—*KENYON v. HART*, No. 152, *ante*.

157. — *TANTON v. JERVIS*, No. 153, *ante*.

158. — — — *Intention to kill at time unnecessary.*—In order to support a conviction under Game Act, 1831 (c. 32), s. 30, for trespassing in the daytime in search or pursuit of game, it is not necessary to prove that the searching & pursuing was with the intention to kill at the time.—*STIFF v. BILLINGTON* (1901), 84 L. T. 467; 65 J. P. 424; 49 W. R. 486; 17 T. L. R. 430; 45 Sol. Jo. 448; 19 Cox, C. O. 680, D. C.

159. "Aiding & abetting" poacher—Person from highway assisting poacher—Summary Jurisdiction Act, 1848 (c. 43), s. 5.—A. & B. were driving along a turnpike road in a trap, on their way to shoot on their sister's land. A. stopped the trap, & B. got out, went on to some land adjoining the road, shot a hare, brought it back, & gave it to A., who remained in the trap. B. was convicted before justices of trespassing in pursuit of game.—*Held*: there was ample evidence for the justices to convict A. on an information, charging him under above sect. with "aiding & abetting B. to commit the said offence."—*STACEY v. WHITEHURST* (1865), 18 C. B. N. S. 344; 5 New Rep. 368; 34 L. J. M. C. 94; 11 L. T. 710; 29 J. P. 136; 13 W. R. 384; 144 E. R. 477.

Annotations:—*Mentd.* *Du Cros v. Lambourne*, [1907] 1 K. B. 40; *Gould v. Houghton*, [1921] 1 K. B. 509.

(b) Defences.

i. Claim of Right.

160. Ouster of jurisdiction—General rule.—(1) A conviction under Game Act, 1831 (c. 32),

gally—Shooting pheasants in close season.—*Apltd.*, a gamekeeper, as a common informer, prosecuted resp., for trespass in pursuit of game under 27 Geo. 3, c. 35. Resp. was found on the lands of L. to whom the game rights belonged, with a dog & gun, & resp.

Sect. 2.—Criminal: Sub-sect. 1. A. (b) i.]

s. 30, & Summary Jurisdiction Act, 1848 (c. 43), s. 23, against four defts. for trespass in pursuit of game, contained an order that, "if the said several sums," being the penalty & costs of conviction before awarded to be paid by each deft. "be not paid on or before Nov. 10 instant, we adjudge each of them the said," (names of defts.) "to be imprisoned" "for the space of one month, unless the said several sums & the costs & charges of conveying each of them, the said" (names of defts.) "so making default, to the said common gaol, shall be sooner paid." By Game Act, 1831 (c. 32), s. 30, it is provided "that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." At the hearing before the justices, a *bond fide* claim of title to the land was set up on behalf of defts., but no evidence was offered of the actual existence of any dispute, or of any title in the person under whom defts. claimed:—*Held*: the conviction was bad, for it adjudicated each deft. to be imprisoned for one month, unless the costs & charges of conveying all to gaol should be sooner paid, & it was not in the form authorised by Summary Jurisdiction Act, 1848 (c. 43), s. 17, or to the like effect.

Semle: (2) the general rule is that, in case of summary convictions, justices have jurisdiction to determine whether the claim to title to real property is set up *bond fide*, but, if it is *bond fide* set up, they have no jurisdiction to proceed further in the matter, & the proviso in Game Act, 1831 (c. 32), s. 30, does not give justices jurisdiction, upon a charge of trespass in pursuit of game, to determine a claim of title to land against the wish of defts.—*R. v. CRIDLAND* (1857), 7 E. & B. 853; 27 L. J. M. C. 28; 29 L. T. O. S. 210; 3 Jur. N. S. 1213; 5 W. R. 679; 119 E. R. 1463; *sub nom.* *R. v. BACON*, *R. v. CRIDLAND*, 21 J. P. 404.

Annotations:—*As to* (2) *Distd.* *Morden v. Porter* (1860), 7 C. B. N. S. 641; *Leatt v. Vine* (1861), 30 L. J. M. C. 207. *Consd.* *Cornwell v. Sanders* (1862), 3 B. & S. 206. *Refd.* *Ex p. Whittaker* (1859), 23 J. P. Jo. 84; *Legg v. Pardoe* (1860), 9 C. B. N. S. 289; *Williams v. Adams* (1862), 2 B. & S. 312; *Hudson v. MacIac* (1863), 4 B. & S. 585; *R. v. Stimpson* (1863), 4 B. & S. 301; *Raby v. Seed* (1864), 29 J. P. 37; *R. v. Farrer* (1866), 7 B. & S. 554; *Watkins v. Major* (1875), 44 L. J. M. C. 164; *Birnie v. Marshall* (1876), 35 L. T. 373; *Penwarden v. Palmer* (1894), 10 T. L. R. 362; *R. v. French*, [1902] 1 K. B. 637. *Generally*, *Mentd.* *Il. v. Walker* (1881), 45 J. P. 682.

161. ———.]—Justices have no power to entertain a complaint for an alleged trespass in pursuit of game, under Game Act, 1831 (c. 32), s. 30, where deft. sets up a *bond fide* claim of right; & of this the justices are the judges.—*LEGG v. PARDOE* (1860), 9 C. B. N. S. 289; 30 L. J. M. C. 108; 3 L. T. 371; 25 J. P. 39; 7 Jur. N. S. 499; 9 W. R. 234; 142 E. R. 113.

Annotations:—*Distd.* *Philpot v. Bugler* (1890), 54 J. P. 646. *Refd.* *Brigstocke v. Rayner* (1875), 40 J. P. 245. *Mentd.* *Parker v. Green* (1862), 2 B. & S. 299.

162. ———.]—Resp. laid an information against applt. under Game Act, 1831 (c. 32), s. 30, for trespassing in pursuit of game. At the hearing he gave evidence that the lords of the

manor had in the year 1815 granted the right of shooting, down to the present time, & that he was then renting the shooting of them. On the part of applt. it was alleged that he had a lease from the lords of the manor of the lands said to be trespassed upon, dated 1859, in which there was no reservation of a right to the game, & that the alleged trespass was committed in the assertion of his right to the game. The justices having convicted applt.:—*Held*: under the circumstances the claim of right having been *bond fide* made, the jurisdiction of the justices was ousted.—*ADAMS v. MASTERS* (1871), 24 L. T. 502; 35 J. P. 644.

163. ———.]—Applt., tenant of a farm under a lease which reserved the game to the lessor, but did not expressly say that it did so exclusively, shot three hares in the presence of the keeper to assert his right. He set up this claim of right on the hearing of an information against him before the justices, & alleged that it ousted their jurisdiction. They found that the claim was not *bond fide*, because he had a copy of the lease, & convicted him:—*Held*: this finding as to applt.'s *bona fides* was not conclusive, because there was no evidence that his claim was made *malâ fide*, & as he asserted his claim of right the magistrates had no jurisdiction to hear the information.—*LOVESY v. STALLARD* (1874), 30 L. T. 792; 38 J. P. 391.

Annotation:—*Mentd.* *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128.

164. ———.]—Applt., a gamekeeper in the service of an alleged assignee of the right of shooting over resp.'s land, was charged with trespassing on resp.'s land in search of game. Resp., who was the tenant of the land, contended that the right of shooting had not been reserved by his landlord, & that even if it had, it had not been let to applt.'s employer:—*Held*: applt. had set up a *bond fide* claim of right, & the jurisdiction of the justices having thereby been ousted they had had no power to convict.—*R. v. LOADER* (1885), 2 T. L. R. 161, D. C.

165. ———.]—B. was tenant of lands, there being no reservation of game, by the landlord, & B. let the land to A. to get & cut the hay, & both B. & A. gave leave to P. to shoot game over the land. P. was convicted under Game Act, 1831 (c. 32), s. 30, of trespassing in pursuit:—*Held*: the justices were wrong, for the whole right to the game was in B. & A., & P. having the leave & authority of both had a good claim of right to the rabbits.—*POCHIN v. SMITH* (1887), 52 J. P. 4; 3 T. L. R. 647, D. C.

166. ———.]—*R. v. TREVOR* (LORD) (1888), 4 T. L. R. 254, D. C.

167. ———.]—In cases of summary conviction for trespass in pursuit of game, justices have jurisdiction to determine whether a claim is *bond fide* set up; if it is, they have no jurisdiction to proceed further in the matter.—*PENWARDEN v. PALMER* (1894), 10 T. L. R. 362, D. C.

168. ———.]—*Held*: resp., who was charged with trespassing in pursuit of game, had

had shot a pheasant on L.'s lands. The pheasant was illegally shot, as it was the close season. On being challenged, resp. stated he had "the right to shoot there" & would do so again. L. was not called to disprove per-

mission or authority to resp. to enter the lands:—*Held*: there was evidence to support the complaint, it could not be presumed that the occupier of the lands would authorise illegality, & resp.'s act in shooting the pheasant

was admittedly illegal.—*GLEESON v. HURLEY*, [1916] 2 I. R. 180.—*IR.*

m. Demise of shooting rights to coursing club—Trespass by authorised person ignorant of demise.—*A. demised to a coursing club the exclusive right*

reasonable ground for believing that he had a right to shoot upon the land in question, & the jurisdiction of the justices was ousted.—*MANN v. NURSE* (1901), 17 T. L. R. 569, D. C.

169. — Claim *prima facie* impossible in law.]

—S. being summoned before justices for trespassing in pursuit of game, *bonâ fide* set up a claim of right, that as gamekeeper of the lord of the manor, of which the place in question was a customary tenement, he had for forty years & upwards without challenge pursued the game there for the lord's benefit:—*Held*: as the claim of right was not impossible in point of law, the justices ought to have waived their jurisdiction.—*STEWART v. FELL* (1866), 30 J. P. 294.

170. — — —.]—*WATKINS v. MAJOR*, No. 142, *ante*.

171. — — —.]—F. obtained under seal a licence of the Duke of Cornwall to enter on certain commons of Devon, situate in the parish of B., & form a rabbit warren there. N. was the tenant of a farm in the parish of B., & after notice not to shoot in the warren, shot a rabbit in F.'s warren, in the parish of B., in order to raise the question of right. N., being summoned for unlawfully killing the rabbit in a warren, produced an ancient charter purporting to allow those holding lands near the Forest of Dartmoor, in Devon, to take hares, etc., outside the forest, & some evidence of user for commoners was given:—*Held*: on the claim of right set up by N., the justices ought to have declined jurisdiction, as it could not be said that the claim was impossible in point of law.—*NEWCOMBE v. FEWINS* (1876), 41 J. P. 581, D. C.

172. — Whether mere *bonâ fide* belief in existence of right sufficient—Belief unreasonable.]—*WATKINS v. MAJOR*, No. 142, *ante*.

173. — & unsupported by evidence.]—Appls. were charged before justices under Game Act, 1831 (c. 32), s. 30, with trespassing in pursuit of conies, & were proved to have shot rabbits on land which one of applts. claimed to be his property. They called witnesses who stated that applt. purchased the land adjoining that occupied by the informant, & that close to this particular spot the persons from whom he purchased had been accustomed to stack timber. It was, however, shown on the informant's part that, by a plan attached to the conveyance of the land to the persons from whom applt. purchased, this particular spot was a long way outside the boundary of the land conveyed. The justices decided that applt.'s claim was unfounded & unsustainable, & that although it might have been made *bonâ fide*, it was not reasonable, & was not supported by evidence; & they therefore convicted applts. Upon a case stated:—*Held*: this was not a claim of right sufficient to oust the jurisdiction of the justices.—*WATKINS v. SMITH* (1878), 38 L. T. 525; 42 J. P. 468; 26 W. R. 692, D. C.

Annotation:—*Reid*. *Burton v. Hudson*, [1909] 2 K. B. 564.

174. — — —.]—*BRIGSTOCKE v. RAYNER*, No. 76, *ante*.

175. — Claim merely colourable.]—Upon an information under Game Act, 1831 (c. 32),

s. 30, for a trespass in search of game on land in the occupation of the lord of the manor, deft. asserted that the land was not, as alleged by the informant, common or waste land within the manor, but was land vested in the inhabitant householders of certain parishes under an inclosure award, & claimed a prescriptive right to kill game on the land, but did not show that he was an inhabitant householder of either of those parishes. The justices convicted deft.; & in a case, stated under Summary Jurisdiction Act, 1857 (c. 43), set out the evidence upon which they decided that the land was waste or common of the manor, & found that deft. had no ground for believing that he had the right of shooting over it. By Game Act, 1831 (c. 32), s. 30, it is provided, "That any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass:—*Held*: the jurisdiction of the justices was not ousted by the claim of a prescriptive right in gross to kill game on the land, there being no colour for such a claim, nor by the assertion that the land was not in the occupation of the lord of the manor, but was vested in other persons, as the claim of title to oust the jurisdiction of the justices must be a claim of title in the party charged, & not in a third person.

It is my decided opinion that a question of title to take away the jurisdiction of the justices, must be one arising from a claim of right set up by the party against whom the proceedings are instituted. If he asserts a title, though only a colourable one, *bonâ fide*, the jurisdiction of the magistrate falls to the ground, but the claim must have some colour, & not be merely a frivolous one (*COCKBURN, C.J.*).—*CORNWELL v. SANDERS* (1862), 3 B. & S. 206; 1 New Rep. 57; 32 L. J. M. C. 6; 7 L. T. 356; 27 J. P. 148; 9 Jur. N. S. 540; 11 W. R. 87; 122 E. R. 78.

Annotations:—*Consd.* *It. v. Stimpson* (1863), 4 B. & S. 301. *Reid*. *Hudson v. Macrae* (1863), 3 New Rep. 76; *Watkins v. Major* (1875), L. R. 10 C. P. 662.

176. — Mere assertion of general public right insufficient.]—A person charged under Game Act, 1831 (c. 32), s. 30, with trespassing in pursuit of game in the daytime on land in the occupation of a tenant to A. set up a claim of right to shoot over the land, on the ground that he & every one who chose had always shot there till some recent acts of interruption, & declared his readiness to try the right with A.:—*Held*: the mere assertion of such a general right in himself & every one else, though he really believed it without showing any such claim of right as would be a defence to an action of trespass, did not oust the jurisdiction of the magistrates to convict under the statute in question.—*LEATT v. VINE* (1861), 30 L. J. M. C. 207; 8 L. T. 581; 25 J. P. 791.

Annotations:—*Reid*. *Cornwell v. Sanders* (1862), 3 B. & S. 206; *It. v. Stimpson* (1863), 4 B. & S. 201; *Watkins v. Major* (1875), L. R. 10 C. P. 662.

177. — Right of justices to determine *bonâ fides* of claim.]—*R. v. CRIDLAND*, No. 160, *ante*.

178. — — —.]—*LEGG v. PARDOE*, No. 161, *ante*.

179. — — — Whether justices' finding conclusive.]—Where, in order to oust the jurisdiction

of hunting hares on his lands. Subsequently A. gave permission to H. & M., who were ignorant of the demise, to hunt over the lands. H. & M. did

hunt & look for game:—*Held*: H. & M. were guilty of an offence under 27 Geo. III., c. 35, s. 10, & the offence was committed, even if they believed that

they had authority to hunt or look for game on A.'s land.—*COLLINS v. MURPHY & HORGAN* (1912), 46 I. L. T. 240.—*IR.*

Sect. 2.—Criminal: Sub-sect. 1, A. (b) i. & ii., (c). & B. (a) i..]

of justices to adjudicate upon an information for trespassing in pursuit of game, a claim of title is set up, the justices are not conclusively the judges of the *bona fides* of the claim; & where a deft. in such information made a claim of right to shoot over the lands in question as lord of the manor, & gave in evidence in support of such right certain documents of title & an inclosure Act, but the justices found that there was no evidence that he, as such lord, had any right other than those possessed by every other lord, & that he having practised for years as an attorney, did not *bona fide* believe when he committed the trespass that he had any such right as that claimed & convicted, the conviction was quashed upon the ground that there was evidence of the *bona fides* of the claim set up.—*R. v. DERBYSHIRE JJ.* (1863), 11 W. R. 780.

180. ———.]—*R. v. KAYLEY, KIDDLE v. KAYLEY*, No. 48, *ante*.

181. ———.]—*M.*, lord of the manor, having shot a pheasant on the freehold land of a tenant of the manor, & been summoned before the justices at petty sessions under Game Act, 1831 (c. 32), s. 30, set up a claim of right to shoot on all the lands of the manor. The justices holding this to be impossible in point of law, & that *M.* being an attorney, must know it to be so, overruled the claim of right, & convicted him:—*Held*: the conviction was wrong, & the justices ought to have stayed their hands, seeing that the claim was made *bona fide*.—*R. v. MOULSEY* (1864), 28 J. P. 133.

182. ———.]—*LOVESY v. STALLARD*, No. 163, *ante*.

183. ———.]—Applt. was charged with trespass in pursuit of game, under Game Act, 1831 (c. 32), s. 30, & was proved to have shot game on glebe land over which the rector of the parish had always exercised the privilege of sporting. Applt.'s defence was that he was game watcher, employed by three gentlemen who were proved to rent shooting from the lord of the manor, & that the lord claimed the shooting over part of the glebe under an Inclosure Act. He proved that his employers ordered him to go upon this land, but he produced no evidence, although an adjournment was offered for that purpose, that the land upon which the alleged trespass was committed was included in the lands over which his employers' shooting extended, nor in the disputed part of the glebe. The magistrate decided that applt. had no *bona fide* claim of right to shoot on this particular land, & convicted him of the trespass. Upon a case stated:—*Held*: under the circumstances, the magistrate was justified in convicting.—*BIRNIE v. MARSHALL* (1876), 35 L. T. 373; 41 J. P. 22, D. C.

184. ———.]—*PENWARDEN v. PALMER*, No. 167, *ante*.

PART VI. SECT. 2, SUB-SECT. 1.—A. (c).

n. Conviction.—Evidence to support.]—A conviction under Game Protection Act, 1898, s. 14, as re-enacted by 1909, c. 20, sect. 8, for hunting any animal must be supported by evidence showing the species of animal hunted.—*It. v. OBERLANDER* (1910), 15 B. C. II. 134.—*CAN.*

o. ———.]—It is not necessary to a conviction of a contravention of Poaching Prevention Act, 1862, s. 2, that the parties charged should have been seen on any lands, or coming from any lands upon which they might have been poaching.—*M'KENZIE v. LOCKHART* (1890), 2 White, 634; 18 R. (Ct. of Sess.) 1; 28 Sc. L. R. 30, J.—*SCOT.*

185. ———.]—**Claim of title must be in party charged.—Not in third party.]**—*CORNWELL v. SANDERS*, No. 175, *ante*.

186. ———.]—**When claim of right inadmissible.—No title to property involved.]**—*B.*'s covert adjoined the field of *P.*, & *B.* went on a public footpath in this field of *P.*'s to shoot, directing his servant to beat *B.*'s own covert & hedge. *B.*, on being charged under Game Act, 1831 (c. 32), s. 30, set up a claim of right, as the hedge was his:—*Held*: the justices were wrong in allowing a claim of right, as no title to property was involved, & *B.* ought to have been convicted.—*PHILPOT v. BUGLER* (1890) 54 J. P. 646, D. C.

ii. Leave and Licence.

See generally Part IV., Sect. 2, sub-sect. 2, B.; Part VI., Sect. 1, sub-sect. 2, *ante*.

Prosecution under Poaching Prevention Act, 1862 (c. 114).]—*See* No. 297, *post*.

(c) Practice.

See Game Act, 1831 (c. 32), ss. 38–45; & *generally*, Summary Jurisdiction Acts, 1848 (c. 43), 1879 (c. 49), & 1884 (c. 43); *MAGISTRATES*.

187. ———.]—**Information.—May be laid by any person.]**—Under Game Act, 1831 (c. 32), s. 30, it is not necessary that a conviction for a trespass in search of game should purport to be, or should in fact be, at the instance or on the information of the owner or occupier of the land, or of a party interested in the game, or of a person authorised by such owner, occupier, or party.—*MIDDELTON v. GALE* (1838), 8 Ad. & El. 155; 112 E. R. 796; *sub nom.* *MIDDLETON v. GALE*, 3 Nev. & P. K. B. 372; 1 Will. Woll. & H. 352; 7 L. J. M. C. 103; 2 J. P. 328; 2 Jur. 819.

Annotations:—Folld. Morden v. Porter (1860), 7 C. B. N. S. 641. *Mentd. Cole v. Coulton* (1860), 24 J. P. 596.

188. ———.]—*MORDEN v. PORTER*, No. 139, *ante*.

189. ———.]—**Trial.—Jurisdiction of justices to try together several offenders.—Separate information.]**—A separate information & separate summons were respectively laid & issued against two persons for having used nets for the purposes of taking game contrary to Game Act, 1831 (c. 32), s. 23. The summonses were returnable at the same time; & as the two persons had been using the nets together, the two cases were heard as one. The two persons were severally convicted in full penalties. Sect. 45 of the Act takes away the writ of *certiorari*. On cause shown against a rule *nisi* for a *certiorari* to bring up the convictions that they might be quashed on the grounds that the justices had imposed two distinct penalties for one joint offence, & that they had heard the two cases as one:—*Held*: there was no excess of jurisdiction, & the rule must be discharged.—*R. v. STAFFORDSHIRE JJ.* (1858), 32 L. T. O. S. 105; 23 J. P. 486.

Annotation:—Reid. Re Appln. for Mandamus to Brighton Stipendiary Mag. (1893), 9 T. L. R. 622.

190. ———.]—**Joint information.]**—By Game

p. ———.]—A complaint, charging a person with a contravention of Poaching Prevention Act, 1861 (c. 114), did not set forth that accused had unlawfully obtained game found in his possession, but merely set forth that the complainant, a constable, had good cause to suspect that he had obtained it unlawfully. The justices convicted the accused of the contravention

Act, 1831 (c. 32), s. 3, if any person whatsoever shall kill or take any game, or use any dog, gun, etc., for the purpose of killing or taking any game on a Sunday . . . such person shall, on conviction, forfeit for every such offence a penalty not exceeding £5. At petty sessions, an information was laid against two defts. charging that they did use a gun & kill two pheasants contrary to the above statute: each claimed to be tried separately in order to call the other as a witness; the justices refused, & heard the charge against both together & convicted them, & a conviction was drawn up separately against each deft. imposing a penalty of £3:—*Held*: it was in the discretion of the justices whether they would hear the charge separately or not, & as the penalty was imposed on every person acting in contravention of the statute, each deft. was separately liable to the whole penalty, & separate convictions were right. *R. v. LITTLECHILD, R. v. HESLOP* (1871), *L. R. 6 Q. B. 293*; *40 L. J. M. C. 137*; *24 L. T. 233*; *35 J. P. 661*; *19 W. R. 748*.

191. Conviction—Sufficiency.—(1) The forms of convictions given in the schedule to Summary Jurisdiction Act, 1848 (c. 43), apply to all cases, & convictions drawn up in such of the forms as are applicable to the case are sufficient.

(2) A conviction under Game Act, 1831 (c. 32), & 5 & 6 Will. 4, c. 20, s. 21, adjudged a pecuniary penalty, to be paid & applied according to law, following the words of Forms 1, 2, in the schedule to Summary Jurisdiction Act, 1848 (c. 43). The Game Acts provided that one moiety of the penalty should be paid to the informer & the other moiety to go to the overseers of the poor, & be paid to one of the overseers or to some other parish officer appointed by the justice:—*Held*: the conviction was sufficient.

(3) By Game Act, 1831 (c. 32), the *certiorari* is taken away.

Qu.: whether the objection that there is no proper adjudication of the penalty be one for which the *certiorari* may nevertheless issue; but the conviction having been brought up by *certiorari* under Quarter Sessions Act, 1849 (c. 45), s. 18, in order to be enforced the ct. entertained the objection.—*R. v. HYDE* (1852), *7 E. & B. 859, n.*; *21 L. J. M. C. 94*; *18 L. T. O. S. 223*; *16 J. P. 67*; *16 Jur. 337*; *119 E. R. 1466*.

Annotation:—*As to* (3) *Reid. R. v. St. Albans JJ.* (1853), *22 L. J. M. C. 142*.

192. Of several persons tried together—Each offender adjudged to be imprisoned on default of all other defendants.—*R. v. CRIDLAND, No. 180, ante*.

193. — Separate convictions.—*R. v. LITTLECHILD, R. v. HESLOP, No. 190, ante*.

194. Certiorari—Whether available—Game Act, 1831 (c. 32), s. 45.—*R. v. HYDE, No. 191, ante*.

195. — — — — ——*R. v. STAFFORDSHIRE JJ., No. 189, ante*.

charged.”—In a suspension:—*Held*: the conviction must be read as a conviction of a contravention of the Act & the objection to the terms of the complaint was an objection in a matter of form, consideration of which was excluded by Summary Procedure Act. —*SCOTT v. ANDERSON* (1868), *7 Macph. (Ct. of Sess.) 43*; *41 Sc. Jur. 30*.—*SCOTT*.

q. Refusal to account for possession of game.—Possession of game by a person who is suspected by the police

of coming from land where he had been unlawfully in search of game & who refuses to say how he obtained the game, does not amount to an offence under Poaching Prevention Act, 1861 (c. 114), s. 2.—*JAMESON v. BARTY* (1893), *1 Adam, 91*.—*SCOTT*.

PART VI. SECT. 2, SUB-SECT. 1.—
B. (a) i.

r. Place of offence—Lands in occupation of accused.—A tenant of a

—*See, generally, CROWN PRACTICE, Vol. XVI., pp. 398 et seq.*

B. Poaching by Night.

(a) *Offences.*

i. *Poaching by Persons Singly.*

See Night Poaching Act, 1828 (c. 69), s. 1.

196. Place of offence—“Open or inclosed” land—Waste bordering highway.—Applt. was found with a net, & for the purpose of taking game upon certain land, which had a hedge on either side, & a metalled road running through it. Between the road, on both sides of it, & the hedges the land was waste land varying in extent:—*Held*: this land was not either open or inclosed within Night Poaching Act, 1828 (c. 69), s. 1, which made it an offence to enter by night any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game.—*R. v. HARRIS, R. v. VESEY* (1865), *6 New Rep. 62*; *12 L. T. 303*; *29 J. P. 486*; *13 W. R. 652*; *sub nom. VEYSEY v. HOSKINS, HARRIS v. HOSKINS, 34 L. J. M. C. 145*; *11 Jur. N. S. 737*.

197. — Place not “warren or ground, etc.” within Larceny Act, 1861 (c. 96), s. 17—Power of justices to convict under Night Poaching Act, 1828 (c. 69).—Where a field in an agricultural farm has rabbits in it, but justices find as a fact that it was not a warren or ground used for the breeding or keeping of hares or rabbits, a person poaching by night there for rabbits may be summarily convicted under Night Poaching Act, 1828 (c. 69), s. 1, notwithstanding Larceny Act, 1861 (c. 96), s. 17.—*BEVAN v. HOPKINSON* (1876), *34 L. T. 142*; *40 J. P. 693, D. C.*

198. When offence amounts to misdemeanour—After two previous convictions—Convictions must be under same section.—Night Poaching Act, 1828 (c. 69), s. 1, provides that, if any person by night enters upon any land with any gun or other instrument for the purpose of taking or destroying game, he shall for the first & second offences be liable to certain penalties on summary conviction, & “in case such person shall so offend a third time” he shall be guilty of a misdemeanour:—*Held*: on an indictment for a third offence two previous convictions under sect. 1 must be alleged & proved, & a previous conviction under sect. 9 of the Act of the misdemeanour of entering upon land by night armed & to the number of three or more for the purpose of taking game was not a previous conviction within sect. 1.—*R. v. LINES*, [1902] *1 K. B. 199*; *71 L. J. K. B. 125*; *85 L. T. 790*; *66 J. P. 24*; *50 W. R. 303*; *18 T. L. R. 176*; *46 Sol. Jo. 138*; *20 Cox, C. C. 142, C. C. R.*

Annotation:—*Folld. R. v. McLauchlan* (1910), *75 J. P. 8*.

199. — — — — ——*R. v. McLAUCHLAN* (1910), *75 J. P. 8*.

— — — — — Proof of convictions.—*See No. 246, post.*

farm was charged with contravention of the 9 Geo. IV. c. 69, s. 1, in so far as he did by night “unlawfully enter or was found upon ‘the lands tenanted by himself’ for the purpose of destroying game or rabbits”:—*Held*: a tenant may be guilty of contravening this statute, by unlawfully entering or being on his farm by night, for the purpose of taking or destroying game.—*SMITH v. YOUNG* (1856), *2 Irv. 402*; *28 Sc. Jur. 338*.—*SCOTT*.

Sect. 2.—Criminal: Sub-sect. 1, B. (a) ii.]ii. Poaching by Three or More Persons in Concert.

See Night Poaching Act, 1828 (c. 69), s. 9.

200. "Game"—What is—Young tame pheasants.]—R. v. GARNHAM, No. 9, *ante*.

— — —.]—*Sec, generally, Part I., ante.*

201. "Unlawfully enter or be in any land"—Night Poaching Act, 1828 (c. 69), s. 9, which relates to night poaching, creates two distinct offences:—First, the entering in the night on land, to the number of three, some one of them being armed: & second, the being in the night on land to the number of three, some one of them being armed.—R. v. KENDRICK (1835), 7 C. & P. 184; 3 Nev. & M. M. C. 400.

202. — Whether personal entry by all essential—Some only bodily on land—Others aiding but not entering.]—To support an indictment for night poaching, by three or more being armed, etc., it is not sufficient to prove that one of the prisoners was in the place laid in the indictment, & that the rest of the party were in another wood, which was separated from the place mentioned by a turnpike road.—R. v. DOWSELL (1834), 6 C. & P. 398; 2 Nev. & M. M. C. 194.

*Annotations:—*Consd. R. v. Lockett (1836), 7 C. & P. 300. *Expld.* R. v. Scotton (1844), 5 Q. B. 493. *Reid.* R. v. Nickless (1839), 8 C. & P. 757.

203. — — —.]—On an indictment for night poaching by four, one being armed: *Semble*: if two enter the land laid in the indictment, & the other two remain outside the preserve, but are of the same party, & are there for the same purpose, all ought to be found guilty.—R. v. LOCKETT (1836), 7 C. & P. 300; 3 Nev. & M. M. C. 430.

*Annotation:—*Consd. R. v. Scotton (1844), 5 Q. B. 493.

204. — — —.]—*Semble*: in cases of night poaching, all who are at the place, each acting his part with a common intent, are equally guilty, although some only are bodily upon the land.

Held: those who were watching at the outside of a preserve for the purpose of giving the alarm on the approach of the gamekeeper to others who were in the preserve, & who afterwards went into the preserve for that purpose, were equally guilty with those who entered the preserve at first.—R. v. PASSEY (1836), 7 C. & P. 282; 3 Nev. & M. M. C. 426.

*Annotations:—*Consd. R. v. Scotton (1844), 5 Q. B. 493. *Reid.* R. v. Fry (1846), 10 J. P. 219.

205. — — —.]—(1) In an indictment under Night Poaching Act, 1828 (c. 69), s. 9, it is sufficient to charge entering, etc., certain land in the occupation of A., etc., without specifying whether it was inclosed or not.

(2) If one of a party of poachers be found in the land specified, the rest co-operating in the pursuit of game in adjoining land, all may be alleged to be found in the land specified.—R. v. ANDREWS (1837), 2 Mood. & R. 37, N. P.

206. — — —.]—The prisoner was indicted under Night Poaching Act, 1828 (c. 69), s. 9, for being together with other persons to the number of three or more in the night time & armed with offensive weapons, in a certain wood, with intent to kill game. The evidence was that two only of the party were actually & bodily in

the wood. On its being objected that this did not support the indictment as it was necessary that three at least should be bodily in the wood:—*Semble*: (ROLFE, B.) the objection was valid.—R. v. FRY (1846), 10 J. P. 219, N. P.

207. — — —.]—R. v. SCOTTON, No. 146, *ante*.

208. — — —.]—To support a charge of night poaching, by three or more armed, under Night Poaching Act, 1828 (c. 69), s. 9, it is not necessary that all the persons charged, or even three of them, should have been actually on the land; & if it be shown that all the defts. were at the time associated & engaged in pursuing the common purpose & object of taking game by some of them going armed into the field, & there beating for game, while others rendered them aid by remaining outside of the field, that is sufficient.—R. v. WHITTAKER, HOLMES, MAWE, WILLIAMS, WILSON & GETTING (1848), 1 Den. 310; 2 Car. & Kir. 636; 17 L. J. M. C. 127; 11 L. T. O. S. 310; 12 J. P. 612; 3 Cox, C. C. 50, C. C. R.

*Annotation:—*Reid. R. v. May & Darling (1851), 5 Cox, C. C. 176.

209. — — —.]—A count for assaulting a gamekeeper under Night Poaching Act, 1828 (c. 69), s. 2, alleged that defts., with other persons to the number of three & more, entered by night a certain close, with guns & other offensive weapons, for the purpose of taking & destroying game, & then proceeded to allege that defts. being then & there in the said land, were found by one H., the servant of one B., & there with the said guns assaulted & beat the said H., etc.:—*Held*: (1) the count was defective for not alleging that defts. were in the close armed with guns, etc., according to the language of sect. 9 of the statute.

Semble: (2) in an indictment under sect. 9, which makes it a misdemeanour if any persons to the number of three or more together shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed, etc., it is sufficient to allege that defts. "unlawfully" entered, without alleging the particular facts which rendered the entry unlawful; (3) the allegation that defts. entered for the purpose of taking or destroying game is sufficient, without specifying the particular description of game.

An indictment under Night Poaching Act, 1828 (c. 69), s. 8, alleged that defts. on Dec. 15, 1850, at the parish of F., in the county of B., "about the hour of six in the night of the same day, being then & there respectively armed with guns & other offensive weapons, did then & there together by night as aforesaid, & armed as aforesaid, unlawfully enter certain land called O. there situate, & were then & there by night as aforesaid, & armed as aforesaid, together unlawfully in the said land for the purpose then & there of taking & destroying game":—*Qu.*: whether the words "then & there" last-mentioned amounted to an allegation that defts. were then on the land for the purpose of taking game by night, & whether, if not, an express averment to that effect was necessary:—*Held*: (4) in order to support a conviction under this indictment, the evidence must show that all the three men actually entered the coppice, & a constructive entering was insufficient.—R. v. MAY & DARLING (1851), 5 Cox, C. C. 176.

210. — Sending dog on land.]—If three persons go out together night poaching, one being armed, & two of them stand in a road & set nets in the hedge of a field of M., & send their dog into the field to drive hares into the net, & after this the third leave them in the road & go to poach by himself in another field of M., this will not support an indictment for night poaching on land of M., for the sending in of a dog is not an entering of land within Night Poaching Act, 1828 (c. 69), s. 9, & the entering of the second field was not a joint act of the three.—*R. v. NICKLESS* (1839), 8 C. & P. 757.

Annotation :—*Reid. R. v. Pratt* (1855), 1 Jur. N. S. 681.

211. "Armed"—Whether constructive arming sufficient—Only one armed.]—Indictment on 57 Geo. 3, c. 90. If several persons are out with the intent to kill game, & only one of them is armed, the rest who are unarmed, are liable to be convicted under this Act.—*R. v. SMITH, O'FLANNAGHAN & PRESTON* (1818), Russ. & Ry. 368, C. C. R.

Annotation :—*Reid. R. v. Goodfellow* (1845), 9 J. P. 297.

212. Without knowledge of others.]—If several go into a close in the night to kill game, & one has arms without the knowledge of the others, the other persons who are unarmed are not liable to be convicted under 57 Geo. 3, c. 90.—*R. v. SOUTHERN* (1821), Russ. & Ry. 444, C. C. R.

213. —.]—*R. v. LOCKETT*, No. 203, ante.

214. —.]—An indictment for night poaching, which charges that A. & B., together with another person, entered certain land, "the said A. & B. then & there being armed," is not supported by proof that the third person was armed, & that A. & B. were not so.

Under Night Poaching Act, 1828 (c. 69), a constructive arming is not sufficient.—*R. v. DAVIS* (1839), 8 C. & P. 759.

Annotations :—*Consd. Fletcher v. Calthrop* (1845), 6 Q. B. 880. *Overd. R. v. Goodfellow* (1845), 1 Den. 81.

215. — — —.]—In a case of night poaching by three or more armed, if one has a gun, all are armed within Night Poaching Act, 1828 (c. 69), s. 9.—*R. v. GOODFELLOW* (1845), 1 Den. 81; 1 Car. & Kir. 724.

Annotation :—*Reid. R. v. Thompson* (1869), 21 L. T. 397.

216. Arms abandoned before discovery.]—Indictment on 57 Geo. 3, c. 90. It is no answer to a charge under this Act, that prisoners put down their arms & left them before they were seen, if it was perceived that some one was there armed before they were seen.—*R. v. NASH & WELLER* (1819), Russ. & Ry. 386, C. C. R.

217. "Other offensive weapon"—Stick or bludgeon—Necessity for proof of offensive intent.]—A party in pursuit of game at night, provided with a stick or bludgeon, is not armed with an offensive weapon, unless the jury find that he took it with intent to use it as such.—*R. v. PALMER* (1831), 1 Mood. & R. 70, N. P.

218. — — —.]—The mere use of a small stick as a weapon by a poacher, in a sudden affray with gamekeepers, is not enough to prove such stick an offensive weapon under Night Poaching Act, 1828 (c. 69), s. 9. The jury must be convinced that the party took it with him for the purpose of offence.—*R. v. FRY & WEBB* (1837), 2 Mood. & R. 42, N. P.

219. — — —.]—(1) On an indictment

for night poaching, having been twice summarily convicted, the convictions produced contained no allegation that deft. had entered at night :—*Held* : insufficient evidence of previous conviction.

(2) The indictment alleged deft. & others were armed with "bludgeons & other offensive weapons," & the evidence was that they had sticks :—*Held* : a stick was not necessarily "an offensive weapon," in the absence of evidence of its size, etc., even although it had been used offensively.—*R. v. MERRY* (1847), 9 L. T. O. S. 202; 2 Cox, C. C. 240.

220. — — —.]—An indictment under Night Poaching Act, 1828 (c. 69), charged, that the prisoners "were in G. on Feb. 11, armed, with intent then & there, to take game." The evidence showed that the prisoners were all seen, for the first time, in G., employed in taking down two nets; after this was done they picked up some dead hares, which were lying on the ground near the nets, & hanging them on long sticks over their shoulders, walked homewards with them. It also appeared that they had dogs with them in G. :—*Held* : the allegation that they were "armed" could not be sustained, unless the jury should be of opinion that they took the sticks for the double purpose of carrying away the game, & of attack or defence in the event of their being interrupted by keepers while in pursuit of game.—*R. v. TURNER* (1849), 3 Cox, C. C. 304.

221. —.]—Three men in company were seen hunting game in the night time with dogs. It was not proved that two of the men were in any way armed. The third, prisoner, who was lame, only carried the stick with which he usually walked. The jury should not find the prisoner guilty unless satisfied that this walking-stick was an offensive weapon & that the prisoner had carried it with the intention of using it as an offensive weapon, should occasion arise.—*R. v. WILLIAMS* (1878), 14 Cox, C. C. 59.

222. Stones—Brought & used for offensive purpose.]—Large stones are offensive weapons within Night Poaching Act, 1828 (c. 69), s. 9, if the jury are satisfied that the stones are of a description capable of inflicting serious injury if used offensively, & were brought & used by defts. for that purpose.—*R. v. GRICE* (1837), 7 C. & P. 803.

223. Includes anything brought out for & capable of offensive use.]—Night poachers carrying things not apparently weapons but capable of being used as such & brought out to serve for both harmless & offensive purposes are "armed" within Night Poaching Act, 1828 (c. 69), s. 9.—*R. v. SUTTON* (1877), 13 Cox, C. C. 648.

224. What must be proved—Intention to destroy game—In particular place.]—On an indictment on 57 Geo. 3, c. 90, for having entered a given close, with intent there to kill game, & being there found armed, it is necessary to prove an entry with that intent into the close specified.

Qu. : whether it is necessary he should have such an intent in the place in which he is found armed, unless so stated in the indictment.—*R. v. BARHAM* (1826), 1 Mood. C. C. 151, C. C. R.

225. — — —.]—A count in an indictment for night poaching stated, that prisoners were in a field called A., for the purpose of then & there taking game :—*Held* : prisoners could not be convicted on that count, unless the jury were satisfied that prisoners had an intention of

Sect. 2.—Criminal: Sub-sect. 1, B. (a) ii. & iii., & (b) i.]

taking game in that particular field.—*R. v. CAPEWELL* (1833), 5 C. & P. 549; 1 Nev. M. M. C. 373.

226. — — — — —.]—To sustain an indictment for night poaching armed, etc., the parties must have been in the place charged in the indictment with intent to destroy game, etc., there, & it is incumbent on the prosecutor to convince the jury that defts. had an intent to destroy game, etc., in the particular place mentioned in the indictment.—*R. v. GAINER* (1835), 7 C. & P. 231 3 Nev. & M. M. C. 415.

Annotation:—Consd. Fletcher v. Calthrop (1845), 6 Q. B. 880.

227. — — — — — Presumption of intent.]—

(1) It is not necessary to prove a "deputation" to a gamekeeper from the lord of the manor, but any person, even a watcher, may apprehend parties, to the number of three or more, who are with weapons on land in pursuit of game (*BYLES, J.*).

(2) There was a fallacy in the suggestion that, because the men were not actually found shooting or searching for game in the meadow, therefore they were not "found committing" the offence of night poaching; because the offence under the statute [Night Poaching Act, 1828 (c. 69)] was "being on any land unlawfully for the purpose of destroying game or rabbits," & the men might well be deemed to be found in the meadow "for the purpose" of taking game in the wood. The whole question would be for the jury (*BYLES, J.*).—*R. v. LUCK* (1862), 3 F. & F. 483.

Annotation:—As to (2) Rejd. R. v. Turner (1864), 4 F. & F. 339.

228. — — — — — General intention sufficient.]—

Prisoners were charged with being by night, & armed, in a certain close for the purpose therein of destroying game. It was proved that they passed through the close without doing anything in it, & that after being lost sight of for two hours, they were found three miles off with game in their possession:—*Held:* there was evidence to go to the jury that they were in the particular close for the purpose of taking game, & if persons went out with a general intention of taking game, that was sufficient evidence of an intent to take game in every field through which they passed, in which game might be expected to be found.—*R. v. HIGGS, FLOYD, HAWES & COX* (1867), 10 Cox, C. C. 527.

229. —.]—On indictment under 57 Geo. 3, c. 90, a man may be convicted of having entered a wood, & of being found armed there though he is not seen in such wood. It is sufficient if there be evidence to show he had been there armed.—*R. v. WORKER* (1827), 1 Mood. C. C. 165, C. C. R.

230. — — — Action in concert.]—*R. v. DOWSELL*, No. 202, *ante*.

231. — — —.]—*R. v. NICKLESS*, No. 210, *ante*.

232. — — —.]—*R. v. JONES* (1847), 9 L. T. O. S. 180; 2 Cox, C. C. 185.

233. — — — — — Presence of all members of party in same or adjoining close unnecessary.]—In order to bring a case of night poaching within Night Poaching Act, 1828 (c. 69), s. 9, it is not necessary to prove that three persons were all within the same close or inclosure, or the same piece of open land, if all were of one party, one or more being armed, with the same common purpose, in the place described in the indictment.—*R. v. UEZZELL, EATON & PARKINS* (1851), 2 Den. 274; 3 Car. & Kir. 150; 4 New Sess. Cas. 599; 20 L. J. M. C. 192; 17 L. T. O. S. 136; 15 J. P. 324; 15 Jur. 434; 5 Cox, C. C. 188; *sub nom. R. v. EATON, T. & M. 598, C. C. R.*

Annotation:—Mentd. Ex p. Brown (1852), 16 J. P. 69.

iii. Assaults by Poachers.

Liability—As principals in second degree—Common purpose.]—*See CRIMINAL LAW*, Vol. XIV., pp. 88, 89, Nos. 574–578.

— For homicide—Resistance to arrest.]—*See CRIMINAL LAW*, Vol. XV., pp. 784, 785, 786, Nos. 8452–7, 8477, 8478.

Who may arrest poachers, *see* Part VII., Sect. 3, sub-sect. 1, *post*.

Indictment—Form & contents—"Being armed."]—*See* No. 209, *post*.

— Joinder of counts—Assault on gamekeeper & night poaching.]—*See* No. 264, *post*.

— Assault on gamekeeper & common assault.]—*See* No. 264, *post*.

— Abandonment of count—Validity of verdict on abandoned count.]—*See* No. 265, *post*.

(b) Practice.

i. In General.

234. Apprehension of poachers—Application of Prevention of Offences Act, 1850 (c. 19), s. 11.]—The above sect. giving any person the right to apprehend persons committing indictable offences in the night applies to persons night poaching within Night Poaching Act, 1828 (c. 69), s. 9, although the night is defined to begin & end at different times in the two statutes.—*R. v. SANDERSON* (1859), 1 F. & F. 598.

— By gamekeepers.]—*See* Part VII., Sect. 3, sub-sect. 1, *post*.

235. Commencement of prosecution—What amounts to—Preferring indictment—Indictment ignored.]—*Qu.*: whether the preferring of an indictment against a party for night poaching, which is ignored, is a commencement of the prosecution within Night Poaching Act, 1828 (c. 69), s. 4, so as to warrant the conviction of the

PART VI. SECT. 2, SUB-SECT. 1.— B. (a) ii.

230 i. What must be proved—Action in concert.]—Where several persons are out in company for the purpose of taking or destroying game & only one of them is armed, the rest who are unarmed are liable to be convicted under Night Poaching Act, 1828 (c. 69).—*H.M. ADVOCATE v. GRANGER* (1863), 4 Irv. 432; 36 Sc. Jur. 3.—*SCOT*.

PART VI. SECT. 2, SUB-SECT. 1.— B. (b) i.

s. Information—Form & contents.]—*DRUMMOND v. LATHAM* (1892), 3 White, 166; 29 Sc. L. R. 481, J.—*SCOT*.

t. Evidence—Admissibility—Accomplice.]—Certain persons were accused of night poaching, & at the trial counsel proposed to call as witnesses for them several companions, in whose company the indictment alleged they

had committed the offence & who were indicted for the same offence on a separate indictment at the same circuit:—*Held:* the proposed witnesses should not be examined.—*H.M. ADVOCATE v. MITCHELL* (1887), 1 White, 321.—*SCOT*.

a. — Sufficiency of.]—On Sept. 30, at an hour not stated, deft. shot a pheasant on lands occupied by a yearly tenant on the K. estate. *Com-*

party on another indictment preferred four years after the offence.

Preferring the bill is an act done by the party, which is the commencement of a prosecution. . . . I do not feel so clear as to be disposed to put an end to the prosecution, but I will reserve this point if necessary (COLERIDGE, J.).—*R. v. KILLMINSTER* (1835), 7 C. & P. 228; 3 Nev. & M. M. C. 413.

236. Laying information.]—In a case of night poaching by persons armed, the offence was committed on Dec. 4, 1845. On Dec. 19, 1845, information of the offence was made before a magistrate, who on that day granted warrants to apprehend A. & B., two of the offenders. On one of these warrants A. was apprehended & committed for trial on Sept. 16, 1846, B. being apprehended on the other warrant & committed for trial on Oct. 21, 1846. The indictment was preferred & found on Apr. 5, 1847:—*Held*: the prosecution was “commenced within twelve calendar months after the commission” of the offence, & it was commenced by the information & warrants to apprehend, or at all events by the apprehension of prisoners.—*R. v. BROOKS & GIBSON* (1847), 2 Car. & Kir. 402; 1 Den. 217; 2 Cox, C. C. 436, C. C. R.

Annotations:—*Distd.* *R. v. Hull* (1860), 2 F. & F. 16. *Consd.* *R. v. Smith* (1862), Le. & Ca. 131; *Thorpe v. Priestnall*, [1897] 1 Q. B. 159. *Refd.* *R. v. Parker & Smith* (1864), Le. & Ca. 459; *Yatcs v. R.* (1885), 52 L. T. 305; *R. v. Clarke, Ex p. Crippen* (1910), 103 L. T. 636.

237. — Issue of warrant.]—The issuing of a warrant of apprehension is not a “commencement of proceedings” within Night Poaching Act, 1828 (c. 69), s. 4.—*R. v. HULL* (1860), 2 F. & F. 16.

Annotation:—*Folld.* *R. v. Casbolt* (1869), 21 L. T. 263.

238. — Proof of.]—On the trial of an indictment of Night Poaching Act, 1828 (c. 69), s. 9, for night poaching, it appeared that the offence was committed on Jan. 12, 1844. The indictment was preferred on Mar. 1, 1845. The warrant of commitment by which deft. was committed to take his trial for this offence was given in evidence: it was dated on Dec. 11, 1844:—*Held*: it was sufficiently shown that the prosecution was commenced “within twelve calendar months after the commission” of the offence, within sect. 4 of that statute.

The warrant of commitment must be taken to show the commencement of the prosecution. The first proceeding was to take the party before the magistrate, & he grants his warrant of commitment. This prosecution is shown to have been commenced within twelve months after the commission of the offence (POLLOCK, C.B.).—*R. v. AUSTIN* (1845), 1 Car. & Kir. 621.

Annotations:—*Distd.* *R. v. Hull* (1860), 2 F. & F. 16. *Consd.* *R. v. Parker & Smith* (1864), 12 W. R. 765. *Refd.* *R. v. Casbolt* (1869), 21 L. T. 263; *Beardsley v. Giddings* (1904), 73 L. J. K. B. 378.

239. — Production of warrant—Information not produced.]—Upon the trial of an indictment under Night Poaching Act, 1828 (c. 69), s. 9, for night poaching, in order to prove that the proceedings were commenced within twelve months after the commission of the offence as required by

sect. 4, a warrant for defts.: apprehension issued within the twelve months was produced; but the information on which the warrant was founded was not put in evidence:—*Held*: in the absence of the information, the warrant was not legal evidence that the proceedings had been commenced within the time limited.—*R. v. PARKER & SMITH* (1864), Le. & Ca. 459; 4 New Rep. 115; 33 L. J. M. C. 135; 10 L. T. 463; 28 J. P. 359; 10 Jur. N. S. 596; 12 W. R. 765; 9 Cox, C. C. 475, C. C. R.

240. Neither warrant nor information produced.]—C. was indicted for night poaching on Feb. 6, 1863. He pleaded guilty, but subsequently applied by his counsel for leave to withdraw the plea, & to move in arrest of judgment, upon the ground that the proceedings against him had not been commenced within twelve calendar months, as directed by Night Poaching Act, 1828 (c. 69), s. 9:—*Held*: the application to withdraw the plea was one which ought to be granted, & as no warrant & information was produced showing that proceedings had been commenced within twelve months, the objection was fatal.—*R. v. CASBOLT* (1869), 21 L. T. 263; 11 Cox, C. C. 385.

Annotation:—*Refd.* *R. v. Brown* (1913), 8 Cr. App. Rep. 173.

—*See, generally*, CRIMINAL LAW, Vol. XIV., pp. 154 *et seq.*

241. Information—Form & contents—Whether purpose of entry.]—An information, under Night Poaching Act, 1828 (c. 69), s. 1, for entering land for the purpose of taking game, is sufficient to give the justices before whom it is laid jurisdiction to hear the charge, although it does not allege that the entry was for the purpose of taking game there.—*R. v. WESTERN* (1868), L. R. 1 C. C. R. 122; 37 L. J. M. C. 81; 18 L. T. 299; 32 J. P. 390; 16 W. R. 730; 11 Cox, C. C. 93, C. C. R.

Annotation:—*Refd.* *R. v. Wilcox* (1889), 37 W. R. 686.

Indictment.]—*See* Sub-sect. 1, B. (b) ii., *post*.

242. Right to trial by jury—First offence under Night Poaching Act, 1828 (c. 69), s. 1—Application of Summary Jurisdiction Act, 1879 (c. 49), s. 17.]—By Summary Jurisdiction Act, 1879 (c. 49), s. 17, a person where charged before a ct. of summary jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, may claim to be tried by a jury:—*Held*: the offence of night poaching, whereby the person charged was liable under Night Poaching Act, 1828 (c. 69), to imprisonment for a period not exceeding three months, & at the expiration of that period to a further imprisonment of six months in case he failed to find sureties for his not so offending again, was not within the Act so as to entitle the person charged to be tried by a jury.—*WILLIAMS v. WYNNE* (1888), 57 L. J. M. C. 30; 58 L. T. 283; 52 J. P. 343; 4 T. L. R. 254, D. C.

243. Evidence—Admissibility—Acts of accused forming part of same transaction—Larceny & poaching.]—Prisoner was indicted for night poaching, & it was proposed to show that, on the

plainant, a gamekeeper of K., spoke to deft., who said that he had a right to shoot there, & would do so again. The game rights belonged to the tenant, but he was not examined before the justices to negative authority or

consent:—*Held*: there was sufficient evidence to support a conviction.—*GLEESON v. HURLEY*, [1916] 2 I. R. 180; 50 L. T. 53.—*IR.*

b. Conviction—Form & contents.—A man was summoned, upon the

supposed complaint of the occupier of land, for having trespassed in pursuit of game. The sole evidence offered was that of an informer, & deft. was fined £5, of which one-third was directed to be paid to the informer.

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occasion in question, one of the prosecutor's gamekeepers had lost his coat, & that it was found in prisoner's house. There was another indictment against prisoner for stealing the coat:—*Held*: this evidence was inadmissible, unless the prosecutor consented to an acquittal on the indictment for the larceny.—*R. v. WESTWOOD* (1831), 4 C. & P. 547; 2 Man. & Ry. M. C. 509.

Annotation:—*Consd. R. v. Ollis*, [1900] 2 Q. B. 758.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 366 *et seq.*

244. Of accomplice—Sufficiency of confirmation.]—The confirmation of an accomplice should be as to some circumstance affecting the party accused, as by showing the party & the accomplice together, under such circumstances as were not likely to have occurred, unless there was concert between them.

In a case of night poaching the only confirmation was, that, on the evening of the offence, the accomplice & prisoner were drinking together at a public-house commonly frequented by prisoner, & that they both left the house together, when it was shut up for the night. This was considered no sufficient confirmation.

Semble: the accomplice having been summarily convicted of the poaching, under Night Poaching Act, 1828 (c. 69), s. 1, did not at all dispense with his being confirmed on the trial of another person, under sect. 9 of the Act.—*R. v. FARLER* (1837), 8 C. & P. 106.

Annotations:—*Consd. R. v. Mullins* (1848), 12 J. P. 776; *R. v. Baskerville*, [1916] 2 K. B. 658. *Refd. R. v. Keats* (1843), 1 L. T. O. S. 552; *R. v. Tate* (1908), 72 J. P. 391; *R. v. Everest* (1909), 73 J. P. 269; *R. v. Wilson, Lewis & Havard* (1911), 6 Cr. App. Rep. 124.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 460 *et seq.*

245. — “Unlawful” presence on land—Absence of permission from owner or tenant need not be proved.]—On an indictment for night poaching it is not necessary, on behalf of the prosecution, to show that no permission to be on the land was given by the landlord or tenant, in order to prove that prisoners were there unlawfully.—*R. v. WOOD* (1856), Dears. & B. 1; 25 L. J. M. C. 96; 27 L. T. O. S. 176; 20 J. P. 310; 2 Jur. N. S. 478; 4 W. R. 509; 7 Cox, C. C. 106, C. C. R.

— **Proof of commencement of proceedings.]**—*See Nos. 238–240, ante.*

246. Proof of previous convictions—Time for proving.]—Where a person is indicted for night poaching after two previous convictions, the previous convictions should not be proved until the jury find a verdict on the other facts of the case.—*R. v. WOODFIELD* (1887), 16 Cox, C. C. 314.

247. Defence—Res judicata—First charge dismissed on ground of illegal arrest.]—L. was charged with night poaching under Night Poaching Act, 1828 (c. 69), & in the course of cross-examination of prosecutor's witnesses, the justices considered he had been illegally arrested, & discharged him. L. was again summoned for the same offence on

the same facts, when the justices held that they had no jurisdiction, as the former discharge was *res judicata*:—*Held*: the justices were right, & moreover, they had heard the case on the second occasion also.—*R. v. BRAKENRIDGE* (1884), 48 J. P. 293, D. C.

Res judicata generally, see ESTOPPEL, Vol. XXI., pp. 159 *et seq.*

248. Conviction—Form & contents—Intention to destroy game in particular place.]—Qu.: whether a conviction under Night Poaching Act, 1828 (c. 69), s. 1, ought to state that deft. was in the close in question for the purpose of taking game there, or whether it is sufficient to pursue the words of the Act of Parliament.—*Re FLETCHER* (1843), 1 Dow. & L. 726; 13 L. J. M. C. 16; 8 J. P. 168; *sub nom. Ex p. FLETCHER*, 2 L. T. O. S. 155; 8 Jur. 146.

Annotations:—*Refd. R. v. Reynolds & Hodgson* (1844), 13 L. J. M. C. 65; *Fletcher v. Calthrop* (1845), 1 New Sess. Cas. 529; *R. v. Bidwell* (1847), 2 Car. & Kir. 564. *Mentd. Bowdler's Case* (1848), 12 Q. B. 612; *Henderson v. Preston* (1888), 21 Q. B. D. 362.

249. — — — — —.]—Night Poaching Act, 1828 (c. 69), s. 1, gives a summary conviction, if any person “shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun,” etc., “for the purpose of taking or destroying game.” A conviction set forth that C. did, by night, “unlawfully enter certain inclosed land,” “with a net, for the purpose of taking game, to wit partridges & pheasants, contrary to the form,” etc.:—*Held*: bad, for not stating the intent to be to take game there.—*FLETCHER v. CALTHROP* (1845), 6 Q. B. 880; 1 New Sess. Cas. 529; 14 L. J. M. C. 49; 4 L. T. O. S. 393; 9 J. P. 230; 9 Jur. 205; 115 E. R. 332.

Annotations:—*Consd. R. v. Brown* (1852), 17 Q. B. 833. *Dtd. Cureton v. R.* (1861), 1 B. & S. 208. *Refd. Murray v. R.* (1845), 7 Q. B. 700.

250. — — — — —.]—Time game killed — “By night.”—Where parties are summarily convicted under Night Poaching Act, 1828 (c. 69), s. 1, the warrant of commitment should specify not only that prisoners entered the lands in question by night, but also that they killed game, etc., “by night.” It is not enough to allege that they “entered by night & then & there killed, etc.”—*LANSDELL v. BIDWELL* (1844), 8 J. P. 647.

251. — — — — —.]—Time of entry on land — “By night.”—*R. v. MERRY*, No. 219, *ante*.

252. Recognisance — Form & contents.]—Re REYNOLDS (1844), 1 Dow. & L. 846; 1 New Sess. Cas. 51; 8 J. P. 199; *sub nom. Ex p. REYNOLDS & HODGSON*, 2 L. T. O. S. 353; 8 Jur. 192; *sub nom. R. v. REYNOLDS & HODGSON*, 13 L. J. M. C. 65.

Annotation:—*Refd. Re Dunn* (1847), 5 C. B. 215.

ii. Indictment.

See, generally, CRIMINAL LAW, Vol. XIV., pp. 202–244; & Indictments Act, 1915 (c. 90).

253. Form & contents—Place.]—The indictment under 57 Geo. 3, c. 90, charging a party with having entered into a forest, chase, etc., with intent to destroy game, & being found armed in the night, must, in some way or other, particularise the place.—*R. v. RIDLEY* (1823), Russ. & Ry. 515, C. C. R.

Annotation:—*Refd. Davies v. R.* (1829), 8 L. J. O. S. M. C. 49.

(1869), 18 W. R. 164.—*IR.*

c. Possession of firearms by night.] R. v. CONN (1920), 28 B. C. R. 189.—*CAN.*

Upon application to quarter sessions the conviction was affirmed, although the order of conviction disclosed no offence against the game laws, &

although the nominal complainant repudiated the proceedings:—*Held*: the conviction was bad, for indicating no offence.—*R. v. WATERFORD JJ.*

254. —[.]— 'A certain cover, in the parish of A.' is too general a description to sustain an indictment for poaching under Night Poaching Act, 1828 (c. 69).—*R. v. CRICK* (1832), 5 C. & P. 508; 1 Nev. & M. M. C. 354.

255. 'Being armed.'—Where an indictment alleged that A., B., C., D., etc., on, etc., at, etc., to the number of three & more, together, did by night unlawfully enter divers closes, etc., there situate & being in the occupation of E., & were then & there in the said closes, etc., armed with guns, for the purpose of destroying game:—*Held*: it did not contain a sufficient averment that defts. were by night in the closes armed, for the purpose of destroying game.—*DAVIES v. R.* (1829), 10 B. & C. 89; 5 Man. & Ry. K. B. 78; 2 Man. & Ry. M. C. 562; 8 L. J. O. S. M. C. 49; 109 E. R. 384.

Annotations:—*Reid*. *Fletcher v. Calthrop* (1845), 1 New Sess. Cas. 529; *Cureton v. R.* (1861), 30 L. J. M. C. 149.

256. —[.]—In indictments for night poaching, it is advisable to insert a distinct averment that defts. were armed when they entered & were in the land, in addition to the usual allegation, "being then & there by night as aforesaid armed."—*R. v. WILKS & GUY* (1837), 7 C. & P. 811.

257. By night."—*DAVIES v. R.*, No. 255, *ante*.

258. Whether land "open or inclosed."—*R. v. ANDREWS*, No. 205, *ante*.

259. ———[.]—In an indictment for night poaching under Night Poaching Act, 1828 (c. 69), s. 9, it is unnecessary to state whether the land was open or inclosed.—*R. v. MORRIS* (1851), 5 Cox, C. C. 205.

260. Ownership of land.]—In an indictment for night poaching it is sufficient to allege that the land is land "of & belonging to J." without stating it to be "in the occupation of J."—*R. v. RILEY* (1851), 3 Car. & Kir. 116.

261. "Unlawful" entry on land sufficient.]—*R. v. MAY & DARLING*, No. 209, *ante*.

262. "Game" sufficient—Not kind of game.]—*R. v. MAY & DARLING*, No. 209, *ante*.

—[.]—*See, now*, Indictments Act, 1915 (c. 90).

263. Previous convictions.]—An indictment, under Night Poaching Act, 1828 (c. 69), s. 1, alleged that on Dec. 26, 1854, C. was convicted before, etc., for that he, within the space of six calendar months then last past, to wit, on, etc., by night, after the expiration of the first hour after sunset, & before the beginning of the first hour before sunrise, that is to say, about the hour of, etc., did, by night, then & there unlawfully enter a certain close, etc., with a gun, for the purpose of then & there taking & destroying game, contrary, etc., & that he was then sentenced to be imprisoned for the period of three calendar months; that, afterwards, to wit, on Nov. 2, 1858, he was duly convicted before, etc., for that he, within six calendar months next before, etc., to wit, on Nov. 24, in the year aforesaid, in the night of the same day, at, etc., by night, unlawfully did enter & be in & upon certain inclosed land, in, etc., with certain instruments, for the purpose of killing, taking & destroying game thereon, this being his second offence, contrary, etc., & was then

adjudged to be imprisoned for six calendar months, etc. It then alleged a third offence, which, by the terms of the statute, is made a misdemeanour:—*Held*: the indictment was good, as it sufficiently showed upon the face of it that two previous convictions of offences within the terms of the Act had taken place.—*CURETON v. R.* (1861), 1 B. & S. 208; 30 L. J. M. C. 149; 4 L. T. 286; 25 J. P. 436; 7 Jur. N. S. 1193; 9 W. R. 665; 8 Cox, C. C. 481; 121 E. R. 692.

See, now, Indictments Act, 1915 (c. 90), r. 11.

264. Joinder of counts—Acts forming part of one transaction—Night poaching & assault on gamekeeper.]—A count for night poaching may be joined with a count on Night Poaching Act, 1828 (c. 69), s. 2, for assaulting a gamekeeper, authorised to apprehend, & with counts for assaulting a gamekeeper in the execution of his duty, & for a common assault.—*R. v. FINACANE & WILLIAMS* (1833), 5 C. & P. 551.

265. Abandonment of count—Verdict on abandoned count—Validity.]—The first count of the indictment charged prisoners under Night Poaching Act, 1828 (c. 69), s. 2, with being found on land, at night armed with a gun for the purpose of taking game, by A. & B. who had lawful authority to apprehend them, & that A. & B. being about to apprehend them, the prisoners with a weapon assaulted & wounded A. & B. The second count charged an unlawful wounding. The third & fourth counts charged a common assault. At the close of the prosecution the counsel for the prosecution abandoned the last three counts & elected to stand on the first count. The jury returned a verdict of guilty of night poaching & a common assault. Upon a question raised whether prisoners could be convicted of a common assault upon the first count:—*Held*: the prosecuting counsel having withdrawn the counts for common assault from the jury, the question ought not to be entertained.—*R. v. DAY & COX* (1870), 22 L. T. 452; 34 J. P. 355; 11 Cox, C. C. 505, C. C. R.

266. Separate indictments—Same transaction—Transaction involving distinct offences—Night poaching & shooting of gamekeeper.]—A. was indicted for shooting at B., a gamekeeper, there being another indictment against A. for night poaching:—*Held*: although both indictments related to the same transaction, yet the offences were quite distinct from each other, & the prosecutor, therefore, ought not to be put to his election to go upon one indictment & abandon the other.—*R. v. HANDLEY* (1833), 5 C. & P. 565.

SUB-SECT. 2.—PROCEEDINGS AGAINST PERSONS SUSPECTED OF POACHING.

See Poaching Prevention Act, 1862 (c. 114).

267. Object of Poaching Prevention Act, 1862 (c. 114).]—In order to justify a conviction under sect. 2 of above Act it is necessary that game or instruments for taking game should be found on the accused in a highway. It is not sufficient that the accused should be seen in a highway & followed, & game found on him elsewhere. *Semble*: it is also necessary that the game or instruments for killing or taking game should be detained & taken from the accused in the highway, in order to give magistrates jurisdiction to convict for the offence.

Sect. 2.—Criminal: Sub-sect. 2.]

The Act passed for the purpose of giving authority to constables & peace officers to do certain acts, & power was given them to search in the highways any suspected person, & also power to stop & search any cart. This power, however, was expressly limited to highways & public places, & it was never intended to give power to search in places other than those in which the officers would be in the ordinary execution of their duty (BOVILL, C.J.).

It seems to me that there are four requirements before that jurisdiction arises: (a) the accused must be found in a highway, street, or public place; (b) a constable or peace officer must have good ground to suspect that he is coming from land where he had been unlawfully in search or pursuit of game; (c) he must have in his possession some game unlawfully obtained, or a gun, or part of a gun, or net, or engine for taking or killing game; (d) the game, or other article, or thing, must have been found on him, & by that I understand that it has been either heard, seen, or felt on him. It must then & there have been perceived by the finder's senses, & not inferred by conjecture (BYLES, J.).—CLARKE v. CROWDER (1869), L. R. 4 C. P. 638; 38 L. J. M. C. 118; 17 W. R. 857.

Annotations :—*Folld.* Turner v. Morgan (1875), L. R. 10 C. P. 587. *Consd.* Lloyd v. Lloyd (1885), 14 Q. B. D. 725.

268. Scope of Poaching Prevention Act, 1862 (c. 114), s. 2—Two offences created.]—(1) A person may be convicted of that offence, or of having used any net, etc., for unlawfully killing or taking game, upon circumstantial evidence; (2) under above sect. a person may be convicted of having obtained game by unlawfully going on land in search or pursuit of game without evidence of his having been on any particular land.

There are two heads of offence in sect. 2 under either of which a person who has been stopped by a constable, & in whose possession any game, or any article or thing for the destruction of game has been found, may be convicted: viz., the "having obtained game" by unlawfully going on land in search or pursuit of game & "the having used the article or thing" for unlawfully killing or taking game (COCKBURN, C.J.).—EVANS v. BOTTERILL (1863), 3 B. & S. 787; 2 New Rep. 70; 33 L. J. M. C. 50; 8 L. T. 272; 28 J. P. 21; 10 Jur. N. S. 311; 11 W. R. 621; 122 E. R. 294.

Annotation :—*Generally*, *Mentd.* R. v. Jarrauld & Ost (1863), Le. & Ca. 301.

269. — Ingredients of offence.]—CLARKE v. CROWDER, No. 267, *ante*.

270. Power to search—In "public place"—What is "public place."]—CLARKE v. CROWDER, No. 267, *ante*.

271. — "Good cause to suspect"—Necessity for.]—A policeman has no power under Poaching Prevention Act, 1862 (c. 114), to apprehend persons whom he may suspect of coming from land where they have been unlawfully in pursuit of game, & such persons may lawfully resist & use such violence as is necessary to prevent their apprehension.

A policeman can only justify stopping & searching a cart upon a highway under Poaching Prevention Act, 1862 (c. 114), where he has good cause to suspect that the cart is carrying game which has been unlawfully obtained, etc.; & upon an indictment for assaulting the policeman in the execution of his duty under such circum-

stances, it is necessary to prove the existence of reasonable grounds of suspicion. Evidence that prisoners were habitual poachers is not sufficient & is inadmissible for the purpose. Where no reasonable ground of suspicion can be shown, debts. are justified in resisting the search.—R. v. SPENCER (1863), 3 F. & F. 854, 857.

272. — — What is.]—A constable saw H. with a gun poaching in a field, & then saw him go to another field also poaching, & then on the highway, where the constable stopped & searched him, saying he suspected H. of coming from land where he had been unlawfully searching for game. H. assaulted the constable, & was summoned for the assault:—*Held*: the justices were wrong in dismissing the charge for the reason they gave, viz., that as H. had been seen poaching, he could not have been suspected of poaching.—HALL v. ROBINSON (1889), 53 J. P. 310, D. C.

273. — Search & seizure must constitute one transaction.]—LLOYD v. LLOYD, No. 276, *post*.

274. Power to seize game & guns, nets, etc.—Whether seizure on highway itself essential.]—CLARKE v. CROWDER, No. 267, *ante*.

275. —.]—In order to give jurisdiction to magistrates to convict of an offence under Poaching Prevention Act, 1862 (c. 114), s. 2, it is necessary that the game or instruments for killing or taking game should be seized & detained on the highway.—TURNER v. MORGAN (1875), L. R. 10 C. P. 587; 44 L. J. M. C. 161; 33 L. T. 172; 39 J. P. 695; 23 W. R. 659.

Annotation :—*Consd.* Lloyd v. Lloyd (1885), 14 Q. B. D. 725.

276. — Seizure after chase—At spot several hundred yards from highway.]—A police constable saw applt. in a highway with some rabbits slung over his back. Applt. left the highway & ran across a meadow, followed by the police constable, & on being overtaken, at a distance from the highway, he threw the rabbits on the ground, & they were then & there taken possession of by the police constable. On appeal against a conviction under Poaching Prevention Act, 1862 (c. 114), s. 2:—*Held*: the conviction was right.

The seizure & detainer must then & there follow the search, so as to be one transaction. There are no words in the statute which say that the seizure must be at the very spot where the search takes place or that it shall be in the highway. I do not think the justices would have jurisdiction to convict if, after a search in the highway, the constables let the suspected person go away, & then afterwards went after him & seized & detained the game (SMITH, J.).—LLOYD v. LLOYD (1885), 14 Q. B. D. 725; 53 L. T. 536; 49 J. P. 630; 33 W. R. 457; 15 Cox, C. C. 767, D. C.

Annotation :—*Mentd.* R. v. Ettridge, [1909] 2 K. B. 24.

277. — After abandonment of possession by offender.]—LLOYD v. LLOYD, No. 276, *ante*.

278. — Validity of seizure—Necessity for continuing proceedings under Poaching Prevention Act, 1862 (c. 114), s. 2.]—In above sect. "the value" of the game which is to be restored to an innocent person from whom it has been taken by a police officer, in pursuance of the power of seizure given by the section, means the value of the game at the time of the termination in favour of the innocent person of proceedings subsequently taken against him by the police officer under the provisions of the section, &

not the value of the game at the time it was seized.

A police officer seized certain partridges' eggs in accordance with above sect., under which partridges' eggs are "game," but subsequently took out a summons against the person from whom he seized them charging him before justices with an offence against Game Act, 1831 (c. 32), s. 24, which contains no power of seizure. A conviction under the summons was, on a case stated by the justices, quashed. By order of the justices the eggs were destroyed:—*Held*: the police officer was liable for the value of the eggs at the time they were seized in an action founded on trover, inasmuch as it is a condition subsequent to any steps that a police officer takes under above sect. that he should continue to proceed under that section in order to be entitled to its protection. If he seizes game with a *bonâ fide* intention of acting under above sect. but subsequently proceeds under a different statute, his act of seizure is thereby rendered unlawful & he becomes in law a trespasser.—*STOWE v. BENSTEAD*, [1909] 2 K. B. 415; 78 L. J. K. B. 837; 101 L. T. 38; 73 J. P. 370; 25 T. L. R. 546; 53 Sol. Jo. 543, D. C.

279. No power to arrest person suspected of poaching.—*R. v. SPENCER*, No. 271, *ante*.

280. Liability as accessory—Possession of game by carrier.—In an information on the 5 Ann., c. 14, s. 2, against a carrier between Norwich & London, for having game in his possession as carrier, it is not necessary to aver that deft. is not a person qualified to kill game, nor that he had the game in his possession knowingly. The evidence for the prosecution was, that game was found in deft.'s wagon at an intermediate place between Norwich & London:—*Held*: there was sufficient *prima facie* evidence that deft. had it in his possession as carrier.—*R. v. MARSH* (1821), 2 B. & O. 717; 4 Dow. & Ry. K. B. 260; 2 Dow. & Ry. M. C. 182; 107 E. R. 550.

Annotations:—*Reffd.* *Fletcher v. Calthrop* (1845), 6 Q. B. 880; *Kenyon v. Hart* (1865), 34 L. J. M. C. 87. *Mentd.* *R. v. Prince* (1875), L. R. 2 C. C. R. 154; *Newman v. Jones* (1886), 17 Q. B. D. 132; *Cotterill v. Lempriere* (1890), 24 Q. B. D. 634; *Sherras v. De Rutzen*, [1895] 1 Q. B. 918.

281. —[—*Resp.*, a carrier, was stopped by a policeman on the highway, at three o'clock in the morning, which was his usual time for passing the place where he was stopped. In answer to the policeman he stated that he had not any game in his cart, but upon searching, the policeman found a number of rabbits which appeared to have been killed on the previous day. *Resp.* stated that he was going to take the rabbits to two persons, who denied all knowledge of the respondent or the rabbits:—*Held*: there was no evidence that *resp.* had been on land for the purpose of unlawfully taking game, or that he had been accessory thereto, within Poaching Prevention Act, 1862 (c. 114), s. 2.—*SHUTTLEWORTH v. GRANGE* (1867), 31 J. P. 280.

282. —[—*M.*, a constable, at 7.30 a.m., in Oct. stopped Mrs. L. driving her carrier's cart on the highway, & after questioning L., searched it. M. found two pairs of rabbits, of which L. gave no account, & seized them under Poaching Prevention Act, 1862 (c. 114), s. 2. L., on being served with a summons, said, "I bought them of a man I did not know. This is the first time I have been summoned. I won't have any more of them":—*Held*: the evidence was not sufficient to justify

the justices in convicting L. of aiding persons unknown, who unlawfully went on land, etc.—*LAWLEY v. MERRICKS* (1887), 51 J. P. 502; 3 T. L. R. 450, D. C.

Compare No. 291, *post*.

283. Possession of game not satisfactorily accounted for.—*Ex p. WHITELEY* (1875), 39 J. P. Jo. 70.

Annotation:—*Reffd.* *Lundie v. Botham* (1877), 41 J. P. Jo. 340.

284. Possession of game purchased from notorious poachers.—*R. v. CHESHIRE JJ.* (1876), 40 J. P. Jo. 148, D. C.

285. Necessity for continuing proceedings under Poaching Prevention Act, 1862 (c. 114), s. 2—Statutory protection of constable.—*STOWE v. BENSTEAD*, No. 278, *ante*.

286. Information—Form & contents—What must be charged.—An information under Poaching Prevention Act, 1862 (c. 114), s. 2, must charge deft. with having obtained the game found on him by unlawfully going on land in search or pursuit of game, or being accessory to another person so doing:—*Held*: a conviction was bad which proceeded on an information which did not allege that the game was obtained by deft. unlawfully going on land, or being accessory to another doing so.—*LUNDY v. BOTHAM* (1877), 41 J. P. 774, D. C.

287. Proof of offences—General rule.—If a man is found at an unusual time of the day or night with rabbits which seem to have been caught in a way unusual with sportsmen, it is some evidence that they were got unlawfully (*COCKBURN, C.J.*).—*Ex p. HURST* (1863), 27 J. P. 824.

288. Circumstantial evidence.—A., B., C., & D., four labourers, were met by a police constable early one Sunday morning on the high road leading from X. to Y. Suspecting from their appearance that they had been poaching, & seeing that there was something bulky in the pocket of A., the constable searched him, the other three walking away, & drew from his pocket five wild rabbits which had been recently killed, & an iron spud. The constable then followed B., & found in his pocket a net suitable for taking rabbits & which appeared to have been recently used, & some rabbit's fur, & fresh blood on his coat-cuffs. The constable afterwards found that C. had at a subsequent hour on same morning sold a dead wild rabbit at a beerhouse for 6d. As to D., the only evidence, besides his being seen in company with the others on the road, was that his clothes & shoes were found to be very wet & dirty:—*Held*: the magistrates were justified in inferring from the above evidence, as against A., B., & C., that they had been unlawfully on some land in search or pursuit of game, within Poaching Prevention Act, 1862 (c. 114), although there was no proof that either of the parties had been seen off the high road: but that the evidence against D. was not sufficient to justify a conviction.

If the circumstances proved before the magistrates fairly warranted the inference that the parties charged had been guilty of the offence imputed to them, they had same right to make inferences as any other tribunal has from circumstantial evidence (*ERLE, C.J.*).—*BROWN v. TURNER* (1863), 13 C. B. N. S. 485; 1 New Rep. 283; 32

Sect. 2.—Criminal: Sub-sects. 2 & 3. Part VII.
Sect. 1.]

L. J. M. C. 106; 7 L. T. 681; 27 J. P. 103; 9 Jur. N. S. 850; 11 W. R. 290; 143 E. R. 192.

Annotations:—*Appl. Evans v. Botterill* (1863), 3 B. & S. 787. *Distd. Shuttleworth v. Grange* (1867), 31 J. P. 280. *Refd. Fuller v. Newland* (1863), 27 J. P. 406. *Mentd. R. v. Jarrold & Ost* (1863), L. & Ca. 301.

289. ———.]—EVANS v. BOTTERILL, No. 268, *ante*.

290. ———.]—Where a person has been searched on a highway, & game found upon him, & he is summoned before the justices under Poaching Prevention Act, 1862 (c. 114), s. 2, it is not necessary to prove specifically that he was seen upon any particular lands; it is for the justices to draw the inference from the facts before them whether he had obtained the game by going unlawfully upon some lands; & if there is some evidence to justify that conclusion, the superior court will not interfere.—*FULLER v. NEWLAND* (1863), 27 J. P. 406; *subsequent proceedings. sub nom. Ex p. FULLER*, 27 J. P. 792.

291. ———.]—*Appl.*, a common carrier between B. & R., was met by a police constable coming along the turnpike road to R. with his horse & cart. The constable, suspecting that *applt.* had been unlawfully on land in pursuit of game, asked him if he had any game in his cart, to which he replied that he had only a few rabbits. The constable then searched the cart, & found in a basket, beneath the rabbits, a pheasant, nine partridges, three of which had been shot & six netted, & two hares, one of which had been shot & the other trapped. The game was wet & had been recently killed; & the boots of *applt.*, who fainted when the game was discovered, were dirty, although the road was dry. The justices who convicted *applt.* found that "no evidence was given on the one hand to show that the game was unlawfully obtained, or on the other hand to show that it was lawfully obtained":—*Held*: the foregoing circumstances did not constitute sufficient evidence on which *applt.* could be convicted of having obtained game by unlawfully going on land in search or pursuit of game within Poaching Protection Act, 1862 (c. 114), s. 2.—*JONES v. DICKER* (1870), 22 L. T. 95; 34 J. P. 677.

292. ———.]—*Applts.* were convicted under Poaching Protection Act, 1862 (c. 114), s. 2, of having used a net for unlawfully taking game. The evidence was that the two *applts.* were seen together by a policeman on Dec. 16 on a highway, about half-past nine p.m. One had a net under his arm for catching hares. Nothing else was found on either of them; but they had a lurcher with them. The policeman had heard a dog yelping as if in chase of a hare or rabbit a little time before *defts.* came along the road. The night was damp, & the net was wettish:—*Held*: there was evidence to support the conviction; for that it was not necessary that *applts.* should have caught any game; it was sufficient if they had used the net for the purpose, though unsuccessfully, of which there was evidence.—*JENKIN v. KING* (1872), L. R. 7 Q. B. 478; 41 L. J. M. C. 145; 26 L. T. 428; 37 J. P. 53; *sub nom. R. v. CORNWALL JJ., JENKIN & DENNIS v. KING*, 20 W. R. 669.

PART VI. SECT. 2, SUB-SECT. 3.
d. What is subject of larceny—
Dead game.]—A conviction obtained

upon a summary complaint before the sheriff, which charged the theft from a turnpike road of "a dead pheasant,

or a pheasant totally disabled by a shot, & the property or in the lawful possession of H." suspended on the

293. ———.]—*Appl.* having been summoned for being in possession of game eggs unlawfully obtained, evidence was given on behalf of the prosecution that a constable, having seen *applt.* in the month of May under circumstances of suspicion with other men, searched *applt.*'s cart & found a large number of game eggs which *applt.* stated came off his own farm. No evidence was called on behalf of *applt.*:—*Held*: *applt.* was rightly convicted of an offence within Poaching Prevention Act, 1862 (c. 114), s. 2.—*STOWE v. MARJORAM* (1909), 101 L. T. 569; 73 J. P. 498, D. C.

294. Proof of presence on any particular land unnecessary.]—EVANS v. BOTTERILL, No. 268, *ante*.

295. ———.]—FULLER v. NEWLAND, No. 290, *ante*.

296. Proof of actual search unnecessary—
Game seen on offender.]—Upon an information against a person under Poaching Prevention Act, 1862 (c. 114), s. 2, for having obtained game by unlawfully being on land in search or pursuit of game, it is not necessary to prove an actual search of the person by the constable if game was seen upon the person.—*HALL v. KNOX* (1863), 4 B. & S. 515; 3 New Rep. 117; 33 L. J. M. C. 1; 9 L. T. 380; 28 J. P. 22; 12 W. R. 103; 122 E. R. 552.

Annotations:—*Refd. Clarke v. Crowder* (1869), L. R. 4 C. P. 638; *Lloyd v. Lloyd* (1885), 53 L. T. 536. *Mentd. R. v. Ettridge*, [1909] 2 K. B. 24.

297. Defence—Leave & licence.]—An information was laid by *applt.* against *resps.* under Poaching Prevention Act, 1862 (c. 114), s. 2, for unlawfully obtaining game by unlawfully going on certain land in search & pursuit of game contrary to the statute. *Resps.* set up the defence that they had obtained permission to go upon the land from the son of the occupier & that they, *bonâ fide*, believed that under the circumstances they were not trespassers:—*Held*: the justices were right in dismissing the information if they were satisfied upon the evidence adduced that *resps.* did believe, *bonâ fide*, that they had leave & licence to enter in & upon the land & therefore, were not trespassers, if there were any reasonable grounds for such belief on their part.—*DICKINSON v. EAD* (1914), 111 L. T. 378; 78 J. P. 326; 30 T. L. R. 496; 24 Cox, C. C. 308, D. C.

298. Restoration on acquittal—Of game, etc., seized or "value" thereof—How value ascertained.]—STOWE v. BENSTEAD, No. 278, *ante*.

SUB-SECT. 3.—PROCEEDINGS FOR LARCENY.

See Larceny Act, 1861 (c. 96), ss. 17, 21, 22; & generally, CRIMINAL LAW, Vol. XV., pp. 865 *et seq.*

What is subject of larceny—Live game.]—See ANIMALS, Vol. II., pp. 210, 211, Nos. 59–62, 68, 69.

Dead game.]—See ANIMALS, Vol. II., p. 212, Nos. 79–82.

Pheasants' eggs.]—See CRIMINAL LAW, Vol. XV., p. 906, No. 9959.

299. "Take" — Catching — Actual carrying away unnecessary.]—Taking a rabbit in a wire is sufficient to constitute an offence within 5 Geo. 3, c. 14, s. 6, though the rabbit is not killed, & though the party never takes it away.—*R. v. GLOVER* (1814), Russ. & Ry. 269, C. C. R.

300. Warren or ground lawfully used for breeding or keeping of hares or rabbits—What is—Question of fact.]—*BEVAN v. HOPKINSON*, No. 197, *ante*.

301. ——— Rickyard where rabbits kept.]—Destroying rabbits in the night-time in a rick-

yard in which they were kept, is not a misdemeanour under Larceny Act, 1827 (c. 29), s. 30.—*R. v. GARRATT* (1834), 6 C. & P. 369; 2 Nev. & M. M. C. 197.

302. Ordinary agricultural land.]—*BEVAN v. HOPKINSON*, No. 197, *ante*.

303. —.]—Ordinary agricultural land is not land used for the breeding or keeping of rabbits merely because rabbits are tolerated there & breed in the hedgerows.—*R. v. McLAUCHLAN* (1910), 75 J. P. 8.

Part VII.—Gamekeepers.

SECT. 1.—APPOINTMENT.

304. Who may appoint—Not lord of hundred or wapentake.]—A lord of a hundred, or wapentake, cannot grant a deputation to a gamekeeper.—*AILESBUURY (EARL) v. PATTISON* (1778), 1 Doug. K. B. 28; 99 E. R. 22.

305. Trustees — Interests of estate.]—A trustee & exor., though taking under the will a commission as a satisfaction for his trouble, entitled to allowances under a general trust to set & manage, as he should think proper, & out of the rents & profits to pay all rates & taxes, charges of repairs, stewards, bailiffs, & gamekeepers, salaries & expenses, & all other charges & expenses he should think proper. But he was not allowed to appoint an establishment, gamekeepers, etc., except as the due management required.—*WEBB v. SHAFESBURY (EARL), SHAFESBURY (EARL) v. ARROWSMITH* (1802), 7 Ves. 480; 32 E. R. 194, L. C.

Annotations :—*Mentd. Cafe v. Bent* (1813), 3 Harc. 245; *Bethell v. Abraham* (1873), L. R. 17 Eq. 24; *Re Skeats' Settlement*, *Skeats v. Evans* (1889), 42 Ch. D. 522.

306. Agent.]—*R. v. KING* (1884), 48 J. P. Jo. 149, C. C. R.

307. Appointment in manor—Not transferable—Except by conveyance of manor itself.]—It is no defence to debt for penalties on the game laws that debt. acted *bonâ fide* as gamekeeper of the manor in which the offence was committed, under a deputation from a person claiming a right to appoint the gamekeeper, there being no ground for the claim.

A man cannot convey to another the power of appointing a gamekeeper without a conveyance also of the manor itself. Such a power is a mere emanation of the manor & inseparable from it (*LORD KENYON, C.J.*).—*CALCRAFT v. GIBBS* (1792), 5 Term Rep. 19; 101 E. R. 11.

Annotations :—*Consd. Sowerby v. Smith* (1874), L. R. 9 C. P. 524. *Refd. Hunt v. Andrews* (1820), 3 B. & Ald. 341; *Cornwell v. Sanders* (1862), 3 B. & S. 206. *Mentd. Gregory v. Tufts* (1834), 4 Tyr. 820.

308. — Registration of appointment.]—(1) The evidence of colourable title, necessary to

make a deputation a defence to an action on the game laws, is such as, *primâ facie*, affords a fair presumption: (a) of the existence of a manor; (b) that there exists some serious claim to the manor, on the part of the person under whom debt. claims a right to act; & if the evidence actually given does not amount to that, it ought not to be left to the jury.

Semble: (2) a deputation is not evidence of qualification, without proof of registration with the clerk of the peace; (3) a deputation is not admissible as evidence of the existence of a manor, without a foundation being first laid in fact.—*RUSHWORTH v. CRAVEN* (1825), M'Cle. & Yo. 417; 148 E. R. 476.

309. Game Act, 1831 (c. 32), s. 16.]—A gamekeeper acting under a deputation given by a lord of the manor, according to 22 & 23 Car. 2, c. 25, before the above Act came into operation, which deputation has not been registered with the clerk of the peace, pursuant to sect. 16 of the latter statute, is not entitled to the protection & privileges of the statutes repealed by sect. 1 of the latter statute [22 & 23 Car. 2, c. 25, etc.], or, under sect. 47 thereof, to a month's notice of action, & to give the Act & the special matter in evidence under the general issue.—*BUSH v. GREEN* (1837), 4 Bing. N. C. 41; 3 Hodg. 265; 5 Scott, 289; 7 L. J. C. P. 38; 1 Jur. 844; 132 E. R. 704.

Annotations :—*Apld. Lidster v. Borrow* (1839), 1 Per. & Dav. 447. *Refd. Hughes v. Buckland* (1846), 3 Dow. & L. 702.

310. —.]—A gamekeeper acting under a deputation granted & registered before above act is not entitled to notice of action under sect. 47 of that Act.—*LIDSTER v. BORROW* (1839), 9 Ad. & El. 654; 1 Per. & Dav. 447; 2 Will. Woll. & H. 13; 8 L. J. M. C. 27; 112 E. R. 1359; *previous proceedings, sub nom. LINSTER v. BORROLL* (1837), 1 J. P. 108.

Annotation :—*Refd. Smith v. Hopper* (1847), 16 L. J. Q. B. 93.

311. — Court will not try boundaries of manor.]—*HANKINS v. BAILEY* (1791), 4 Term Rep. 681, n.; 100 E. R. 1243.

ground that the charge being a theft of a wild animal, the complaint ought to have specified how it became the property of H.—*WILSON v. DYKES* (1872), 2 Couper, 183; 10 Macph.

(Ct. of Sess.) 444; 44 Sc. Jur. 251.—*SCOT.*

PART VII. SECT. 1.

e. *Terms of appointment—Yearly*

hiring.—A gamekeeper, engaged at a certain sum per quarter, a house & firing, the keep of a cow summer & winter, a suit of clothes, & a cart load of potatoes, must, unless a special

Sect. 1.—Appointment. Sects. 2 & 3: Sub-sect. 1.]

312. Appointment as defence to action for penalty—Title of person appointing.]—*CALCRAFT v. GIBBS*, No. 307, *ante*.

313. ———.]—In an action against a gamekeeper for a penalty for using a gun to kill game, without being qualified, evidence of the real title to the manor is admissible, for the purpose of negating the existence of a colourable title in the person under whom deft. claims to act. Entries in the books of the clerk of the peace of deputations formerly granted to gamekeepers by the real owner of the manor, are also evidence to show that manorial rights were publicly exercised by him, & that the person whose title was set up by deft. knew that he had not any title whatever.—*HUNT v. ANDREWS* (1820), 3 B. & Ald. 341; 106 E. R. 688.

314. ———.]—*RUSHWORTH v. CRAVEN*, No. 308, *ante*.

315. Presumption from possession.—That game killed for use of lord.]—The possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, is not a possession within the penalty of the game laws.—*WARNEFORD v. KENDALL* (1808), 10 East, 19; 103 E. R. 682.

Annotation :—*Reid*. Walker v. Mills (1820), 2 Brod. & Bing. 1.

316. ———.]—In debt for penalty, under the game laws, if deft. show a deputation as gamekeeper of the manor from the lord, it may be presumed if nothing appears to the contrary, that the game killed by him there was for the use of the lord under 3 Geo. 1, c. 11.—*SPURRIER v. VALE* (1809), 10 East, 413; 1 Camp. 457; 103 E. R. 832.

1.—*Reid*. Walker v. Mills (1820), 2 Brod. & Bing. 1.

317. As evidence—Of existence of manor.]—*RUSHWORTH v. CRAVEN*, No. 308, *ante*.

318. ———.]—In ejectment by a party claiming to be devisee of a manor, the facts of the deviser having held a ct. thirty-five years ago, & the lessor of pltf. on several occasions since his death, & of appointments of gamekeepers, are *prima facie* proof, both that a manor exists, & that the lessor of pltf. is the lord, without the production of ct. rolls or any documentary evidence of cts. having been held.

The parol evidence, that his father had held a ct. thirty-five years ago, & he himself on several occasions more recently, with proof of the appointments of gamekeepers by deputation, were clearly sufficient *prima facie* evidence of both facts (*LORD DENMAN*, C.J.).—*DOE d. BECK v. HEAKIN* (1837), 6 Ad. & El. 495; 2 Nev. & P. K. B. 660; 112 E. R. 189.

contract of different endurance, be established, be presumed to have been hired by the year, & is not to be held as a monthly servant.—*ARMSTRONG v. HAINBRIDGE* (1846), 9 Durl. (Ct. of Sess.) 29, 1198; 19 Sc. Jur. 1.—*SCOT*.

PART VII. SECT. 2.

1. Gamekeeper's licence—When required—Watchers on weekly wage.]—Applt. rents extensive shooting grounds, & has servants who watch separate portions of the hill ground. They

are paid weekly wages, but have been employed the whole year. Applt. has a certificated keeper, who resides at I.; but he has no deputation, & has no superintendence of the others, who reside at distances, varying from three to twenty-four miles from I. He claimed to be assessed for the servants in question at the reduced duty of 10s.:—*Held*: liable.—*Ass. TAX CASE* (No. 666) (1848), 13 J. P. 523.—*SCOT*.

2. Issue of licence before registration of reputation—Effect—Failure of collector to give warning of

319. Right to shoot game on private property within Crown manor.]—Applt. who held a deputation from the comrs. of woods as a gamekeeper to Crown lands, charged to the game certificate duty on account of his having been seen in pursuit of game on a farm, the private property of a gentleman; but it was contended that as the farm was within the manor of which the Crown is lord, he was not liable. The surveyor maintained that the deputation did not authorise applt. to shoot upon private property, but only upon waste lands, & the comrs. confirmed the charge:—*Held*: the comrs. were wrong.—*Ass. TAX CASE* (No. 2,389) (1855), 20 J. P. 249.

SECT. 2.—LICENCES REQUIRED.

320. Gamekeeper's licence—When required—Occasional employment.]—Gentleman charged under Sched. (C.), No. 1, in respect of the services of a man whom he employs to kill game for him in Sept., & from Nov. to Jan. Applt. takes out a general certificate (D.) for the person so employed, & gives him his board & lodging when employed. The comrs., considering applt. not liable, relieved:—*Held*: comrs. wrong.—*Ass. TAX CASE* (No. 2,019) (1847), 12 J. P. 727.

321. ———.]—Issue of licence before registration of deputation—Effect.]—Gamekeeper charged for the year 1856–7 to the duty of £8 1s. 8d. for a game certificate, from which he claimed relief, as he had obtained a certificate B. at £1 7s. 6d. to enable him to shoot over all the lands within a certain manor, for which he held a deputation. The certificate B. was dated Aug. 30, 1856, but the deputation was not registered with the clerk of the peace till Dec. 11, 1856, previously to which he was served with the notice of charge. Evidence was produced as to applt. having shot game off the manor for which he was deputed; & the comrs. with reference to this evidence, & the omission of the timely registration of the deputation, confirmed the charge:—*Held*: comrs. right.—*Ass. TAX CASE* (No. 2,490) (1857), 22 J. P. 467.

322. Who liable—Lessee of shooting rights—Keeper paid by lessor under agreement for repayment by lessee.]—The lessee of certain shooting appeals against a charge for a gamekeeper employed by him thereupon, on the ground that the keeper is the servant of the lessor, who pays his wages, receiving repayment, however, from the lessee. The lessor is not assessed for the keeper. The comrs. relieve:—*Held*: commissioners wrong.—*Ass. TAX CASE* (No. 2,661) (1865), 31 J. P. 615.

Game licence.]—See Part VIII., Sect. 1, *post*.

Gun licence.]—See REVENUE.

necessity for registration.]—A game certificate B. was taken out for a gamekeeper, who had not at the time a duly registered deputation; but one was subsequently granted. Intimation of the necessity of a deputation was not given by the collector in terms of his instructions, when the certificate was issued. A charge to the ordinary game certificate duty was made on the keeper:—*Held*: not liable in respect of the want of the intimation.—*Ass. TAX CASE* (No. 707) (1848), 13 J. P. 574.—*SCOT*.

SECT. 3.—POWERS.

SUB-SECT. 1.—TO ARREST.

323. Under Game Act, 1831 (c. 32), s. 31—Whether offender must have been required both to quit land & give his name.]—To justify the apprehension of a person under the above sect., he must have been required to quit the land, & to tell his name; & the "wilfully continuing or returning upon the land," to justify an apprehension, must be upon the same land, & for the purpose of pursuing game there.—*R. v. LONG* (1836), 7 C. & P. 314; 3 Nev. & M. M. C. 435.

324. ———.]—To justify the apprehension of an offender, under the above sect. it is only necessary that he should have been made to understand, by the person authorised under that sect., that he is required to tell his christian name, surname, & place of abode, & that he should have refused to comply with such requisition. It is not necessary that he should have been required both to quit the land & also to tell his name.—*R. v. PRESTNEY* (1840), 3 Cox, C. C. 505.

325. At night—Night Poaching Act, 1828 (c. 69), s. 9.]—Under sect. 2 of the above Act, a keeper may apprehend poachers, though there are three or more, & found armed, for though the sect. only authorises apprehending for what are offences under sect. 1, & when there are three or more armed, they are punishable under sect. 9; yet what is punishable under sect. 9 is nevertheless an offence under sect. 1, though the circumstances of aggravation make it liable to a heinous punishment; & if the keeper, etc., be killed in the attempt to apprehend, the offender will be guilty of murder, though the keeper had previously struck the offender or any of his party; if he struck in self defence only, & to diminish the violence illegally used against him, & not vindictively to punish.—*R. v. BALL* (1832), 1 Mood. C. C. 330, C. C. R.

Annotations:—Consol. R. v. Price (1835), 7 C. & P. 178; *R. v. Lines*, [1902] 1 K. B. 199.

326. Notice of intention to arrest—Necessity for.]—Where gamekeepers had seized two persons who were poaching in the night, & they, having surrendered, called a third, who came up & killed one of the gamekeepers, this is murder in all, though the two struck no blow, & though the gamekeepers had not announced in what capacity they had apprehended them.—*R. v. WHITHORNE* (1828), 3 C. & P. 394.

327. ———.]—A gamekeeper or other person lawfully authorised under Night Poaching Act, 1828 (c. 69), s. 2, may apprehend persons found offending under that Act, without giving notice of his purpose.—*R. v. PAYNE, RUSSELL & EVERETT* (1833), 1 Mood. C. C. 378, C. C. R.

328. ———.]—Gamekeepers being in a preserve between twelve & one at night, heard the firing of two guns, & proceeding in the direction of the sound, met with two persons, who neither had guns nor game upon them, nor were either found near them. The gamekeepers immediately seized them, without calling on them to surrender, or in any way notifying to them who they were. The keepers were wounded, one of them seriously:—*Held: prisoner who wounded them might, under the circumstances, & taking into consideration the situation & the time of the night, etc., be properly convicted under 9 Geo. 4, c. 31, ss. 11 & 12.*—*R. v. TAYLOR* (1836), 7 C. & P. 266.

329.

—*]*—(1) If the servant of A., who is not lord of the manor, find a night poacher on the land of B., & pursue him with intent to take him, this is such an attempt at an illegal arrest that, if the poacher shoot the servant with the gun he has in his hand & kill him, this will be manslaughter only.

(2) Where gamekeepers find poachers in a wood, they need not give any intimation by words that they intend to apprehend. The circumstances are sufficient notice; & if a person out poaching see a man running after him, he may fairly presume that the person means to apprehend him.—*R. v. DAVIS* (1837), 7 C. & P. 785.

330.

Who may arrest—Gamekeeper—Employed by shooting tenant.]—A servant of C. attempted to apprehend A., who was out at night poaching in a wood, & he was killed by A. C. was neither the owner nor the occupier of the wood, nor the lord of the manor, he having only the permission of the owner to preserve game there:—*Held: this was manslaughter only in A.*—*R. v. ADDIS* (1834), 6 C. & P. 388.

Annotations:—Distd. R. v. Price (1835), 7 C. & P. 178. *R. v. Price* (1851), 15 J. P. 149. *Mentd. Simmons v. Simmons* (1847), 5 Notes of Cases 324.

331.

—*]*—A person who hires merely the right of sporting over an estate, is not within Night Poaching Act, 1828 (c. 69), s. 2, & therefore the gamekeeper of such person has no right to apprehend a person unlawfully being upon such estate by night for the purpose of taking game.—*R. v. PRICE* (1851), 15 J. P. 149; 5 Cox, C. C. 277.

332.

—*]*—A person having only a right of shooting over land has no right to empower keepers to apprehend parties trespassing in search of game; & on their resisting, with no greater violence than is used by the keepers, they will not be liable for an assault. But if the trespass is in the night, they may be indicted for night poaching.—*R. v. WOOD* (1859), 1 F. & F. 470.

333.

Appointed by agent of lord of manor.]—*R. v. KING* (1884), 48 J. P. Jo. 149, C. C. R.

334.

Watcher—Employed by shooting tenant.]—*R. v. DAVIS*, No. 329, *ante*.

335.

Necessity for written authority from employer.]—A person who is employed by a lord of a manor as a watcher of his game preserves, is a person having authority to apprehend night poachers, & he need not have any written authority from the lord of the manor.—*R. v. PRICE* (1835), 7 C. & P. 178; 3 Nev. & M. M. C. 401.

336.

Appointed by head gamekeeper.]—On an indictment for wounding with intent to prevent lawful apprehension, it was proved that prisoners were found poaching in the night, armed, in a preserve which had belonged to L., & then was in the possession of L.'s trustees. The person trying to apprehend was a watcher employed by the head keeper, the latter having been appointed by L. twenty years before, & paid by his agent down to the time of the trial, but the head keeper had never had any direct communication with the trustees:—*Held: sufficient proof of an authority to apprehend.*—*R. v. FIELDING* (1848), 2 Car. & Kir. 621.

337.

—*]*—*R. v. LUCK*, No. 227, *ante*.

Sect. 3.—Powers: Sub-sects. 1, 2, 3 & 4.]

338. — Any person—Prevention of Offences Act, 1851 (c. 19).—*R. v. SANDERSON*, No. 234, *ante*.

339. Arrest on highway—Validity.—A gamekeeper, accompanied by his assistant, met four poachers on the highway, one carrying a gun, another a gun barrel, & the other two bludgeons. There had been previously two shots fired. The gamekeeper said to his assistant, "Mind the gun"; & the assistant laid hold of it, & then the gamekeeper called to another person. Upon this three of the poachers knocked him down & stunned him; & when he came to himself, he saw all of them near him, & one said, as they passed, "Damn them, we have done them both," & one turned back & cut him on the left leg, & all then ran away. It was objected that, prisoners being on the highway, the gamekeeper & his assistant had no right to interfere with them. Prisoners were convicted:—*Held*: the conviction was right.—*R. v. WARNER* (1833), 5 C. & P. 525; 1 Mood. C. C. 380; 1 Nev. & M. M. C. 364, C. C. R. *Annotation*:—*Refd.* *R. v. Addis* (1834), 6 C. & P. 388.

340. —.]—Gamekeepers who were out watching in the night heard firing of guns in the preserves of their employer, & they waited in a turnpike road, expecting the poachers to come there, which they did, & an affray ensued between the gamekeepers & the poachers:—*Held*: if the gamekeepers were then endeavouring to apprehend the poachers they were not justified in so doing.—*R. v. MEADHAM* (1818), 2 Car. & Kir. 633.

341. Offence committed at time not night under Night Poaching Act, 1828 (c. 69).—The servant of the owner of a wood attempted to apprehend a poacher whom he found there at eight o'clock in the morning of Dec. 17, & the poacher shot at him:—*Held*: this was not a capital offence within 9 Geo. 4, c. 31, ss. 11 & 12, as there was no proof that the poacher was in pursuit of game an hour before sunrise [within above Act].—*R. v. TOMLINSON* (1835), 7 C. & P. 183; 3 Nev. & M. M. C. 405.

For purpose of seizing gun.—*See* No. 408,

SUB-SECT. 2.—TO SEIZE.

342. Game.—In hands of unqualified person—Necessity for specific authority from lord of manor.—Before game in the hands of an unqualified person can be seized within a manor for the use of the lord or lady of the manor, the lord or lady must exercise his or her judgment on the specific case, whether the person possessing the game is or is not unqualified; but after such judgment exercised, the lord or lady may take the game by the hands of another.

In trespass for taking hares, where deft. justified seizing them by command of the lord of the manor, & for his use, within the manor, the hares being found in the possession of an unqualified person, & pltf. traversed the command:—*Held*: the

command to be proved, to maintain the issue, must be such a command as would legally authorise the seizure; & evidence of a wrongful command would not maintain the issue.—*BIRD v. DALE* (1817), 7 Taunt. 560; 1 Moore, C. P. 290; 129 E. R. 223.

343. Gun—Must be in actual use.—The keeping of a gun is not a keeping of an engine for killing or destroying game.

If this plea [the unlawful keeping by pltf. of a gun, being an engine for the killing of game] had not been bad, by reason of its amounting to the general issue, it could have been bad, because it is not alleged that the gun had been used for killing the game (*DENISON, J.*).—*WINGFIELD v. STRATFORD & OSMAN* (1752), Say. 15; 1 Wils. 315; 96 E. R. 787.

Annotation:—*Refd.* *Hayward v. Horner* (1822), 5 B. & Ald. 317.

344. Carried by gamekeeper of manor outside manor.—A gamekeeper of a lord of a manor has a right to carry a gun anywhere out of the manor.—*ROGERS v. CARTER* (1768), 2 Wils. 387; 95 E. R. 877.

345. — Who may seize—Assistant keeper—Appointment not confirmed by owner.—*R. v. AMEY*, No. 408, *post*.

346. Gamekeeper—Appointed by shooting tenant.—A gamekeeper appointed by a person having only a permission to shoot, trying to take a gun from a poacher, & in the scuffle, causing a loaded gun to go off, which killed the poacher:—*Held*: guilty of manslaughter.

The struggle between prisoner & deceased must be considered as one continuous illegal act on the part of prisoner (*LORD CAMPBELL, C.J.*).—*R. v. WESLEY* (1859), 1 F. & F. 528.

Annotation:—*Refd.* *R. v. Skeet* (1866), 4 F. & F. 931.

347. — Right to apprehend person to obtain gun—Necessity for prior demand for gun.—*R. v. AMEY*, No. 408, *post*.

348. Not "engine" or "instrument" within Game Act, 1831 (c. 32), s. 13.—A gun is not an engine or instrument for the killing or taking of game within the above sect.—*DADDLE v. HICKTON* (1868), 17 L. T. 549; 32 J. P. 119; *sub nom.* *DUDDLE v. HICKTON*, 16 W. R. 372.

349. Hounds—Deputation authorising seizure of greyhounds & setting dogs.—A gamekeeper was authorised by his deputation to seize greyhounds, setting dogs, ferrets, & to do all things belonging to the office of gamekeeper, according to the directions of the Acts of Parliament:—*Held*: he was not thereby authorised to seize hounds.—*GRANT v. HULTON* (1817), 1 B. & Ald. 134; 106 E. R. 50.

SUB-SECT. 3.—TO KILL DOG.

350. Right to kill dog.—Pltf.'s son appears to have been a person who made a practice of carrying a gun, & likewise was warned several times by M., the gamekeeper, not to come into the duke's manor: afterwards M., being upon his lawful business, finds this young man, with a gun in his hand, &

PART VII. SECT. 3, SUB-SECT. 3.

350 i. Right to kill dog.—A gamekeeper has no right to shoot a poaching

dog as such.—*BROWN v. BELFAST WATER COMRS.* (1913), 47 1. L. T. 153.—*IR.*

h. — On highway.] — *WARD*—

ROPE v. HAMILTON (DUKE) (1876), 13 Sc. L. R. 568; 4 R. (Ct. of Sess.) 876.—*SCOT.*

might have justified seizing the dog, & though he shot it, it does not make any great alteration, because if anybody has suffered, the duke has, who lost the benefit of the dog, which should have been secured to his own use. The carrying a gun & shooting the keeper's dog, in return for his own being killed, was a sufficient justification of M for taking pltf.'s son before a justice of peace (LORD HARDWICKE, C.).—*ROY v. BEAUFORT (DUKE)* (1741), 2 Atk. 190; 26 E. R. 519.

Annotations.—*Reid*. *Astley v. Weldon* (1801), 2 Bos. & P. 346. *Mentid*. *Fallowes v. Taylor* (1708), 7 Term Rep. 475.

351. — In pursuit of hares — Necessary for preservation of hares.—A plea to an action of trespass, for killing pltf.'s dog, cannot justify the act by stating that the lord of the manor was possessed of a close, & that deft., as his gamekeeper, killed the dog when running after hares in that close for the preservation of the hares; such plea not even stating that it was necessary to kill the dog for the preservation of the hares; nor stating that it was the dog of an unqualified person.—*VERE v. CAWDOR (EARL)* (1809), 11 East, 568; 103 E. R. 1125.

Annotations.—*Consd*. *Deane v. Clayton* (1817), 1 Moore, C. P. 203. *Distd*. *Protheroe v. Mathews* (1833), 5 C. & P. 581. *Consd*. *Taylor v. Newman* (1863), 4 B. & S. 89. *Apld*. *Barnard v. Evans* (1925), 41 T. L. R. 682.

352. Chasing deer.—The servant of the owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; & the servant may justify the shooting, although the dog may not have been chasing deer at the moment when it was shot, if the chasing of the deer & the shooting the dog were all one & the same transaction.—*PROTHEROE v. MATHEWS* (1833), 5 C. & P. 581.

353. On highway — "Unlawful dog" within 10 Geo. 4, c. 50, s. 14.—If there be evidence that a dog is brought into the Forest of Dean for the purpose of taking or destroying deer, etc., the dog is an "unlawful dog" within the above sect., & if not delivered up, may be shot by the gamekeepers whilst going along a public highway which passes through the forest.—*DAVIS v. GIRDER* (1846), 7 L. T. O. S. 63; 10 J. P. Jo. 261.

354. — Whether offence under Malicious Damage Act, 1861 (c. 97), s. 41.—An information under the above sect. was laid against applt., a gamekeeper, for unlawfully & maliciously killing a dog; the dog was at the time near an aviary in which pheasants, the property of applt.'s master, were confined for breeding purposes:—*Held*: the test of applt.'s liability under the sect. was whether he acted under the *bond fide* belief that what he was doing was necessary for the protection of his master's property, & it was the only way in which the property could be protected.—*MILES v. HUTCHINGS*, [1903] 2 K. B. 714; 72 L. J. K. B. 775; 89 L. T. 420; 52 W. R. 284; 20 Cox, C. C. 555, D. C.

Annotation.—*Reid*. *Nye v. Niblett* (1918), 87 L. J. K. B. 590.

355. — No intention of killing dog—Whether gamekeeper guilty of cruelty to animal.—A keeper seeing a dog come into a field over which his master had the shooting rights, & frightening the pheasants, shot at it not with the intention of killing it, but intending to injure it, if necessary, for the purpose of frightening it away:—*Held*:

the question whether deft. had cruelly ill-treated or abused the dog was a question of fact for the justices, & that they could lawfully dismiss the summons, although they found, as a fact, that deft. intended to injure the dog, if necessary, for the purpose of frightening it.—*ARMSTRONG v. MITCHELL* (1903), 88 L. T. 870; 67 J. P. 329; 19 T. L. R. 525; 20 Cox, C. C. 497, D. C.

Annotation.—*Reid*. *Green v. Cross* (1910), 103 L. T. 279.

—.]—*See, generally*, ANIMALS, Vol. II., p. 214.

SUB-SECT. 4.—OTHER POWERS.

356. Removal of trespasser — Use of force.—Trespass against two for assaulting pltf. & tearing his clothes. The fourth plea stated, that before the committing those trespasses, pltf. was found by deft. on the land of S. in search of game, without the licence & against the will of S., & that pltf. had in his possession a hare which appeared to have been recently killed. Whereupon one deft. as servant of, & by command of S. demanded the hare, which pltf. refused to deliver, & had in his possession. That afterwards, & just before committing the trespasses, the said deft. demanded the hare from pltf., & because he refused to deliver it, & kept it in his possession, both defts., as such servants, & by such command, in order to take the same for the use of W. S., seized pltf. & took it from him, according to Game Act, 1831 (c. 32), s. 36. The fifth plea stated, that just before the trespasses, pltf. had in his possession a dead hare belonging to S. without his leave & licence; wherefore defts. did, as his servants, & by his command, demand the same from pltf., which he refused to deliver, & detained: whereupon the defts., as such servants, etc., seized pltf., etc. The replication to the fourth plea stated, that at the several times of the demands of defts. & refusal by pltf., pltf. was lawfully on the highway. A similar replication to the demand & refusal in the fifth plea. On demurrer to the replications:—*Held*: (1) the fourth plea was bad, for not sufficiently showing when the second demand was made, or that it was made on the land of S.; & (2) the fifth plea was also bad, for not stating that defts. gently laid their hands on pltf. in order to take the game, & because he resisted, they necessarily committed the trespasses complained of, doing as little damage, & using as little violence to pltf. as they could on that occasion.—*WISDOM v. HODSON* (1833), 3 Tyr. 811.

357. — — — — ——In an action for an assault against gamekeepers, who plead not guilty by statute, it is proper to leave it to the jury to say, whether deft. believed that they were acting under the authority of the statute, & whether they had reasonable grounds for the belief; & this direction will be right, although they may have been guilty of excess not *eiusdem generis* with the acts which in the particular case they were by the statute authorised to do.—*COX v. REID* (1849), 13 Q. B. 558; 18 L. J. Q. B. 216; 13 L. T. O. S. 158; 13 J. P. 315; 13 Jur. 563; 116 E. R. 1376.

Annotation.—*Consd*. *Hermann v. Sonoschal* (1862), 13 C. B. N. S. 392.

358. Prevention of trespasser interfering with shoot.—*HARRISON v. RUTLAND (DUKE)*, No. 126, ante.

Part VIII.—Licences.

SECT. 1.—GAME LICENCES.

SUB-SECT. 1.—NECESSITY FOR LICENCE.

See Game Licences Act, 1860 (c. 90), s. 4.

359. Game accidentally killed.]—(1) In an action of debt to recover the penalties under the game laws, *pltf.* can recover but one penalty under the statute for the same act.

(2) If a person not qualified to kill game, kills a pheasant or other game by accident, he cannot take it away, or he is subject to the penalty.—*MOLTON v. CHEESELEY* (1788), 1 Esp. 123, N. P.

Annotation :—*Expld.* *Warneford v. Kendall* (1808), 10 East, 19.

360. Walking with gun—On land where game is.]—Proof that *deft.* "did keep & use a gun to kill & destroy the game" is sufficient evidence to support a conviction on the game laws, though the witness add his reason for believing it, "that the gun was fired by *deft.* who was walking about a piece of ground at H. with that apparent intent." If there be any evidence tending to prove an offence over which a magistrate has a summary jurisdiction by conviction, this *ct.* cannot judge of the degree of it, or control the determination of the magistrate upon that evidence.—*R. v. DAVIS* (1795), 6 Term Rep. 177; 101 E. R. 498.

361. With licenced person shooting [at game.]—Party charged to the game certificate duty who had been seen with a gun in his hand in a field in Sept., into which he went to drive back some birds which had been marked down there. It appeared on appeal that *applt.*'s companion, who had taken out a certificate, had been seen to shoot at partridges, but there was no proof that *applt.* had shot at game. The *comrs.* confirmed the charge :—*Held* : *comrs.* were right.—*ASS. TAX CASE* (No. 2,215) (1851), 16 J. P. 200.

362. Beating for game—& pointing gun—Gun not fired.]—In action for penalties for using a gun to kill & destroy game :—*Held* : sufficient to prove that *deft.* was beating about for game, & pointed his gun, though he did not fire at any game.—*HEBDEN v. HENTLEY* (1819), 1 Chit. 607.

363. & firing at game—No game killed.]—*Appls.* charged to the game certificate duty, who had been seen with guns, but without dogs, beating for game & to shoot at partridges. One of *appls.* declined to be sworn, but the other on being sworn stated, that although they had guns they had not shot at partridges, & that the bird which he killed was a hawk. This assertion, however, was contradicted by other evidence. The *comrs.*, notwithstanding, relieved :—*Held* : *comrs.* were wrong.—*ASS. TAX CASE* (No. 2,507) (1857), 22 J. P. 692.

PART VIII. SECT. 1, SUB-SECT. 1.

k. Position of members of party—Master & licenced servant in search of hares—Master not licenced.]—*Deft.* had taken out a game licence in the name of his servant & accompanied the servant in search of hares :—*Held* : he was liable under I. of M. statute which rendered liable "any unlicensed person going in pursuit of game."—*COWIN v. HARRISON* (1841), Bluet, 211.—I. of M.

l. — Coursing hares—Aidors & abettors.]—Where it was alleged that *deft.* was one of a party of persons, some licensed, others not, who had engaged in coursing with greyhounds & had taken two or three hares, but *deft.* averred that he was merely a spectator, *deft.* was nevertheless held liable, the I. of M. Statute rendering liable "any person going in pursuit of game," so that all unlicensed persons aiding & assisting licensed persons are liable.—*COWIN v. CLUCAS* (1841),

Bluet, 210.—I. of M.

m. — — — — —.]—*Deft.* having a few young gentlemen on a visit from College requested a friend who had a game licence to come over & show them some sport. It was held that the I. of M. statute rendered liable "any person going in pursuit of game," & that every unlicensed person who joins a party & aids & assists in the pursuit of game is liable although a licensed person be of the

364. — Permission to shoot rabbits.]—*Applt.* charged to the game certificate duty, who had been seen with dogs, carrying a gun, but not to use it, in company with two other persons, in a field which was frequented with game, & beating about apparently in search of game; he alleged that he was in search of rabbits by invitation of the owner of the land. The *comrs.*, however, confirmed the charge :—*Held* : *comrs.* were right.—*ASS. TAX CASE* (No. 2,506) (1857), 22 J. P. 692.

365. — — — — —.]—*Appls.* charged to the game certificate duty who had been seen with guns & dogs beating where game was likely to be found. They contended that they were not liable, as they were not bent upon killing game but rabbits, which they had permission to shoot from the occupier of the land where they were seen beating. The *comrs.* discharged *appls.* :—*Held* : commissioners wrong.—*ASS. TAX CASE* (No. 2,523) (1859), 23 J. P. 457.

366. Position of members of party—Licenced & unlicensed persons firing at same bird—Identity of person killing bird not established.]—The four *resps.* were summoned for killing game without a licence. It appeared that they all went to kill rabbits in a wheatfield that was being cut in Aug. A pheasant got up, & three of them, who had no licence to kill game, fired at it & killed it. The justices dismissed the summons on the grounds, (1) *resps.* went there with the intention of killing rabbits & not game; (2) as the particular person who killed the pheasant could not be identified they ought to be acquitted :—*Held* : the justices were wrong.—*HUNTER v. CLARK* (1902), 66 J. P. 247; 18 T. L. R. 366, D. C.

367. Persons employed to assist keeper in killing rabbits—Keeper killing game.]—*Appls.* charged to the game certificate duty. They had accompanied the Duke of S.'s keeper with a gun & dogs, but to shoot rabbits only, the keeper, however, on these occasions, killing game; & it was contended that they were not liable on the ground that the duke's steward had authorised the keeper to procure the assistance of *appls.*, to assist in killing the rabbits. The *comrs.* relieved :—*Held* : *comrs.* were wrong.—*ASS. TAX CASE* (No. 2,364) (1854), 19 J. P. 328.

368. Shooting rabbits—In company with others shooting game.]—*Applt.*, charged for a game certificate, who had been out with a gun & beagles rabbit shooting. The surveyor contended, that as *applt.* was at the time in company with other persons when game was shot, he must be considered as aiding & assisting in its destruction, & therefore liable to the certificate duty. The

comrs. confirmed the charge:—*Held*: comrs. were right.—*Ass. TAX CASE* (No. 2,436) (1856), 21 J. P. 488.

369. Servant—Acting under master's direction.]—A groom attending his qualified master while using dogs for killing the game, & pursuing it by his master's command, is not liable to the penalty of 6 Ann. c. 16.—*R. v. TAYLOR* (1812), 15 East, 460; 104 E. R. 917.

Annotations:—*Distd. R. v. Sylvester* (1829), 7 L. J. O. S. M. C. 63. *Reid. Lewis v. Taylor* (1812), 16 East, 49.

370. —.]—A servant of a qualified person assisted his master in setting a trap on his land for taking rabbits & vermin, & he ordered such servant, if a hare should be caught to bring it to him. A hare being afterwards caught in the trap, in the absence of the master, it was accordingly killed, & carried to him by the servant:—*Held*: he was not liable to the penalties for using snares for the destruction of game, or having it in his possession, so as to constitute an exposure to sale.—*WALKER v. MILLS* (1820), 2 Brod. & Bing. 1; 4 Moore, C. P. 343; 129 E. R. 856.

Annotation:—*Reid. Ex p. Sylvester* (1829), 9 B. & C. 61.

371. —.]—An action for a penalty under the game laws was brought against a servant in husbandry, who was seen to go up to a snare laid in a hedge, take out a hare, & carry it to his master:—*Held*: (1) the proof of the innocence of the possession of game lies on the person accused of having it; (2) inasmuch as this servant never intended to make any use of it for himself, he could not be said ever to have had the possession of it.—*HEMMING v. HALSEY* (1823), 1 L. J. O. S. K. B. 105.

372. —.]—An unqualified person going out with a qualified person, as his servant, & shooting game for him, is liable to the penalty imposed by 6 Ann. c. 16, for keeping & using a gun to kill game.—*Ex p. SYLVESTER* (1829), 9 B. & C. 61; 4 Man. & Ry. K. B. 5; 2 Man. & Ry. M. C. 59; 109 E. R. 23; *sub nom. R. v. SYLVESTER*, 7 L. J. O. S. M. C. 63.

373. —.]—Labourer charged for a game certificate, who was employed by a gentleman who takes out a certificate. He was ordered by his employer to set snares & traps in a field belonging to him, of about twenty acres, which is surrounded by lands & woods abounding with game, the crops of which are injured by hares & rabbits. It was proved that numerous hares & rabbits had been trapped in the year of assessment, & that on one occasion a pheasant was taken out of the trap when his employer was not present. The surveyor contended that game could not be destroyed by traps by an unqualified person unless in the presence of another person who had obtained a certificate. The comrs., however, relieved:—*Held*: comrs. were right.—*Ass. TAX CASE* (No. 2,055) (1847), 13 J. P. 25.

374. Infant.]—An appeal was made against a charge to the game certificate duty on a young

nobleman. The surveyor produced evidence in support of the charge, but the comrs. refused to hear the witness, they being of opinion that the party charged being only fourteen & a half years old affected his responsibility, & relieved him accordingly:—*Held*: comrs. wrong.—*Ass. TAX CASE* (No. 2,525) (1859), 23 J. P. 457.

375. Exemption—Registration under Hares Act, 1848 (c. 29)—In whom right to register vested—Person having shooting rights over land.]—Servant charged to the game certificate duty on account of his shooting hares. His employer contended that he was not liable, inasmuch as applt. had been registered by him to kill hares on his farm, under the above Act, there being no covenant in his lease not to take game; but the surveyor contended, that as the lessor of the farm had by his lease reserved the right of shooting, the right to register rested with him only. The comrs. confirmed the charge:—*Held*: comrs. were right.—*Ass. TAX CASE* (No. 2,347) (1854), 19 J. P. 8.

—.]—*See, further*, Game Licences Act, 1860 (c. 90), s. 5; Ground Game Act, 1880 (c. 47), s. 4.

SUB-SECT. 2.—FROM WHAT TIME LICENCE OPERATIVE.

376. Detention of issued licence—Pending payment of duty.]—Where a certificate was issued & detained by the officer till payment of duty, & the certificated party was seen in pursuit of game in the mean time:—*Held*: liable to the supplemental charge.—*Ass. TAX CASE* (No. 1,474) (1840), 6 J. P. 186.

377. Date of intimation to collector.]—Applt., charged for a game certificate, who shot game previously to obtaining one on Oct. 25. He claimed relief on the ground of his having intimated to the collector of his present parish, through a friend, on Aug. 31, that in case a certificate was not obtained for him in the parish where he had previously resided, he should want one in the parish where he now lived. The comrs. confirmed:—*Held*: comrs. were right.—*Ass. TAX CASE* (No. 2,434) (1857), 21 J. P. 488.

378. Date of payment of duty.]—Party charged for game certificate duty, who admitted having been in pursuit of game, but stated that he first paid the proper duty to the collector of his parish, & obtained his receipt, but omitted to exchange it for a certificate. The comrs. confirmed the charge:—*Held*: comrs. were right.—*Ass. TAX CASE* (No. 2,435) (1857), 21 J. P. 488.

SUB-SECT. 3.—PRODUCTION OF LICENCE.

379. Refusal to produce licence—No refusal of name & address.]—The penalty under 25 Geo. 3, c. 50, s. 15, for not producing a licence when lawfully required, is not complete by the refusal

co.—*COWIN v. QUIRK* (1841), Bluet, 209.—I. of M.

n. "Hunting" without licence—Construction of word "hunt."—British Columbia Game Protection Act, as amended by 9 Edw. VII. c. 20, s. 8, makes it unlawful to "at any time hunt, take, or kill any animal," without

a licence, etc. Deft. was convicted by a magistrate for that he did at a specified place & time "hunt animals without a licence," etc. Deft. had no licence. There was no evidence that he "hunted" in the sense that he pursued any animal. The only evidence was that deft. went out with a gun to look for deer but did not find

any:—*Held*: the word "hunt" in the statute means, to pursue some particular animal, & the conviction not so stating & there being no evidence to show such an offence, no offence was alleged or proved; & the conviction should be quashed.—*R. v. OBERLANDER* (1910), 13 W. L. R. 643.—CAN.

Sect. 1.—Game licences: Sub-sects. 3 & 4. Sects. 2, 3 & 4.]

to produce it, unless the party refuses on request, to tell his Christian & surname, & the place of his residence.—*MOLTON v. ROGERS* (1802), 4 Esp. 215, N. P.

380. Refusal to produce licence & to give name & address—Authority for demand need not be shown.]—(1) To bring a party within 52 Geo. 3, c. 93, for not producing his game certificate, it is not necessary that the demand of it should be made on the land on which he was sporting; but the demand must be made so immediately after the party has left the land, as to form a part of the same transaction.

(2) It is not necessary that the person making the demand should produce any certificate; & if the other party refuses to produce his, he takes the risk of whether the person demanding is one having a right to make such demand.

(3) If a person refuses to produce his game certificate, or to tell his name or residence, the person demanding need not go on to ask in what place, if any, he is assessed to the game duty.—*SCARTH v. GARDENER* (1831), 5 C. & P. 38, N. P.

Annotation:—Generally, Reidd. Cox v. Reid (1849), 18 L. J. Q. B. 216.

381. — Time for demanding licence & information.]—*SCARTH v. GARDENER*, No. 380, *ante*.

382. — No question as to where licence taken out.]—*SCARTH v. GARDENER*, No. 380, *ante*.

383. Refusal to give name & address—Questions must be asked individually.]—The Act [52 Geo. 3, c. 93] intended that each person should be asked individually for his Christian name, surname, place of abode, etc., this not having been done the conviction must be quashed (*per CUR.*).—*COPELAND v. BUCKS JJ.* (1837), 1 J. P. 10.

SUB-SECT. 4.—PROCEEDINGS AGAINST OFFENDERS.

384. Whether acts single offence—Killing several hares at same time.]—If a man not qualified go a hunting, & kill never so many hares up on the same day, he would forfeit but one five pounds, for it is but one offence. But if a man keep dogs, & go a hunting several days, & kill hares; & if it had been thus laid, "that he, on such a day, kept dogs & killed, etc." & then again such a day; by laying it thus severally, the offence is severed, & he shall forfeit five pounds for each offence (*per CUR.*).—*R. v. MATHEWS* (1711), 10 Mod. Rep. 26; 88 E. R. 609.

Annotations:—Consd. Apothecaries' Co. v. Jones, [1893] 1 Q. B. 89. *Mentd. R. v. Jarvis* (1757), 1 East, 643, n.

385. — — —.]—A conviction *super præ* for three penalties of five pounds each for killing three hares, where it appears that it was done at the same time, is bad, for the statute does not give five pounds for every hare, it being but one offence.—*MARRIOTT v. SHAW* (1718), 1 Com. 274; 92 E. R. 1069.

Annotation:—Reidd. Apothecaries' Co. v. Jones, [1893] 1 Q. B. 89.

386. — Using dog & gun on same day.]—It is no objection to an information on the game laws that it is not *qui tam*. On an information, charging deft. with keeping & using a dog & also a gun on the same day, he can only be convicted

in one penalty. If the evidence be given on the same day that deft. appeared & pleaded, it will be intended that the evidence was given in his presence. A magistrate should state all the evidence in the conviction, & not merely the result of it.—*R. v. LOVER* (1797), 7 Term Rep. 152; 101 E. R. 905.

Annotation:—Mentd. Re Tordoff (1844), 13 L. J. M. C. 145.

387. — Using engine for taking game during close season.]—Game Act, 1831 (c. 32), s. 3, forbids, under penalties, the killing or taking certain game during certain intervals of the year; & sect. 23 imposes penalties on any person taking or killing game, or using a dog or engine for that purpose, not being authorised for want of a certificate:—*Held*: a person using an engine for taking game without a certificate during the forbidden interval, was liable to penalties under the latter sect. although he might also be liable to penalties under sect. 3.—*SAUNDERS v. BALDY* (1865), L. R. 1 Q. B. 87; 6 B. & S. 791; 13 L. T. 322; 30 J. P. 148; 12 Jur. N. S. 334; 14 W. R. 176; 122 E. R. 1385; *sub nom. SANDERS v. BALDY*, 35 L. J. M. C. 71.

388. Taking, killing & pursuing—Game Licences Act, 1860 (c. 90), s. 4.]—J. was charged under the above sect. with taking, killing, & pursuing game without a licence. Objection being taken that these were three separate offences, the justices dismissed the information:—*Held*: the justices were wrong, & only one offence was charged.—*LAXTON v. JEFFERIES* (1893), 58 J. P. 318, D. C.

389. Information for penalty—Application of Bail Bonds Act, 1808 (c. 58).]—An information for penalties under the game law is not an information within the above Act, whereby, if deft. neglect to appear & plead, prosecutor is at liberty to enter an appearance & a plea of not guilty for deft.; & therefore, where prosecutor had entered an appearance & a plea of not guilty for deft., & a verdict had been found against deft., the ct. set aside such verdict for irregularity.—*DAVIES v. BINT* (1824), 3 B. & C. 586; 1 C. & P. 439; 5 Dow. & Ry. K. B. 353; 2 Dow. & Ry. M. C. 458; 107 E. R. 851, N. P.

390. Authority to prosecute—By order of Inland Revenue Commissioners—Proof of authority—Excise Management Act, 1826 (c. 53), s. 71.]—In a prosecution for pursuing game without a licence the information alleged that it was by order of the comrs., & objection was taken that no evidence was given thereof:—*Held*: the justices were wrong in allowing such an objection & in ignoring the above sect.—*HARGREAVES v. HILLIAM* (1894), 58 J. P. 655, D. C.

Annotation:—Mentd. Duffin v. Markham (1918), 88 L. J. K. B. 581.

391. — — — the sect., where, in an information for excise penalties under that or any other Act, any allegation is made that the Comrs. of Excise had ordered such information to be exhibited, such allegation shall be sufficient proof, without any further or other evidence, of the fact so alleged.

By Inland Revenue Regulation Act, 1890 (c. 21), s. 21, proceedings shall not be commenced against any person for the recovery of any penalty under any Act relating to inland revenue, except by order of the comrs.; & by sect. 24, in any proceeding the letter or instructions under which an

officer has acted shall be sufficient evidence of any order issued by the comrs. & mentioned or referred to therein.

Where proceedings to recover an excise penalty were taken by an officer of Inland Revenue before a ct. of summary jurisdiction:—*Held*: the provisions of the above sect. were not impliedly repealed by Inland Revenue Regulation Act, 1890, c. 21, ss. 21 & 24, & therefore an allegation in the information that the officer prosecuted by order of the comrs. was sufficient proof of such order without further or other evidence.—*DYER v. TULLEY*, [1894] 2 Q. B. 794; 63 L. J. M. C. 272; 58 J. P. 656; 43 W. R. 61; 10 R. 519, D. C.

392. Conduct of prosecution—By officer of Inland Revenue—General authority—Inland Revenue Act, 1890 (c. 21), s. 27.]—In prosecutions for taking game without a licence the supervisor of Inland Revenue for the district has a right to conduct the case, though the prosecution is not in his name; & a general authority given to him by the comrs. is sufficient compliance with the above sect.—*R. v. TURNER* (1894), 58 J. P. 320, D. C.

See, now, Order in Council, Oct. 19, 1908 (Stat. R. & O. p. 470).

393. Defences—Res judicata—Previous acquittal for trespassing in pursuit of game—For want of corroborative evidence.]—On Mar. 5, B. was charged under Game Act, 1831 (c. 32), s. 30, with trespass in pursuit of game, but acquitted for want of corroboration of a witness. On May 14, B. was charged under sect. 23 with unlawfully using a dog for taking game, he having no licence. The facts were precisely the same, but on second occasion the witness was corroborated, & the justices were satisfied, but B. was discharged on the ground of *res judicata*:—*Held*: the justices were wrong, & there was no *res judicata*, as the offences were not inconsistent.—*BOILLARD v. SPRING* (1887), 51 J. P. 501.

Res judicata, generally, see ESTOPPEL, Vol. XXI., pp. 226 *et seq.*

394. Conviction—Effect of—On charge for same licence.]—Where a conviction under 52 Geo. 3, c. 93, for sporting without a game certificate is withdrawn, the charge for a game certificate founded thereupon falls to the ground as a matter of course.—*ASS. TAX CASE* (No. 1,475) (1840), 6 J. P. 219.

395. Penalties—Whether cumulative.]—*MOLTON v. CHEESELEY*, No. 359, *ante*.

— — —.]—*See, also*, Nos. 384, 385, 387, *ante*.

396. The hearing before magistrates—Right of public to attend.]—The proceeding against a party in a summary manner for keeping & using a gun to destroy game is of a judicial nature, at which all persons have a *prima facie* right to be present. Where a magistrate had, without any specific reason, caused a party, who claimed a right to be present, to be removed from a justice-room, where such a proceeding was going on:—*Held*: he was liable to an action of trespass.—*DAUBNEY*

v. COOPER (1829), 10 B. & C. 237; 5 Man. & Ry. K. B. 314; 3 Man. & Ry. M. C. 23; 8 L. J. O. S. K. B. 21; 100 E. R. 438.

Annotations:—*Refd.* Collier v. Hicks (1831), 9 L. J. O. S. M. C. 138. *Mentd.* R. v. York Sheriffs (1832), 1 L. J. K. B. 211; Rawlings v. Till (1837), 7 L. J. Ex. 6; Newton v. Constable (1841), 6 Jur. 317.

SECT. 2.—GUN LICENCES.

See REVENUE.

SECT. 3.—DOG LICENCES.

See REVENUE.

SECT. 4.—LICENCE TO DEAL IN GAME.

397. Necessity for licence—Live game—In new or breeding place.]—G., not being licensed to deal in game had a mew or breeding place for pheasants, & had several hens hatching pheasants' eggs. During the close season he removed 183 of the birds, some only a few days old, & was found carrying them in a basket with the hens that reared them, many miles from the mew:—*Held*: the birds being reared in a mew, G. had committed no offence under Game Act, 1831 (c. 32), s. 4, in merely having them in his possession away from the mew.—*JENNER v. GORRINGE* (1879), 43 J. P. 781.

Annotation:—*Consd.* Cook v. Trevener (1910), 80 L. J. K. B. 118.

398. Tame.]—*HARNETT v. MILES*, No. 7, *ante*.

399. —.]—*COOK v. TREVENER*, No. 6, *ante*.

Compare No. 5, *ante*.

400. — Imported game killed abroad.]—An excise licence to deal in game under Game Licences Act, 1860 (c. 90), s. 14, is not required to enable a person to deal in England in game which has been killed abroad.—*PUDNEY v. ECCLES*, [1893] 1 Q. B. 52; 62 L. J. M. C. 27; 67 L. T. 713; 57 J. P. 38; 41 W. R. 125; 9 T. L. R. 21; 37 Sol. Jo. 27; 17 Cox, C. C. 594; 5 R. 52, D. C.

— — —.]—*See, now*, Customs & Inland Revenue Act, 1893 (c. 7), s. 2.

401. Who may hold licence—Person "licensed to sell beer by retail"—Holder of additional licence to sell beer.]—The holder of an additional licence to sell beer under Revenue Act, 1863 (c. 33), s. 1, is a person "licensed to sell beer by retail" within Game Act, 1831 (c. 32), s. 18, & is therefore disqualified from holding a licence to deal in game under that sect.—*SHOOLBRED & CO. v. ST. PANCRAS JJ.* (1890), 24 Q. B. D. 346; 59 L. J. M. C. 63; 62 L. T. 287; 54 J. P. 231; 38 W. R. 399; 6 T. L. R. 171, D. C.

402. — — — Branch manager of stores with

PART VIII. SECT. 4.

o. Necessity for licence—Confiscation of skins.]—Accused having been found with 70 bear skins in a sleigh during the prohibited season, without a permit was convicted under Game

Act, s. 33, & the skins were confiscated:—*Held*: although the words "any part of the animal" are not included in sects. 51 of the Act in construing the sect. regard must be had to the whole Act & the objects for which it was enacted, & the magistrate was right

in ordering confiscation of the skins.—*R. v. KRAMER* (1920), 36 Can. Crim. Cas. 236; 29 B. C. R. 132.—*CAN.*

p. — Indians.]—A treaty Indian, hunting & killing fur-bearing animals, within his reserve, there having been

Sect. 4.—Licence to deal in game. Part IX. Sects. 1 & 2.]

off-licence.]—R. v. BIRD, ETC., KENSINGTON JJ., Ex p. JONES (1898), 62 J. P. 309; 42 Sol. Jo. 397, D. C.

Annotations:—Mentd. Hogmaier v. Willesden Overseers (1904), 52 W. R. 654; Huish v. Liverpool JJ., [1914] 1 K. B. 109.

403. Offences by licensed persons—Sale in close season—Live game.]—LOOME v. BAILY, No. 5, ante.

Compare Nos. 6, 7, ante.

Wild birds.]—See ANIMALS, Vol. II., p. 282, Nos. 556–558.

404. Imported game killed abroad.]—A person licensed to deal in game by Game Act, 1831 (c. 32), was convicted under sect. 4 of knowingly having in his shop game during the close season, as defined in sect. 3. It appeared that game was exposed for sale in his shop during the close season, but that it had been killed abroad:—Held:** the Act did not apply to birds killed abroad, & the conviction was wrong.—GUYER v. R. (1889), 23 Q. B. D. 100; 58 L. J. M. C. 81; 60 L. T. 824; 53 J. P. 436; 37 W. R. 586; 5 T. L. R. 418; 16 Cox, C. C. 657, D. C.**

Annotations:—Apld. Pudney v. Eccles, [1893] 1 Q. B. 52. Consd. Robertson v. Johnson, [1893] 1 Q. B. 129.

Compare No. 400, ante.

405. Possession during close season—Game killed prior to opening of close season.]—

By 2 Geo. 3, c. 19, ss. 1 & 4, no person shall take, kill, destroy, carry, sell, buy, or have in his possession or use any partridge between Feb. 12 & Sept. 1, in any year (altered by the 39 Geo. 3, c. 34, to Feb. 1 & Sept. 1) or any pheasant between Feb. 1, & Oct. 1, under a penalty:—Held:** a qualified person who had in his possession on Feb. 9, partridges & a pheasant killed before Feb. 1, was not guilty of any offence against the statute.—SIMPSON v. UNWIN (1832), 3 B. & Ad. 134; 1 L. J. M. C. 28; 110 E. R. 50.**

Annotations:—Consd. Guyer v. R. (1889), 23 Q. B. D. 100. Held. Crofts v. Middleton (1886), 8 De G. M. & G. 192. Mentd. R. v. London (Ex.) (1889), 23 Q. B. D. 414.

Wild birds.]—See ANIMALS, Vol. II., p. 283, Nos. 561–564.

406. Agreement in close season—To deliver live game out of close season.]—A licensed dealer in game is not prohibited by Game Act, 1831 (c. 32), from entering into a contract made in the season to deliver live game out of a mew or breeding place at any time of the year.—PORRITT v. BAKER (1855), 10 Exch. 759; 3 C. L. R. 432; 24 L. T. O. S. 243; 19 J. P. 326; 1 Jur. N. S. 336; 156 E. R. 646.

Annotation:—Held. Looe v. Baily (1860), 3 E. & E. 444.

Part IX.—Deer.

SECT. 1.—IN GENERAL.

407. Definition of “deer”—Includes all ages & both sexes.]—The word “deer,” in Larceny Act, 1827 (c. 29), s. 26, includes all ages, & both sexes, therefore an indictment under this statute for stealing deer is supported by evidence that the animal alleged to have been stolen was a fawn.—R. v. STRANGE (1843), 1 L. T. O. S. 435; 1 Cox, C. C. 58; *sub nom.* R. v. SMITH, 7 J. P. 629.

Property in deer.]—See ANIMALS, Vol. II., p. 208, Nos. 38, 39, 41–44; CONSTITUTIONAL LAW, Vol. XI., p. 586, Nos. 873, 874.

Whether distrainable for rent.]—See ANIMALS, Vol. II., p. 208, No. 39.

Whether liable to execution.]—See ANIMALS, Vol. II., p. 208, No. 40.

408. Powers of deerkeeper—To seize gun—Right to apprehend trespasser for purpose—Necessity for prior demand of gun.]—Under 16 Geo. 3, c. 30, s. 9, as to seizing the guns, etc., of persons carrying them into grounds where deer are usually kept, with intent to destroy deer, an assistant keeper has no right to seize the person of one so armed in order to get his gun, without having first demanded the gun.

no declaration by the Superintendent-General under Indian Act, s. 66, is not subject to the provincial game laws, & requires no permit.—R. v. RODGERS, [1923] 3 D. L. R. 414; 40 Can. Crim. Cas. 61; 33 Man. L. R. 139; 2 W. W. R. 353.—CAN.

PART IX. SECT. 2.

q. Deer depasturing within valed fields.]—Deft. resided upon & managed a certain farm as the agent of the owner, who was then absent, & killed deer depasturing a cultivated field, part of the farm:—Held:** deft.**

in committing the act was within Game Protection Act, 1865 (B. C.), s. 6, & was acquitted.—R. v. SYMINGTON (1895), 4 B. C. R. 323.—CAN.

r. Permitting hounds to run at large.]—R. v. CRANDALL (1896), 27 O. R. 63.—CAN.

Qu.: whether an assistant keeper, appointed by the keeper only, & not confirmed by the owner of the forest, chase, etc., can, in the absence of the keeper, seize guns, etc.—**R. v. AMEY (1823), Russ. & Ry. 500, C. C. R.**

409. Who may seize—Assistant keeper.]—R. v. AMEY, No. 408, ante.

Powers of gamekeepers generally, see Part VII., sect. 3, ante.

SECT. 2.—OFFENCES.

See Larceny Act, 1861 (c. 96), ss. 12–16.

410. Killing deer in uninclosed ground—Omission in commitment of statement that deer in uninclosed ground.]—A warrant of commitment, on a conviction, must recite a conviction for an offence over which the committing magistrate had jurisdiction: & the ct. will not presume a conviction to be good which, according to the recital, shows a want of jurisdiction.

A commitment under Larceny Act, 1827 (c. 29), s. 26, reciting a conviction, that deft. “did unlawfully kill & carry away one fallow deer, the property of Her Majesty Queen Victoria, against the

form of the statute":—*Held*: bad, for omitting to state that the deer was in the uninclosed part of some forest, chase, or purlieu.—*R. v. KING* (1843), 1 Dow. & L. 721; 13 L. J. M. C. 43; 8 Jur. 271.

Annotations:—*Beld*. *Attwood v. Jolliffe* (1848), 10 L. T. O. S. 392; *Threlkeld v. Smith*, [1901] 2 K. B. 531.

411. Killing deer outside limits of forest.—*THRELKELD v. SMITH*, No. 416, *post*.

412. Killing deer in inclosed ground—What is inclosed ground.—*R. v. MONEY* (1847), 2 Russell on Crimes & Misdemeanors, 8th ed., p. 1260.

413. Killing deer after previous conviction—Invalidity of previous conviction.—Upon an indictment for a second offence against 42 Geo. 3, c. 107, by killing deer, objections were taken to the conviction for the first offence, viz. that it was not in the proper county, & that it was not correctly stated in the indictment for the second offence; & the conviction for the second offence held wrong.—*R. v. ALLEN* (1823), Russ. & Ry. 513.

Annotation:—*Beld*. *Cureton v. R.* (1861), 1 B. & S. 208.

414. Conviction by two justices—Omission of place where offence committed.—(1) On an indictment under Larceny Act, 1827 (c. 29), s. 26, for killing a deer after a previous summary conviction, a conviction by two justices of the previous offence was put in:—*Held*: such a conviction was good.

(2) This conviction in stating the offence did not state the place at which it was committed; but the justices, in awarding the distribution of

the penalty, awarded it to the overseers of D., in the said county, "where the said offence was committed":—*Held*: sufficient.—*R. v. WEALE* (1831), 5 C. & P. 135; 1 Nev. & M. M. C. 283.

415. Non-consent of owner—How proved.—On an indictment on 42 Geo. 3, c. 107, s. 1 (a), though there must be some evidence to negative the owner's consent, the owner need not be called for the purpose; his non-consent may be inferred from other circumstances, or proved by his agents.—*R. v. ALLEN*, *R. v. ARGENT*, *CRUSSALL & GREEN*, *R. v. CHAMBERLAIN & HOPWOOD* (1820), 1 Mood. C. O. 154.

Aiding & abetting persons stealing deer.—See CRIMINAL LAW, Vol. XIV., p. 90, Nos. 602, 603.

416. Possession of deer—Killed outside limits of forest—Usually kept in forest.—A person who kills & carries away a deer, usually kept in a forest, when it is outside of the limits of the forest & upon the land of a third person, cannot be convicted, under Larceny Act, 1861 (c. 96), s. 14, of being in unlawful possession thereof.—*THRELKELD v. SMITH*, [1901] 2 K. B. 531; 70 L. J. K. B. 921; 85 L. T. 275; 50 W. R. 158; 17 T. L. R. 612; 45 Sol. Jo. 618; 20 Cox, C. C. 38.

417. Assaulting deerkeeper—What amounts to.—Pulling a deerkeeper to the ground, & holding him there while another person escapes, is not a beating of the deerkeeper within Larceny Act, 1827 (c. 29), s. 29. A mere battery is not sufficient to come within this enactment. There must be a beating in the popular sense of the word.—*R. v. HALE* (1846), 2 Car. & Kir. 326.

GAME LAWS.

See GAME.

GAMING AND WAGERING.

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will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, & therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.

It is also essential that there should be mutuality in the contract. For instance, if the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, & those intentions are at variance, those of one part being such as if agreed in by the other would make the contract a wagering one, whilst those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract & leave it enforceable by law as an ordinary one (*HAWKINS, J.*).—*CARLILL v. CARBOLIC SMOKE BALL CO.*, [1892] 2 Q. B. 484; 61 L. J. Q. B. 696; 56 J. P. 605; 8 T. L. R. 680 36 Sol. Jo. 628; *affd.*, [1893] 1 Q. B. 256, C. A.

Annotations:—*Reid*. *Stoddart v. Sagar, Sagar v. Stoddart* (1895), 73 L. T. 215; *R. v. Stoddart* (1900), 70 L. J. Q. B. 139; *Hawke v. Hulton* (1905), 22 T. L. R. 169. *Mentd.* *World's Tea Co. v. Gardner, World's Tea Co. v. Gardner* (1895), 58 J. P. 358; *R. v. Riley*, [1896] 1 Q. B. 309; *R. v. Consort Deep Level Gold Mines, Ex p. Stark*, [1897] 1 Ch. 575; *Stollery v. Maskelyne* (1893), 15 T. L. R. 79; *Johnston v. Boyes*, [1899] 2 Ch. 73; *Chaplin v. Hicks* (1911), 27 T. L. R. 244; *Western Electric Co. v. G. E. Ry.*, [1914] 3 K. R. 554; *Lyons v. Fox*, [1919] 1 K. B. 11; *Reynolds v. Atherton* (1921), 125 L. T. 690.

3. Party without other interest in event—Wagering policy.—An agreement to pay £20 to deft. at the next port a ship should reach provided that if she did not save her passage to China deft. would pay pltf. £1,000 at the end of one month after she arrived in the river Thames without reference to any property, though one of the parties had some goods on board liable to suffer by the loss of the season, is a wagering policy within 19 Geo. 2, c. 37.—*KENT v. BIRD* (1777), 2 Cowp. 583; 98 E. R. 1253.

Annotations:—*Follid*. *Godge v. Royal Exchange Assce. Corpn.*, [1900] 2 Q. B. 214. *Reid*. *Puller v. Glover* (1810), 12 East, 124.

4. Wager upon a past event.—A bet upon an uncertain event legal.

The question is, what the parties really meant. The material contingency was which of these two young heirs should come to his father's estate first. It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted nor excepted. It was equal to both of them whether one of their fathers should be then sick or dead. All the circumstances show that if it had been then thought of it would not have made any difference in the bet; & there was no reason to presume that they would have excepted it (*LORD MANSFIELD, C.J.*).—*MARCH (EARL) v. PIGOT* (1771), 5 Burr. 2802; 98 E. R. 471.

Annotations:—*Consd.* *Pritchard v. Merchant's & Tradesman's Mutual Life Assce. Soc.* (1858), 3 C. B. N. S. 622. *Reid*. *Good v. Elliott* (1790), 3 Term Rep. 693; *Gilbert v. Sykes* (1812), 16 East, 150; *Mead v. Davison* (1835), 3 Ad. & El. 803.

31. Party without other interest in event—Wagering policy.—An insurance for a term of years on the life of a person in which the insurer has no interest is void as a wagering contract under Contract Act (IX of 1872), s. 30.—*ALAMI v. POSITIVE GOVERNMENT*

SECURITY LIFE ASSURANCE CO., LTD. (1898), 1 L. R. 23 Bom. 191.—*IND.*

a. — Match between racehorses.—Pltf. agreed with B. & others, that a match should be made between a mare, the property of M., & a mare,

5. —.]—A wager that A. had purchased a waggon of B. is not void at common law, nor prohibited by 14 Geo. 3, c. 48, & an action may be maintained upon it.—*GOOD v. ELLIOTT* (1790), 3 Term Rep. 693; 100 E. R. 808.

Annotations:—*Follid*. *Morgan v. Pebrer* (1837), 3 Bing. N. C. 457. *Reid*. *Oakley v. Rigby* (1836), 3 Scott, 194; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Moullis v. Owen*, [1907] 1 K. B. 746.

6. —.]—A wager of more than £10 on a horse race already run is legal under Gaming Act, 1710 (c. 19), s. 5.—*PUGH v. JENKINS* (1841), 1 Q. B. 631; 1 Gal. & Dav. 40; 10 L. J. Q. B. 201; 5 Jur. 1082; 113 E. R. 1273.

Annotation:—*Mentd.* *Greville v. Chapman* (1843), 8 Jur. 189.

7. Ostensible contract of sale—Wager super-added.—An action was brought for a breach of the following agreement. Pltf. agreed to buy & deft. agreed to sell his horse, P., for £200 provided he trotted 18 miles within one hour, within one month; & if the task was not performed, the horse was thereby sold to pltf. for 1s. which pltf. that day paid to deft. At the trial it appeared that the task was not performed, & that deft. had refused to deliver the horse to pltf. A verdict was found for pltf.:—*Held*: this agreement was illegal, & within Gaming Act, 1710 (c. 19).—*BROGDEN v. MARRIOTT* (1836), 3 Bing. N. C. 88; 2 Hodg. 136; 2 Scott, 712; 5 L. J. C. P. 302; 132 E. R. 343.

Annotation:—*Reid*. *Carlill v. Carbolic Smoke Ball Co.* (1892), 67 L. T. 837.

8. —.]—Pltf. & deft., while conversing as to some rags which pltf. proposed to sell & deft. to purchase, disputed as to the price of a former lot of rags, pltf. asserting the price to have been lower than deft. asserted it to have been. They agreed that the question should be referred to M., a spirit merchant, & that whichever party was wrong should pay M. for a gallon of brandy, & that, if pltf. was right, the price of the lot now on sale should be 6s. per cwt. but, if deft. was right, 3s. M. decided that pltf. was right. Pltf. sent the rags to deft. but deft. refused to accept them at 6s. offering 5s. To an action for goods bargained & sold, deft. pleaded the facts specially, except as to the reference to M., averring that 6s. was higher & 3s. lower than the value of the rags bargained for, & justified the refusal to accept on the ground that the agreement was made by way of wager, & therefore within Gaming Act, 1710 (c. 19), s. 18.—*Held*: the plea was good, & was supported by the facts, whether or not the fact of the agreement relating to the brandy was taken into consideration.

If everything is to depend upon the fact of there being a wager would the whole contract be avoided in every case where there is a wager, or is it avoided merely where it is a cloak for gambling? I am not satisfied that the whole contract is void when a part only depends on the wager (*CRUMPTON, J.*).—*ROURKE v. SHORT* (1856), 5 T. & B. 904; 25 L. J. Q. B. 196; 26 L. T. O. S. 35; 2 Jur. N. S. 352; 4 W. R. 247; 119 E. R. 17.

Annotations:—*Consd.* *Wilson v. Cole* (1877), 36 L. T. 703. *Reid*. *Higginson v. Simpson* (1877), 2 C. P. D. 76.

the property of pltf., & that the party nominating the winner should receive from the others £100, & that £100 should be forfeited by the party making default, in causing the mare nominated by him to run:—*Held*: no action was maintainable on such agreement, the

Sect. 1.—What is a contract by way of gaming and wagering. Sect. 2: Sub-sect. 1.]

9. Present sale of article of unascertained value—Prospective dividends.]—Deft. instructed pltf's., stockbrokers, to sell the prospective dividends on certain railway stock, which they accordingly sold to H. & Co., jobbers, calculating the dividend at a certain rate per cent. The dividend, when declared, amounted to a higher rate per cent. than that which pltf's. had calculated, &, according to usage of the Stock Exchange they therefore paid H. & Co. the difference:—*Held*: pltf's. were entitled to recover this difference from deft. Sales of prospective dividends are not contrary to law.—*MARTEN v. GIBBON* (1875), 33 L. T. 561; 24 W. R. 87, C. A.

10. Severable contract.]—*ROURKE v. SHORT*, No. 8, ante.

11. —.]—Pltf. & deft. had agreed in writing that pltf. should take a lease of deft. & buy a goodwill & fixtures for £800, of which £25 was to be paid & was paid by pltf. as a deposit. Afterwards deft. offered pltf. £50 to be off the bargain. Pltf. refused this, but the parties agreed that it should be settled by a toss whether deft. should give pltf. £50 or £75 to be off the bargain. Deft. won the toss & when pltf. sued him for the £50 & for the £25 deposit, set up that the contract of rescission was a wagering one & void. The jury found that the deposit was not in contemplation of the parties, but that a rescission of the contract was in fact made:—*Held*: pltf. was entitled to recover both the £50, as consideration for the rescission, & also the £25 deposit.—*WILSON v. COLE* (1877), 30 L. T. 703; 41 J. P. 501.

12. Must be reciprocal risk of loss.]—Pltf. wagered with deft. that deft. would pass his examination as attorney. Deft. passed. *Assumpsit* being brought on the wager:—*Held*: the wager was void, inasmuch as it was of the nature of a bubble bet, deft. having it in his power to win if he pleased.—*FISHER v. WALTHAM* (1843), 4 Q. B. 889; 1 Dav. & Mer. 142; 12 L. J. Q. B. 330; 1 L. T. O. S. 287; 7 Jur. 625; 114 E. R. 1132.

13. —.]—Pltf., a broker, was employed by deft. to speculate for him upon the Stock Exchange: to the knowledge of pltf. deft. did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that pltf. would so arrange matters that nothing but differences should be payable by him; pltf. knew that unless he could arrange matters for deft. as the latter expected, deft. would be unable to meet the engagements which pltf. might enter into for him. Pltf. accordingly entered into

contracts on behalf of deft., upon which pltf. became personally liable; & he sued deft. for indemnity against the liability incurred by him & for commission as broker:—*Held*: pltf. was entitled to recover; for the employment of pltf. by deft. was not against public policy, & was not illegal at common law, &, further, was not in the nature of a gaming & wagering contract against the provisions of Gaming Act, 1845 (c. 109), s. 18.

The essence of gaming & wagering is that one party is to win & the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win (*OOTTON, L.J.*).—*THACKER v. HARDY* (1878), 4 Q. B. 685; 48 L. J. Q. B. 289; 39 L. T. 595; 43 J. P. 221; 27 W. R. 158, C. A.

Annotations:—*Folld. Re Rogers, Ex p. Rogers* (1880), 15 Ch. D. 207. *Consol. Forget v. Ostigny*, [1895] A. C. 318; *Crawley v. White* (1898), 14 T. L. R. 247. *Folld. Whitelaw v. McKinley, Alexander* (1910), 27 T. L. R. 49; *Richards v. Starck*, [1911] 1 K. B. 296. *Reid. Lilley v. Rankin* (1886), 2 T. L. R. 785; *Reggio v. Steven* (1888), 4 T. L. R. 326; *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484; *Strachan v. Universal Stock Exchange* (1895), 64 L. J. Q. B. 723; *Re Gieve, Ex p. Trustee* (1899), 68 L. J. Q. B. 509.

14. —.]—*CARLILL v. CARBOLIC SMOKE BALL CO.*, No. 2, ante.

15. —.]—Deft. who was a dealer in stocks & shares, issued a circular which stated that upon payment of a subscription of £5 or some multiple thereof the subscriber would be entered in deft.'s three months' trust in respect of a certain number of shares in three named stocks, & the subscriber would then be entitled to the profit arising from the difference between the prices of the stocks on the opening day of the trust & the prices at the end of ninety days from that date, less 10 per cent., together with repayment of the subscription; & in the event of there being no such profit the subscriber would be entitled to the return of his subscription. Pltf. paid to deft. a subscription of £20 upon the terms of the circular, & at the end of the ninety days there accrued a profit upon the prices of the stocks. Pltf. also paid to deft. a subscription of £20 in respect of a similar trust, which resulted in a loss. Deft. repaid to pltf. the amount of his subscription in respect of the first-named trust. In an action to recover the amount of the profit less 10 per cent. in respect of the first-named trust & the £20 subscription in respect of the second trust:—*Held*: though the subscriber was, under the terms of the circular, in any event not to lose his subscription, yet, inasmuch as he would lose interest upon the amount of the subscription, there was a sufficient loss to make the contracts gaming or wagering contracts within Gaming Act, 1845 (c. 109), s. 18, & pltf. was not

same being a wagering agreement.—*IRWIN v. OSBORNE* (1857), 10 Ir. Jur. 153.—*IR.*

b. —.]—*IRWIN v. BURKE* (1857), 28 L. T. O. S. 9.—*IR.*

12.1. Must be reciprocal risk of loss.]—It is of the essence of a wager that each side should stand to win or lose, according to the uncertain or unascertained event, in reference to which the chance or risk is taken.—*SASSOON v. TOKERSEY* (1904), 1 L. R. 28 Bom. 616.—*IND.*

c. Contract to sell ticket in lottery.]—The W. I. Turf Club, with the special sanction of the Govt., organised a War Loan Lottery & offered tickets

numbered from No. 1 onwards to the public at Rs.10 each. Pltf. being desirous of securing the ticket numbered 15,315 paid Rs.10 & obtained a receipt on which was entered the number of the ticket, & the agent of the club agreed to hand over the ticket. By mistake the particular ticket was sold to another:—*Held*: The contract was an agreement by way of wager & was void.—*DORABJI JAMSETJI TATA VIT v. LANCE* (1917), 1 L. R. 42 Bom. 676.—*IND.*

d. Betting by means of totalisator.]—Betting by means of a totalisator is a wagering contract, & the cts. will not entertain actions for the payment of dividends against the holders of the

totalisator.—*DARK v. ISLAND BAY PARK RACING CO.* (1886), 4 N. Z. L. R. 301 (S. C.).—*N.Z.*

e. Match between racehorses—Agreement between owners to share losses & winnings—From bets on match.]—A contract, made between the respective owners of two horses, between whom a racing match is to take place, to share losses & winnings resulting from bets on the match, is illegal.—*WOOLMAN v. MALLAINDAIN* (1901), 22 N. L. R. 97.—*S. AF.*

f. Money lent—To enable borrower to establish bookmaking business.]—Where money had been lent to enable the borrower to become a

entitled to recover.—**RICHARDS v. STARCK**, [1911] 1 K. B. 296; 80 L. J. K. B. 218; 103 L. T. 813; 27 T. L. R. 29.

Annotation:—**Fold**. **Whitelaw v. McKinley**, **Alexander** (1910), 27 T. L. R. 49.

Contracts between principal & agent.—**See Sect. 4, post**.

SECT. 2.—THE CONTRACT AT COMMON LAW.

SUB-SECT. 1.—IN GENERAL.

See, now, Gaming Act, 1845 (c. 109).

16. General rule—Wagering contracts valid.]

—**WALCOT v. TAPPIN** (1873), 1 Keb. 56, 65; 83 E. R. 808; *sub nom.* **ANDREWS v. HERNE**, 1 Lev. 33.

Annotations:—**Reid**. **Good v. Elliott** (1790), 3 Term Rep. 693; **Morgan v. Pebrer** (1837), 6 L. J. C. P. 75; **Egerton v. Brownlow** (1853), 4 H. L. Cas. 1.

17. —.]—A wager on the price of foreign stocks is not illegal by statute or at common law.—**MORGAN v. PEBRER** (1837), 3 Bing. N. C. 457; 3 Hodg. 3; 4 Scott, 230; 6 L. J. O. P. 75; 1 Jur. 166; 132 E. R. 486.

Annotations:—**Mentd**. **Wilson v. Stony** (1840), 4 Jur. 463; **Salkeld v. Johnstone** (1842), 11 L. J. Ch. 201; **Trott v. Smith** (1844), 12 M. & W. 688.

18. Exceptions to rule—Wager contrary to public policy.]—No action lies on a wager, that deft. would beat a third person.—**ALLEN v. RESCOUS** (1676), 1 Freem. K. B. 433; 2 Lev. 174; 89 E. R. 324.

Annotation:—**Mentd**. **Lewis v. Davison** (1839), 4 M. & W. 654.

19. —.]—**ANON.** (1774), Lofft, 552; 98 E. R. 795.

20. —.]—A wager between two voters with respect to the event of an election of a member to serve in Parliament, laid before the poll began, is illegal.

It is a colour for bribery. It has an influence on his mind (**LORD MANSFIELD, C.J.**).—**ALLEN v. HEARN** (1785), 1 Term Rep. 56; 99 E. R. 969.

Annotations:—**Reid**. **Evans v. Jones** (1838), 3 J. P. 274. **Mentd**. **Jones v. Waite** (1839), 1 Arn. 548; **Cooper v. Slade** (1858), 6 H. L. Cas. 746.

21. —.]—A wager respecting the future amount of any branch of the public revenues is illegal, because it leads to an improper discussion, & is contrary to sound policy.—**ATHERFOLD v. BEARD** (1788), 2 Term Rep. 610; 100 E. R. 328.

Annotations:—**Fold**. **Shirley v. Sankey** (1800), 2 Bos. & P. 130. **Consd**. **Ramoll Thackoorseydass v. Soojumull Dhondmull** (1848), 6 Moo. P. C. C. 300. **Expld**. **Fitch v. Jones** (1855), 5 E. & B. 238. **Reid**. **Good v. Elliott** (1790), 3 Term Rep. 693.

member of Natal "Tattersall's" for the express purpose of qualifying the borrower to establish a bookmaking business:—**Held**: the money had been lent for an illegal purpose within Law 25 of 1878, & was irrecoverable at law.—**WOOLMAN v. GLENNICK** (1905), 26 N. L. R. 379.—S. AF.

PART I. SECT. 2, SUB-SECT. 1.

16 i. General rule—Wagering contracts valid.]—A gaming debt or wager unless against public policy, indecent or immoral, is recoverable at common law.—**ROBINSON v. MCNEIL** (1907), 4 E. L. R. 134.—CAN.

16 ii. —.]—By the common law of England in force in India, an

22. —.]—An action will not lie on a promissory note given in payment of a wager on the amount of the hop duties.—**SHIRLEY v. SANKEY** (1800), 2 Bos. & P. 130; 126 E. R. 1196.

Annotation:—**Consd**. **Ramoll Thackoorseydass v. Soojumull Dhondmull** (1848), 6 Moo. P. C. C. 300.

23. —.]—A wagering contract for fifty guineas, that pltf. would not marry within six years, is *prima facie* in restraint of marriage, & therefore void; no circumstances appearing to show that such restraint was prudent & proper in the particular instance.—**HARTLEY v. RICE** (1808), 10 East, 22; 103 E. R. 683.

Annotations:—**Reid**. **Evans v. Jones** (1838), 3 J. P. 274. **Mentd**. **Jones v. Waite** (1839), 6 Bing. N. C. 341.

24. —.]—A wager by which deft. received from pltf. one hundred guineas on May 31, 1802, in consideration of paying pltf. a guinea a day as long as Napoleon Bonaparte, the first Consul of the French Republic, should live; which bet arose out of a conversation upon the probability of his coming to a violent death by assassination or otherwise, is void on the grounds of immorality & impolicy.—**GILBERT v. SYKES** (1812), 16 East, 150; 104 E. R. 1045.

Annotations:—**Fold**. **Evans v. Jones** (1839), 5 M. & W. 77. **Consd**. **Ramoll Thackoorseydass v. Soojumull Dhondmull** (1848), 6 Moo. P. C. C. 300. **Reid**. **Egerton v. Brownlow** (1853), 4 H. L. Cas. 1; **Jeffrey v. Bamford**, [1921] 2 K. B. 351. **Mentd**. **Wilson v. Caruley**, [1908] 1 K. B. 729; **Rodriguez v. Speyer**, [1919] A. C. 59.

25. —.]—A wager as to the conviction or acquittal of a prisoner on trial on a criminal charge, is illegal, as being against public policy.—**EVANS v. JONES** (1839), 5 M. & W. 77; 2 Horn & H. 67; 8 L. J. Ex. 173; 3 J. P. 274; 3 Jur. 318; 151 E. R. 34.

Annotations:—**Consd**. **Ramoll Thackoorseydass v. Soojumull Dhondmull** (1848), 4 Moo. Ind. App. 339. **Reid**. **Egerton v. Brownlow** (1853), 4 H. L. Cas. 1.

26. —.]—So in the case of wagers, it is now fully established that no contract in the nature of a wager is valid which is against public policy (**POLLOCK, C.B.**).—**EGERTON v. BROWNLOW (EARL)** (1853), 4 H. L. Cas. 1; 8 State Tr. N. S. 193; 23 L. J. Ch. 348; 21 L. T. O. S. 306; 18 Jur. 71; 10 E. R. 359, H. L.

Annotations:—**Mentd**. **Kerkin v. Kerkin** (1854), 3 E. & B. 399; **Bean v. Griffiths** (1855), 1 Jur. N. S. 1045; **Hilton v. Eckersley** (1855), 6 E. & B. 47; **Kialmark v. Kialmark** (1856), 26 L. J. Ch. 1; **Scott v. Avery** (1856), 5 H. L. Cas. 811; **H. v. W.** (1857), 3 K. & J. 382; **Clavering v. Ellison** (1859), 7 H. L. Cas. 707; **Shrewsbury v. Scott** (1859), 6 C. B. N. S. 1; **Wright v. Wilkin** (1860), 2 B. & S. 232; **Tatham v. Vernon** (1861), 29 Beav. 604; **Christie v. Gosling** (1866), L. R. 1, H. L. 279; **Elliott v. Richardson** (1870), L. R. 5 C. P. 744; *Re Harrison's Estate* (1870), 5 Ch. App. 408; **Sackville West v. Holmesdale** (1870), L. R. 4 H. L. 543; **Thompson v. Fisher** (1870), L. R. 10 Eq. 207; *Re Exmouth, Exmouth v. Præd* (1883), 23 Ch. D. 158; **Davies v. Davies** (1887), 36 Ch. D. 359; **Lound v. Grimwade** (1888), 39 Ch. D. 605; **Windhill L. B. of**

the declaration that the claim was bad inasmuch as it was based on a contract which was illegal:—**Held**: wagering contracts though unenforceable were not illegal at common law.—**WHITTEK v. O'CONNOR** (1918), 39 N. L. R. 376.—S. AF.

16 i. Exceptions to rule—Wager contrary to public policy.—Bet on result of Parliamentary election.]—Pltf. cannot recover, in the etc. of this province, upon a claim for the amount of a bet made & won in this province on the result of a Parliamentary election in this Dominion. Such a bet is not enforceable, quite apart from any legislation on the subject.—**HARRIS v. ELLIOTT** (1913), 28 O. L. R. 349; 4 O. W. N. 939; 12 D. L. R. 533.—CAN.

action may be maintained on a wager, although the parties had no previous interest in the subject-matter on which it is laid, if such wager be not against the interest or feelings of third parties, does not lead to indecent evidence, & is not contrary to public policy. The mere circumstance that a wager concerns the public revenue, or creates a temptation to do a wrong, will not render it illegal.—**RAMOLL THACKOORSEYDASS v. SOOJANMULL DHONDUMULL** (1848), 4 Moo. Ind. App. 339.—IND.

16 iii. —.]—W. sued O. C. for money agreed to be due in respect of loans & money due to W. while he & O. C. were in partnership as bookmakers. Exception was taken to

Sect. 2.—The contract at common law: Sub-sects. 1 & 2. Sect. 3: Sub-sect. 1, A. & B.]

Health v. Vint (1890), 45 Ch. D. 351; **Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt**, [1893] 1 Ch. 630; **Savill v. Langman** (1898), 79 L. T. 44; **Re Kelcey, Tyson v. Kelcey**, [1899] 2 Ch. 530; **Marlborough v. Marlborough** (1900), 83 L. T. 578; **Jeffreys v. Jeffreys** (1901), 84 L. T. 417; **Re Greenwood, Goodhart v. Woodhead**, [1902] 3 Ch. 198; **Jansson v. Driefontein Consolidated Mines**, [1902] A. C. 484; **Re Hope Johnstone, Hope Johnstone v. Hope Johnstone**, [1904] 1 Ch. 470; **Prince v. Haworth**, [1905] 2 K. B. 768; **Wilson v. Carnley** (1908) 1 K. B. 729; **R. v. L. G. Board, Ex p. Arldgo**, [1913] 1 K. B. 463; **Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co.**, [1915] 1 K. B. 893; **Montefiore v. Menday Motor Components Co.**, [1918] 2 K. B. 241; **Rodrigues v. Speyer**, [1919] A. C. 59; **Kemp v. Glasgow Corpn.**, [1920] A. C. 836; **Re Wallace, Champion v. Wallace**, [1920] 2 Ch. 274.

27. — Wager contrary to public morality.—An action will not lie upon a voluntary wager between two indifferent persons, upon the sex of a third, apparently a man; having acted, & continuing to act, as such, in various public characters, because such inquiry tends to indecent evidence; & because it tends to disturb the peace of the individual, & of society.—**DA COSTA v. JONES** (1778), 2 Cowp. 729; 98 E. R. 1331.

Annotations.—**Consd. Good v. Elliott** (1790), 3 Term Rep. 693. **Reid. Roebuck v. Hammerton** (1778), 2 Cowp. 737; **Brown v. Leeson** (1792), 2 Hy. Bl. 43; **Micklefield v. Hepgin** (1794), 1 Anst. 133; **Gilbert v. Sykes** (1812), 16 East, 150; **Evans v. Jones** (1838), 3 J. P. 274; **Johnson v. Lansley** (1852), 13 C. B. 468; **Egerton v. Brownlow** (1853), 4 H. L. Cas. 1; **Fitch v. Jones** (1855), 24 L. J. Q. B. 293. **Mentl. Gurney v. Gurney** (1863), 1 Hem. & M. 413; **Cooke v. Cooke** (1865), 34 L. J. Ch. 460, n.

28. ——[A policy upon the sex of a person, is a wagering policy within 14 Geo. 3, c. 48.—**ROEBUCK v. HAMMERTON** (1778), 2 Cowp. 737; 98 E. R. 1335.

Annotations.—**Consd. Nantes v. Thompson** (1802), 2 East, 385. **Foll. Paterson v. Powell** (1832), 9 Bing. 320.

29. ——[No action can be maintained upon a wager on a cock-fight.—**SQUIRES v. WHISKEN** (1811), 3 Camp. 140, N. P.

30. ——[An action cannot be maintained upon a wager, whether an unmarried woman has had a child.—**DITCHBURN v. GOLDSMITH** (1815), 4 Camp. 152, N. P.

SUB-SECT. 2.—ATTITUDE OF COURT.

31. Hearing in discretion of court—Wager as to decision of court.—**WALKHOUSE v. DERWENT** (1747), 1 Wm. Bl. 19; 96 E. R. 9.

32. ——[No action will lie on a wager respecting the mode of playing an illegal game; & if such a cause be set down for trial, the judge at *Nisi Prius* will order it to be struck out of the paper.—**BROWN v. LEESON** (1792), 2 Hy. Bl. 43; 126 E. R. 419.

Annotation.—**Foll. Ditchburn v. Goldsmith** (1815), 4 Camp. 152.

33. — Parties without interest.—An action cannot be maintained on a wager on a point of law

in which the parties have no interest.—**HENKIN v. GUERES** (1810), 12 East, 247; 2 Camp. 408; 104 E. R. 97.

Annotations.—**Foll. Ditchburn v. Goldsmith** (1815), 4 Camp. 152. **Expld. Robinson v. Mearns** (1825), 3 L. J. O. S. K. B. 124.

34. ——[A. paid B. £7,500, in consideration that B. should pay A. £10,000, or such proportion of that amount, say £10,000, as C. paid his legal general creditors:—**Held**: after verdict, the declaration which alleged that O. had paid his legal general creditors £10,000 for the purpose of showing that A. had won the wager, was warranted by the construction of the wager. It is no ground for arresting the judgment after verdict, that the subject-matter of the action was a wager between A. & B. upon the solvency of C. in which they had no interest. *Seemle*: the judge may refuse to try a cause upon a wager, where the parties have no interest.—**THORNTON v. THACKRAY** (1828), 2 Y. & J. 156; 148 E. R. 872, Ex. Ch.

Annotation.—**Reid. Evans v. Jones** (1838), 3 J. P. 274.

35. ——[If an action, for money had & received is brought against the stake-holder on a dog fight, to recover the stakes, on the ground that pltf.'s dog won; the judge will order it to be struck out of the cause paper, as he will not try which dog won the battle.—**EGERTON v. FURZEMAN** (1825), 1 O. & P. 613; Ry. & M. 213, N. P.

Annotation.—**Expld. Robinson v. Mearns** (1825), Ry. & M. 214, n.

36. ——[The stakeholder upon a cricket match between eleven players on each side at 5s. ahead, is liable to the winner, if the judge at *Nisi Prius*, in the exercise of his discretion, thinks proper to try the cause.—**WALPOLE v. SAUNDERS** (1825), 7 Dow. & Ry. K. B. 130.

37. ——(1) It is discretionary with a judge at *Nisi Prius*, whether he will or will not try an idle or frivolous cause, & if he suffers it to be tried, & pltf. recovers a legal verdict, it is no ground for disturbing the verdict.

(2) A stakeholder upon a wager on a horse-race for £20, is liable to an action for money had & received, if the money be demanded before he pays it over to the winner.—**ROBINSON v. MEARNES** (1825), 6 Dow. & Ry. K. B. 26; Ry. & M. 214, n.; 3 L. J. O. S. K. B. 124.

Annotation.—**As to** (2) **Consd. Hodson v. Terrill** (1833), 1 Cr. & M. 797.

38. ——[The ct. will not try an action for money had & received to recover back a deposit paid to abide the event of a wrestling match which did not take place.—**KENNEDY v. GAD** (1828), 3 O. & P. 376; Mood. & M. 225, N. P.

39. ——[The ct. will not assist a pltf. seeking to have a contract set aside on the ground of fraud, if the contract be in its nature one of gambling or wagering.

Where a person having only thirty shares in a co. in the course of a fortnight entered into contracts for the sale of between seven hundred & eight hundred shares to be delivered on a future

PART I. SECT. 2, SUB-SECT. 2.

g. Whether action lies.—[Whether action lay on claims for debts incurred by wagering are good in law:—**Held**: no, upon the principle of *sponsio ludicrae*.—**BRUCE v. ROSS** (1788), 3 Pat. App. 107.—**SCOT**.

h. ——[A picture, which formed the prize at a coursing match, was

gained by a particular greyhound. A competition for the picture having arisen between the owner of the greyhound & the person by whom the dog had been nominated for the match, a multiplepointing was raised by the custodian of the picture, for the purpose of ascertaining which of the claimants was entitled to it:—**Held**: the action was competent, & did not resolve into

a question of *sponsio ludicra*.—**GRAHAM v. POLLOK, POLLOK v. GRAHAM** (1843), 10 Dunl. (Ct. of Sess.) 646; 20 Sc. Jur. 200.—**SCOT**.

k. ——[An action does not lie either for repetition of money lost through unfair play at cards, or for the damage thereby sustained.—**PATERSON v. MACQUEEN & KILGOUR** (1866), 4

day, & was unable to deliver them in consequence of the shares of the co. being under the control of the persons to whom he had agreed to sell, the ct. refused to assist him on an interlocutory application, though the fraud was not denied by defts.—*REES v. FERNIE* (1864), 4 New Rep. 539; 13 W. R. 6.

See, also, Nos. 126, 127, *post*.

SECT. 3.—RIGHTS OF PARTIES TO CONTRACT.

SUB-SECT. 1.—INTER SE.

A. In General.

40. Rule at common law — Money lost not recoverable.—*Indebitatus assumpsit* will not lie for a wager, or money won at play.—*JACKSON v. COLEGRAVE* (1694), Carth. 338; 90 E. R. 797, Ex. Ch.

Annotations :—*Refd.* Walker v. Walker (1695), 12 Mod. Rep. 69; Good v. Elliott (1790), 3 Term Rep. 693.

41. ———.]—No *indebitatus assumpsit* lies for money won at play.—*ANON.* (1695), 12 Mod. Rep. 81; 88 E. R. 1178.

42. ———.]—*WALKER v. WALKER*, No. 116, *post*.

43. ———.]—Money won at play cannot be recovered from the loser on an *indebitatus assumpsit*.—*SMITH v. AIERY* (1704), Holt, K. B. 329; 2 Ld. Raym. 1034; 6 Mod. Rep. 128; 3 Salk. 14, 175; 90 E. R. 1082.

44. Effect of Gaming Act, 1845 (c. 109), s. 18—Wagering contracts void—Act not retrospective.—Above Act has not a retrospective operation, so as to defeat an action for a wager, commenced before the statute passed. *Qu.* : whether, by the first part of above section, the legislature intended to put at once an end to the legal obligation both of existing & future wagering contracts, leaving the parties to all such wagers to act thereafter on them as honourable engagements alone.—*MOON v. DURDEN* (1848), 2 Exch. 22; 12 J. P. Jo. 164; 154 E. R. 389; *sub nom.* *MOORE v. DURDEN*, 12 Jur. 138.

Annotations :—*Consd.* Pardo v. Bingham (1869), 4 Ch. App. 735. *Apld.* Sussenbach v. Fitzgibbon (1892), 8 T. L. R. 692. *Consd.* Bowling v. Camp (1922), 128 L. T. 342; Henshall v. Porter, [1923] 2 K. B. 193. *Refd.* Doolubdaas Pettamberdaas v. Ramloil Thakoorseydaas (1850), 7 Moo. P. C. C. 239; McKenzie v. Sligo & Shannon Ry. (1852), 21 L. J. Q. B. 330; Martin v. Hewson (1855), 10 Exch. 737; Evans v. Williams (1865), 2 Drew. & Sm. 324; Knight v. Lee, [1893] 1 Q. B. 41; *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547; West v. Gwynne, [1911] 2 Ch. 1; Grocock v. Grocock, [1920] 1 K. B. 1. *Mentd.* A.-G. v. Hertford (1849), 3 Exch. 670; Marsh v. Higgins (1850), 19 L. J. C. P. 297; Pinhorn v. Souster (1852), 8 Exch. 138; R. v. Leeds & Bradford Ry. (1852), 16 J. P. 631; *Re* Lord & Copper Miners' Co. (1854), 3 Eg. Rep. 197; Jackson v. Woolley (1858), 8 E. & B. 784; Williams v. Smith (1859), 4 H. & N. 559; The Ironsides (1862), Lush. 458; A.-G. v. Sillem (1864), 10 H. L. Cas. 704; R. v. Vine (1875), L. R. 10 Q. B. 195; The Ydun, [1899] P. 236; R. v. Southampton Income Tax Comrs., *Ex p.* Singer, [1916] 2 K. B. 249.

Macph. (Ct. of Sess.) 602; 38 So. Jur. 321.—SCOT.

1. ———.]—The ct. will not enforce wagering contracts on a horse-race lawfully made in terms of Ordinance 13 of 1918.—*FISHER v. STRAITON* (1920), W. L. D. 53.—S. AF.

PART I. SECT. 3, SUB-SECT. 1.—B.

m. Agreement to share winnings

in sweepstakes.—Agreement between holders of two tickets in sweepstakes to share winnings.—*Held* : good, as not being a wager.—*BARRY v. HEGARTY* (1885), 6 N. S. W. L. R. 64; 1 N. S. W. W. N. 156.—AUS.

n. Agreement to lease racehorse & share winnings.—Pltf. entered into an agreement with the owner of a racehorse in the following terms : "I hereby agree to lease the gelding

45. Contract connected with wager.]—*ROURKE v. SHORT*, No. 8, *ante*.

46. ———.]—Pltf. was a tipster, i.e., gave information as to the probable winners of horse races. Upon his giving the name of a horse to deft. as the probable winner of a certain race, it was agreed between them that pltf. should have £2 on the horse at 25 to 1, that is to say, that, if the deft. backed the horse & won, pltf. should have £50 out of his winnings, but if the horse lost, pltf. should pay the deft. £2. Deft. did back the horse, & it won, & pltf. thereupon claimed £50 out of deft.'s winnings :—*Held* : the agreement was void within above sect., & the £50 could not be recovered.—*HIGGINSON v. SIMPSON* (1877), 2 C. P. D. 76; 46 L. J. Q. B. 192; 36 L. T. 17; 41 J. P. 200; 25 W. R. 303.

Annotations :—*Distd.* Harvey v. Hart (1894), 38 Sol. Jo. 418. *Foll.* Thomas v. Smith (1901), 18 T. L. R. 69. *Refd.* Jeffrey v. Bamford, [1921] 2 K. B. 351.

47. Agreement to pay forfeit for failure to decide wager—Forfeit not recoverable.—An agreement for a match between greyhounds, the best of three courses for £100, either party making default to forfeit that sum, is an illegal agreement within the meaning of the Statute against Gaming, 9 Anne, c. 14, & Gaming Act, 1710 (c. 19).

Where one of the parties to such an agreement made default, by not appearing with his dog to run the race at the time specified :—*Held* : he could not be compelled to pay the sum forfeited, the agreement for that purpose being nothing more than a party binding himself in a penalty to do an act prohibited by statute.—*DAINTREE v. HUTCHINSON* (1842), 10 M. & W. 85; 11 L. J. Ex. 397; 6 Jur. 736; 152 E. R. 392.

Annotations :—*Expld.* Thorpe v. Coleman (1845), 14 L. J. C. P. 280. *Mentd.* Duke v. Forbes (1847), 11 Jur. 951; Rughonauth Sahoi Chotayloil v. Uggerhund & Huruckhund (1856), 10 Moo. P. C. C. 135.

B. Contribution to Prize.

See Gaming Act, 1845 (c. 109), s. 18.

48. Prize consisting of stakes of parties.—*BATTY v. MARRIOTT*, No. 479, *post*.

49. ———.]—The enactment in Gaming Act, 1845 (c. 109), s. 18, making void all contracts by way of wagering or gaming, applies to a wager made at a game in itself lawful, & the proviso in same sect. does not except betting between two persons at the game of billiards, where no money is produced or staked at the time. Where, therefore, to an action to recover a sum of money lost at the game of billiards, it was pleaded that pltf. & the deft. did game together by playing at billiards for money, & that the money sought to be recovered was won by pltf. from deft. by such game, & it was proved that pltf. & deft. had played at billiards at a public billiard-room, betting double or quits until pltf. had lost the sum :—*Held* : pltf. was not entitled to recover.—*PARSONS v. ALEXANDER* (1855), 5 E. & B. 263; 3

'Magdala' to you for the C. G. N. Meeting, 1912, on condition that you pay all fees attached thereto, including training expenses, & give me one-half of any stakes won by 'Magdala.' Pltf. trained the horse & ran it at the said meeting, where it won a race carrying £500 in stakes. This amount was paid over to the owner of the horse :—*Held* : the agreement was not invalid under Gaming Act, 1908, s. 71, & the

Sect. 3.—Rights of parties to contract: Sub-sect. 1, B. & C.]

C. L. R. 1888; 24 L. J. Q. B. 277; 25 L. T. O. S. 175; 19 J. P. 693; 1 Jur. N. S. 660; 3 W. R. 510; 119 E. R. 479.

Annotations:—*Reid*, Dyson v. Mason (1889), 58 L. J. M. C. 55. *Mentd.* *Re* Ryder (1857), 29 L. T. O. S. 217.

50. —.]—Pltf. & deft. agreed to ride a race each on his own horse, both the horses ridden to become the property of the winner:—*Held*: the horses could not be regarded as a contribution towards a prize within the meaning of the proviso in Gaming Act, 1845 (c. 109), s. 18, & the contract was therefore void under that sect. as being “by way of gaming or wagering.”—*COOMBES v. DIBBLE* (1866), L. R. 1 Exch. 248; 4 H. & C. 375; 35 L. J. Ex. 167; 14 L. T. 415; 30 J. P. 375; 12 Jur. N. S. 456; 14 W. R. 676.

51. —.]—H. & B. deposited £50 each with N., & entered into a written agreement that the £100 should be paid to H. if his horse trotted eighteen miles in an hour, & if not, then to B. The referee decided that the horse did trot the distance within the hour. B. demanded his £50 back from N. before the money had been paid over to H.:—*Held*: B. was entitled to recover his stake back from N., for that the transaction was simply a wager, & did not come within the proviso in Gaming Act, 1845 (c. 109), s. 18, as to contributions to a prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime, or exercise.—*BATSON v. NEWMAN* (1876), 1 C. P. D. 573; 25 W. R. 85, C. A.

Annotation:—*Reid*, Diggle v. Higgs (1877), 2 Ex. D. 422.

52. —.]—An agreement to walk a match for £200 a side, the money being deposited with a stakeholder, is a wager, & null & void under Gaming Act, 1845 (c. 109), s. 18. The deposit of the money is not a subscription or contribution for a sum of money to be awarded to the winner of a lawful game within the proviso of that enactment; & although the winner of the match cannot sue the loser or the stakeholder to recover the stakes, yet a depositor may maintain an action to recover back the share deposited by him with the stakeholder. Pltf. & one S. agreed to walk a match for £200 a side, & each deposited £200 with deft. to be paid to the winner. S. won the match. Pltf., after the determination of the match, but before the money was paid over to S., demanded the sum deposited by him from deft.:—*Held*: pltf. was entitled to recover his share of the deposit from deft.—*DIGGLE v. HIGGS* (1877), 2 Ex. D. 422; 46 L. J. Q. B. 721; 37 L. T. 27; 42 J. P. 245; 25 W. R. 777, C. A.

Annotations:—*Consd.* Trimble v. Hill (1879), 5 App. Cas. 342. *Dirtd.* Read v. Anderson (1882), 10 Q. B. D. 100. *Consd.* Shoolbred v. Roberts, [1899] 2 Q. B. 560. *Reid*, Barclay v. Pearson, [1893] 2 Ch. 154; *Re* Crommire, *Ex p.* Waud, [1898] 2 Q. B. 383. *Mentd.* Hunt v. Fripp, [1898] 1 Ch. 675.

53. —.]—Pltf. deposited with deft. £200 to abide the event of a match between a horse of pltf. & another horse belonging to G., but before the day fixed for the race he gave notice to deft. that he revoked the authority to pay over the

money, & demanded the return of it:—*Held*: pltf. was entitled to recover such deposit. The contract under which the money was deposited was one by way of wagering, & therefore null & void under the Colonial Act, which is in the same terms as Imperial Act, Gaming Act, 1845 (c. 109), s. 18. It was not an agreement to contribute a sum of money within the proviso contained in the said section, which proviso applies to contributions other than wagers.—*TRIMBLE v. HILL* (1879), 5 App. Cas. 342; 49 L. J. P. C. 49; 42 L. T. 103; 28 W. R. 479, P. C.

Annotations:—*Consd.* Shoolbred v. Roberts, [1899] 2 Q. B. 560. *Reid*, Strachan v. Universal Stock Exchange (No. 2), [1895] 2 Q. B. 697; *Re* Crommire, *Ex p.* Waud, [1898] 2 Q. B. 383; *Burge v. Ashley & Smith*, [1900] 1 Q. B. 744. *Mentd.* Hunt v. Fripp, [1898] 1 Ch. 675.

See, also, Nos. 252, 253, *post*.

C. Fresh Promise for New Consideration.

Consideration generally, *see* CONTRACT, Vol. XII., pp. 172 *et seq.*

54. **General rule.**—There are, no doubt, cases in the books in which a person who owes money in respect of betting transactions has been held liable on a new contract or promise by him to pay in consideration of some forbearance extended to him by the other party. But I do not think that that class of case affords a true analogy to the present. At common law a promise to pay a bet was an enforceable contract; but the Gaming Acts, though not making betting *per se* illegal, provided that promises to pay bets should not be enforceable in law; that is to say, such a promise was deprived of all legal effect & became a mere nullity. If, however, the parties to a betting transaction enter into a new contract for good consideration, which contract is not in a form which has been declared by statute to be unenforceable, there is no reason in law why that new contract should not be enforced, the making of a bet not being itself illegal (*HAMILTON, J.*).—*GENFORSIKRINGS AKT. (SKANDINAVIA REINSURANCE CO. OF COPENHAGEN) v. DA COSTA*, [1911] 1 K. B. 137; 80 L. J. K. B. 236; 103 L. T. 767; 27 T. L. R. 43; 11 Asp. M. L. C. 548; 16 Com. Cas. 1.

55. **What amounts to sufficient consideration—Forbearance to post as defaulter.**—H., a member of the Jockey Club, owed money for bets on horse races which he could not pay, & he was consequently liable to be turned out of the club. He gave a bond to satisfy his betting creditors:—*Held*: the consideration for the bond was his not being turned out of the club, & whether a bond for a bet on a horse race was or was not good, his estate was liable on this bond.—*BUBB v. YELVERTON* (1870), L. R. 9 Eq. 471; 39 L. J. Ch. 428; 22 L. T. 258; 18 W. R. 512.

Annotations:—*Consd.* Hyams v. Stuart King, [1908] 2 K. B. 596. *Reid*, Read v. Anderson (1882), 10 Q. B. D. 100; *Re* Deerpur, *Ex p.* Seaton (1891), 64 L. T. 273; *Re* Browne, *Ex p.* Martingell, [1904] 2 K. B. 133; *Chapman v. Franklin* (1905), 21 T. L. R. 515; *Cooper v. Willis* (1906), 22 T. L. R. 582; *Goodson v. Grierson*, [1908] 1 K. B. 761.

56. —.]—Deft., a solicitor's articulated

owner was liable to account to pltf. for one-half of the moneys received.—*MITCHELL v. BECK* (1913), 32 N. Z. L. R. 1279.—N.Z.

PART I. SECT. 3, SUB-SECT. 1.—C.

54.1. **General rule.**—When a demand connected with an illegal transaction

can be sued on without having recourse to the illegal transaction, the demand is enforceable by law.

Applt. handed over £25 to resp. for the purpose of staking it on a prize fight. Resp. failed to stake it, & thereafter promised applt. to repay the money to him:—*Held*: as such promise

was founded upon a sufficient *causa* & as the promise could be proved without recourse to the prize fight transaction, an action on it was enforceable by law.—*SILKE v. GOODE* (1911), T. P. D. 989.—S. AF.

o. What amounts to sufficient consideration—Compromise—Must be a

clerk, was sued by pltf., a turf commission agent, for £550 alleged to be due under an agreement signed by deft. Deft. had been betting for some time with pltf., & at the beginning of July, 1908, a sum of £567 9s. 9d. was owing by deft. to pltf. in respect of bets. A representative of pltf. interviewed deft. on the subject of payment, & intimated that if the money was not paid deft. would be posted as a defaulter. Deft. said that was nothing to him, as he did not belong to Tattersall's or any sporting club, but eventually he signed a document which, after admitting his liability, ran as follows:—"In consideration of [ptf.'s] forbearance to sue, & of the fact that I shall not be registered as a defaulter, either in the list compiled by the Turf Register or at Tattersall's or any of the sporting clubs, I hereby undertake to pay the sum of £17 9s. 9d. by July 9, 1908, & to make immediate arrangements with regard to the balance of £550." The £17 9s. 9d. was paid, but not the balance of £550:—*Held*: there was sufficient consideration to support the promise to pay the £550, there being nothing to show that deft. regarded as an empty threat the intimation that if he did not pay he would be posted as a defaulter.—*HODGKINS v. SIMPSON* (1908), 25 T. L. R. 53.

Annotation:—*Distd. Ladbroke v. Buckland* (1908), 25 T. L. R. 55.

57. ———.]—Both pltf. & deft. were bookmakers & deft. owed pltf. £375 in respect of bets. Deft. admitted he owed £355, & asked pltf. to accept a post-dated cheque for £355 in settlement, to which pltf. agreed. That cheque being dishonoured, deft. asked for fourteen days' further time to settle the amount of the cheque which was given. Deft. was a member of a club, to which his being reported as a defaulter would affect his membership. In an action to recover upon the cheque for £355:—*Held*: there was sufficient consideration to support a contract to pay £355.—*GOODSON v. BAKER* (1908), 93 L. T. 415; 24 T. L. R. 338; 52 Sol. Jo. 302.

Annotations:—*Distd. Browne v. Bailey* (1908), 24 T. L. R. 644. *Consd. Hyams v. Stuart King*, [1908] 2 K. B. 696. *Apld. Barkworth v. Gant* (1909), 25 T. L. R. 722. *Reftd. Re Comar, Ex p. Ronald* (1908), 52 Sol. Jo. 642; *Wilson v. Conolly* (1910), 103 L. T. 461.

58. ———.]—Pltf. & deft., who were both bookmakers, had betting transactions together, which resulted in deft. giving pltf. a cheque for the amount of bets lost to him. At the request of deft. the cheque was held over by pltf. for a time, & part of the amount of the cheque was paid by deft. Subsequently a fresh verbal agreement was come to between the parties, by which, in consideration of pltf. holding over the cheque for a further time & refraining from declaring deft. a defaulter & thereby injuring him with his customers, deft. promised to pay the balance owing in a few days. The balance was never paid:—*Held*: the forbearance of pltf. to sue, coupled with his forbearance to declare deft. a defaulter, constituted a good consideration for the fresh agreement, & pltf. was entitled to recover.

The action is brought against a firm in the firm's name. The so-called firm was an assoc. for the purpose of carrying on a betting business & nothing else. In my opinion no such partnership is possible under English law (*FLETCHER MOULTON, L.J.*).—*HYAMS v. STUART KING*, [1908]

2 K. B. 696; 77 L. J. K. B. 794; 99 L. T. 424; 24 T. L. R. 675; 52 Sol. Jo. 551, C. A.

Annotations:—*Consd. Re Comar, Ex p. Ronald* (1908), 52 Sol. Jo. 642. *Follid. Goodson v. Griereson* (1908), 52 Sol. Jo. 599; *Cohen v. Ulph* (1909), 25 T. L. R. 710; *Morisot v. Long* (1910), *Times*, July 11. *Consd. Wilson v. Conolly* (1910), 103 L. T. 461; *Re Campbell, Ex p. Seal*, [1911] 2 K. B. 992. *Apprvd. O'Connor & Ould v. Ralston*, [1920] 3 K. B. 451. *N.F. Jeffrey v. Bamford*, [1921] 2 K. B. 351. *Reftd. Saxby v. Fulton*, [1909] 2 K. B. 208; *Genforsikrings Akt. (Skandinavia Reinsuranc Co. of Copenhagen) v. Da Costa* (1910), 103 L. T. 767; *Re Bonacina, Le Brasseur v. Bonacina*, [1912] 2 Ch. 394; *Gardner v. Lester* (1914), 58 Sol. Jo. 688; *Sutters v. Briggs*, [1922] 1 A. C. 1. *Mentd. Lloyd v. Grace, Smith*, [1911] 2 K. B. 489; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Robinson v. Marsh*, [1921] 2 K. B. 640; *Greenhalgh v. Union Bank of Manchester*, [1924] 2 K. B. 153.

59. ———.]—Deft., who had been betting with ptfs., owed them in August, 1908, a sum of £56 in respect of the bets. Ptfs. applied for payment, & received in reply a letter in which deft. stated that he would not pay at the moment, & added that he was negotiating a business which, when successful, would allow him to pay at an early date, & he asked them on that account to keep the matter private, as otherwise his chance of success would be injured. Ptfs. wrote that they would treat the matter as confidential, but wished deft. to say when they might expect a cheque. In a further letter ptfs. said they would expect a settlement by Sept. 21, but to that deft. sent no reply. Ptfs. knew that deft. belonged to the Badminton Club, but owing to their agreement to wait they alleged that they refrained from bringing his conduct before the committee of that club & from posting him as a defaulter at the Newmarket Rooms:—*Held*: there was no consideration for a fresh promise by deft. to pay the £56, & the action therefore failed.—*LADBROKE & CO. v. BUCKLAND* (1908), 25 T. L. R. 55.

Annotation:—*Reftd. Wilson v. Conolly* (1910), 103 L. T. 461.

60. ———.]—Defts. owed ptfs. a sum of £137 13s. 8d., in respect of bets. When asked for payment defts. stated that they could not pay. Ptfs. threatened to post defts. as defaulters at Tattersall's, whereupon defts. promised that if they were given a week's time they would pay. To that ptfs. agreed, but no payment was in fact made by defts. Defts. were not members of Tattersall's. In an action to recover the £137 13s. 8d.:—*Held*: ptfs. were entitled to recover, as there was consideration for the promise by defts. to pay the debt on the threat by ptfs. to post them as defaulters.—*COHEN (M.) & CO. v. ULPH & CO.* (1909), 25 T. L. R. 710; *affd.*, 26 T. L. R. 128, C. A.

61. ———.]—*MORISOT v. LONG* (1910), *Times*, July 11.

62. ———.]—Pltf. & deft. were bookmakers, & deft., having lost certain bets to pltf., failed to pay at the proper time. Pltf. sued deft. for the amount of the lost bets, alleging a new agreement by deft. to pay the amount in consideration of pltf. giving him time to pay & refraining from publishing his failure to pay on the proper day. The evidence of pltf. was that deft. came to him & asked for time to pay & that he would not tell any one, & that he promised to give him time; that on the next day deft.

claim intended to be pursued.]—Pltf. brought an action against deft. to recover a sum of £137 10s. on an account settled & stated. Before notice of trial deft. settled with pltf., paying him £10 in cash & giving him a promissory for £65. Deft. failed to meet the promissory note on maturity. The £137 10s. was in

Sect. 3.—Rights of parties to contract: Sub-sect. 1, C. & D.; sub-sect. 2, A.]

paid him 10s. on account & asked him to keep the matter absolutely confidential because it would do him, deft., a lot of harm if it got about; & that he promised to keep it confidential:—*Held*: there was evidence upon which the county ct. judge could find, as he did, that there was a new agreement by deft. for a good consideration to pay the amount of the lost bets.—*WILSON v. CONOLLY* (1911), 104 L. T. 94; 27 T. L. R. 212, C. A.

Annotation:—*Expld. & Distd.* Hyams v. Coombes (1912), 28 T. L. R. 413.

63. Withdrawal of letter of complaint.]—After an action to recover a gaming debt had been dismissed, the creditor wrote to the committee of the debtor's club complaining of his conduct in not paying his debts of honour. The debtor, in consideration of this letter of complaint being withdrawn, gave the creditor bills in satisfaction of the debt. Before the bills were paid the debtor became bkpt.:—*Held*: the bills were given for a good consideration, & the creditor could prove for the amount due thereon.—*Re BROWNE, Ex p. MARTINGELL*, [1904] 2 K. B. 133; 73 L. J. K. B. 446; 90 L. T. 291; 52 W. R. 384; 20 T. L. R. 289; 48 Sol. Jo. 300; 11 Mans. 148.

Annotation:—*Consd.* Hyams v. Stuart King, [1908] 2 K. B. 696.

64. Agreement to refer to committee at Tattersall's.]—Pltf., a bookmaker, made bets with deft., & a dispute arising as to the amount owing to pltf., the parties agreed to go before the Committee of Tattersall's, & deft. further agreed that if the Committee decided against him he would send pltf. a cheque for the amount found due. The Committee decided that £37 11s. 3d. was due from deft. to pltf. As deft. did not pay this amount pltf. sued him to recover same. At the trial deft. set up the Gaming Acts:—*Held*: upon the facts there was a new promise to pay by deft. founded upon a fresh consideration which was sufficient to prevent the operation of the Gaming Acts; & therefore pltf. was entitled to recover.—*WHITEMAN v. NEWBY* (1912), 28 T. L. R. 240, D. C.

65. — Forbearance to sue.]—Deft., who had lost £120 to pltf. in respect of bets on horse races, was written to by pltf.'s solr. asking for payment of the amount. Deft. thereupon offered to pay "£30 within a fortnight & £30 within a month in full satisfaction of the account." This offer was accepted. Pltf. knew that the original claim was unenforceable, & there was no evidence that he threatened to sue or to take any step to the detriment of deft. In an action to recover the £60:—*Held*: there was no consideration for the promise to pay that sum, & therefore, the action would not lie.—*CHAPMAN v. FRANKLIN* (1905), 21 T. L. R. 515, D. C.

Annotations:—*Reid.* Cooper v. Willis (1906), 22 T. L. R. 582; Goodson v. Grierson, [1908] 1 K. B. 761.

66. —]—Defts. invited persons to contribute sums to a "trust," & with the sums so subscribed they were to operate in certain stocks for a period of ninety days; if at the end of that time a profit was made on the stocks the profit would be divided, less 10 per cent., among the

subscribers; if no profit were made the subscribers would receive back their subscriptions in full. Pltf. subscribed £96 on these terms & was informed by defts. at the end of ninety days that no profit had been made, but that he would receive back the amount of his subscription by Aug. 31, 1910. Later, pltf. was asked by deft. to send an account of the amount due to him to S., an accountant who was inquiring into the accounts & would deal with them. Pltf. applied to S. for the amount due; S. replied that it would take a considerable time to deal with the accounts & that he could not then comply with pltf.'s request. The money not having been paid pltf. sued to recover the amount:—*Held*: (1) the contract entered into by pltf. was a wagering contract, & therefore was not enforceable; (2) there was no evidence of a fresh promise by defts. upon good consideration to repay the money.—*WHITELAW v. MCKINLEY, ALEXANDER & SONS* (1910), 27 T. L. R. 49.

67. — Apprehension of being declared defaulter.]—In Oct. 1899, the bkpt., an outside broker, lost a bet to a member of the Stock Exchange, & gave a bill for the amount due in Mar. 1900. The bkpt. was unable to meet the bill at maturity, & feared that if his position became known some large accounts which he had open on the Stock Exchange would be closed. He confided his fears to his creditor, & asked for his forbearance, in consideration for which he accepted a new bill, at two months, dated Mar. 17, 1900. He failed to meet the new bill, & the creditor recovered judgment upon it, but took no further steps until the debtor became bkpt., when he presented a proof against the estate:—*Held*: the debt was a gaming debt & not provable, for there was no evidence of any fresh consideration to take the second bill out of the operation of the Gaming Acts. To constitute such consideration there must be evidence of threats on the part of the creditor to do some lawful act. The mere fact that debtor fears the consequences of not paying the debt is insufficient.—*Re COMAR, Ex p. RONALD* (1908), 52 Sol. Jo. 642, C. A.

68. — — — —]—To an action commenced by a bookmaker by specially indorsed writ for a sum alleged to be due on a stated account, deft. pleaded in his defence that the debts were gambling debts, & this was admitted by pltf. by his answer to interrogatories, but pltf. stated by his answer, as other considerations for deft.'s indebtedness, the pltf.'s forbearance to sue & his giving time to deft. at the latter's request. Deft. applied to have the action dismissed as being frivolous & vexatious:—*Held*: the forbearance to sue at deft.'s request, in view of the possible apprehension of deft. of the consequences of not paying the gambling debt, which it would be competent to the pltf., consistently with the pleadings, to allege & prove, might constitute a new & valid consideration for the debt, & the action ought not to be summarily dismissed.—*GOODSON v. GRIERSON*, [1908] 1 K. B. 761; 77 L. J. K. B. 507; 98 L. T. 740; 24 T. L. R. 364, C. A.

Annotation:—*Consd.* Hyams v. Stuart King, [1908] 2 K. B. 696.

69. — — — —]—In an action by a bookmaker to recover a sum of money, deft.

respect of betting transactions:—*Held*: the agreement to compromise failed for want of consideration. To

make an agreement for a compromise a good contract there must be a reasonable claim *bona fide* intended to be

pursued.—*O'DONNELL v. O'SULLIVAN* (1915), 49 I. L. T. 253.—*IR.*

pleaded that the claim was in respect of betting transactions. Pltf. admitted that the amount sued for was wholly in respect of bets upon horse races made by pltf. with deft., but relied on the fact that in compliance with a request contained in a letter written by deft. he forbore to sue deft., & had given him time to get the money, relying on deft.'s promise that if this was agreed to he would not only pay the debt in full, but interest up to payment:—*Held*: pltf. having shown that there was a good consideration for the payment of the debt, apart from the original consideration, he was entitled to judgment.—*GOODSON v. GRIERSON* (1908), 52 Sol. Jo. 599.

70. —.]—Pltf. was a bookmaker, & as the result of betting transactions deft. owed him £138. Pltf. instructed his solr. to proceed against deft., whereupon deft. wrote saying he was trying to carry out a financial arrangement & as soon as it was completed he would attend to pltf.'s claim. He asked pltf. to withdraw the matter from the hands of his solr., as if anything leaked out to show that he had lost money, & had been gambling, the financial arrangements would become impossible. Pltf. thereupon instructed his solr. not to proceed at that time against deft., but the debt not having been paid, pltf. subsequently sued deft., contending that the letter constituted a valid & binding contract to pay:—*Held*: the action failed, as on the facts there was a mere request for & obtaining further time for the payment of a debt which pltf. could not in any circumstances have enforced.—*HYAMS v. COOMBS* (1912), 28 T. L. R. 413.

D. Recovery back of Money paid in respect of Wager.

71. Whether recoverable after wager decided.]—Bond for money won at play & part of it paid. Ct. ordered the money to be repaid, & relieved against the bond for the remainder.

By Gaming Act, 1710 (c. 19), all securities for money won at play are made void (*LORD HARDWICKE, C.*).—*RAWDEN v. SHADWELL* (1755), Amb. 269; 27 E. R. 179, L. C.

Annotation:—*Reid. Smith v. Bond* (1843), 11 M. & W. 549.

72. —.]—Money fairly lost at play cannot be recovered back in an action of debt for money had & received not founded on the statute.—*THISTLEWOOD v. CRACROFT* (1813), 1 M. & S. 500; 105 E. R. 187.

Annotations:—*Reid. Hodson v. Terrill* (1833), 3 Tyr. 929; *Hyams v. Stuart King*, [1908] 2 K. B. 696.

See, now, Gaming Act, 1892 (c. 9), s. 1.

73. Recoverable before wager decided.]—A. in consideration of £200 paid by B. gave a bond for the payment of an annuity to the latter of one hundred guineas, until the hop-duties should amount to a certain sum. Before this event had taken place A. brought an action to recover back

the £200 of B.:—*Held*: the action was maintainable.—*TAPPENDEN v. RANDALL* (1801), 2 Bos. & P. 467; 126 E. R. 1388.

Annotations:—*Consd. Aubert v. Walsh* (1810), 3 Taunt. 277. *Reid. Hermann v. Charlesworth*, [1905] 2 K. B. 123. *Mentd. Herman v. Jeuchner* (1885), 15 Q. B. D. 561; *Harse v. Pearl Life Assoc.* (1903), 72 L. J. K. B. 638; *Tingley v. Müller*, [1917] 2 Ch. 144.

Recovery of money paid to stakeholder.]—*See* Sub-sect. 2, B., *post*.

Rights of principal & agent.]—*See* Sect. 4, *post*.

SUB-SECT. 2.—AGAINST STAKEHOLDER.

A. Position of Stakeholder.

74. Agent of each depositor—To pay deposit to winner—Until authority revoked.]—Pltf. & W. deposited each £500 with deft., on an agreement that if W., on or before Mar. 15, 1870, proved the convexity or curvature to & fro of the surface of any canal, river, or lake, by actual measurement & demonstration, to the satisfaction of deft., W. should receive the two sums deposited; but if W. failed in doing this, the two sums were to be paid to pltf. Deft. decided in favour of W.: to this decision pltf. objected, & before deft. paid over the money to W. demanded the return of his £500 deposited. Deft., nevertheless, paid both sums to W., & pltf. brought an action to recover his deposit:—*Held*: the agreement was a wager; but, although Gaming Act, 1845 (c. 109), s. 18, which makes all contracts by way of wagering null & void, enacts that no action shall be brought to recover any sum of money alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event of any wager, yet, on the authority of decided cases, that did not apply to the recovery of the sum deposited; &, therefore, pltf. having demanded his deposit back before it had been paid over by deft., he was entitled to judgment.

We cannot concur that a stakeholder is the agent of both parties, or rather their trustee. It may be true that he is the trustee of both parties in a certain sense so that if the event comes off & the authority to pay over the money by the depositor be not revoked he may be bound to pay it over. But primarily he is the agent of the depositor & can deal with the money deposited so long only as his authority subsists (*COCKBURN, C.J.*).—*HAMPDEN v. WALSH* (1876), 1 Q. B. D. 189; 45 L. J. Q. B. 238; 33 L. T. 852; 24 W. R. 607.

Annotations:—*Consd. Diggle v. Higgs* (1877), 2 Ex. D. 422; *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697. *Distd. Beavor v. Marler* (1898), 14 T. L. R. 289. *Consd. Re Crommire, Ex p. Waud*, [1898] 2 Q. B. 333. *Reid. Trimble v. Hill* (1879), 5 App. Cas. 342; *Read v. Anderson* (1882), 10 Q. B. D. 100; *Strachan v. Universal Stock Exchange*, [1895] 2 Q. B. 329; *Burge v. Ashley & Smith*, [1900] 1 Q. B. 744. *Mentd. Re Howell, Thomas Jaquess v. Thomas* (1894), 70 L. T. 567.

Revocation of authority.]—*See* Sub-sect. 2, D., *post*.

drawer of the cheques to the indorsee thereof, & pltf. was entitled to recover.—*LYNN v. BELL* (1876), 1 L. R. 10 C. L. 487.—*IR.*

PART I. SECT. 3, SUB-SECT. 2.—A.

q. Effect of statute.]—40 Vict. c. 31 (D), intitled an Act for the repression of betting & pool selling, does not forbid betting, & does not apply to stakeholders in any of the

PART I. SECT. 3, SUB-SECT. 1.—D.

71 i. Whether recoverable after wager decided.]—A deposit of money with a stakeholder to abide the result of a foot-race is not an illegal transaction & no action will lie against the winner of the bet, who has received the money from the stakeholder after the decision of the event.—*SEELY v. DALTON* (1904), 36 N. B. R. 442.—*CAN.*

p. Bets paid by cheque—Payment

by banker to indorsee.]—Pltf., in payment of bets on horse-races, gave deft. three cheques on pltf.'s bankers, payable to bearer on demand which were indorsed by deft., to third persons, to whom they were paid by pltf.'s bankers: in an action to recover back the sums so paid:—*Held*: the payment of the cheques by pltf.'s bankers—being a payment by his direction, on his account, & in discharge of his liability—was a payment by the

Sect. 3.—Rights of parties to contract: Sub-sect. 2, A. & B. (a) & (b).]

75. May not waive conditions.]—(1) If a race be advertised to take place under certain conditions, the stakeholder cannot waive any of the conditions, without the consent of the whole of the subscribers.

(2) If pltf.'s horse was disqualified, as not coming within the description of horses that were to run, he cannot recover back his original share of the stake, if he was aware of the disqualification, & was guilty of a misrepresentation.—*WELLER v. DEAKINS* (1827), 2 C. & P. 618, N. P.

76. May not sue for unpaid stakes.]—(1) The clerk of the course at a race cannot set off a claim of an unpaid stake due from pltf. on one race against a stake of another race won by pltf.'s horse.

(2) The clerk of the course at a race cannot bring actions for unpaid stakes.—*CHARLTON v. HILL* (1831), 5 C. & P. 147, N. P.

77. May be a party to wager.]—Testator by his will bequeathed to his wife all his moneys, household furniture, plate, books, linen, wearing apparel, etc. & his residue to his wife for life, & after her death to his children. Testator had placed £3,000 with certain stakeholders to abide the event of a bet, & after his death it was repaid to his administratrix; & he held moneys for wagers, some of which were decided in his lifetime, but others not; all of which the administratrix paid:—*Held*: the payments made by the administratrix in respect of wagers decided in testator's lifetime were unauthorised, & could not be allowed against the estate, but those made in respect of wagers not so decided were good payments, those undecided wagers being illegal contracts which either party might determine, & which she, by payment, must be taken to have determined.—*MANNING v. PURCELL* (1855), 7 De G. M. & G. 55; 3 Eq. Rep. 387; 24 L. J. Ch. 522; 24 L. T. O. S. 317; 3 W. R. 273; 44 E. R. 21, L. J.

Annotations:—*Apld.* *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697. *Refd.* *Reggio v. Steven* (1888), 4 T. L. R. 326; *Re Cronmire, Ex p. Waud*, [1898] 2 Q. B. 383; *Ward v. Fry* (1901), 85 L. T. 394. *Mentd.* *Pellow v. Horford* (1856), 25 L. J. Ch. 352; *Langdale v. Whitfield* (1858), 4 K. & J. 426; *Stein v. Ritherdon* (1868), 37 L. J. Ch. 369; *Prichard v. Prichard* (1870), L. R. 11 Eq. 232; *Hopkins v. Abbott* (1875), L. R. 19 Eq. 222; *Re Rowson, Field v. White* (1885), 52 L. T. 825; *Re Owen, Peat v. Owen* (1898), 78 L. T. 643; *Re Seton-Smith, Burnand v. Waite*, [1902] 1 Ch. 717; *Re Glendinning, Steel v. Glendinning* (1916), 88 L. J. Ch. 87; *Houston v. Burns*, [1918] A. C. 337; *Re Battle-Wrightson, Cecil v. Battle-Wrightson*, [1920] 2 Ch. 330.

78. —.]—Gaming Act, 1845 (c. 109), s. 18,

three cases mentioned in s. 2.—*R. v. DILLON* (1884), 10 P. R. 352.—*CAN.*

r. — *Territorial limit.*—*R. S. C.*, c. 159, s. 9, does not extend to the result of any election, race, contest, etc., to take place outside of Canada.—*R. v. SMILEY* (1892), 22 O. R. 686.—*CAN.*

PART I. SECT. 3, SUB-SECT. 2.—B. (a).

79 i. Deposit recoverable.]—If a stakeholder holds money deposited with him in respect of an illegal contract at the time of notice of revocation of the contract is served upon him, the appor. for the return of the money is entitled to its return.—*RETCHFORD v. ROBINSON* (1901), 3 W. A. L. R. 117.—*AUS.*

79 ii. —.]—A deposit of money

with a stakeholder in this province, to abide the result of a horse-race in Nova Scotia, is not an illegal transaction, & may be recovered back if the race is not run.—*KINNEY v. STUBBS* (1858), 10 N. B. R. (4 All.) 126.—*CAN.*

79 iii. —.]—*RIKABY v. SUTCLIFFE* (1862), 13 L. C. R. 320.—*CAN.*

79 iv. —.]—*MC SHANE v. JORDAN* (1868), 13 L. C. J. 61.—*CAN.*

79 v. —.]—An action was brought to recover \$100 placed by pltf. in the hands of deft. for the purpose of betting on a boat-race. The bet was made in pltf.'s name, but the money was contributed by several parties in small sums. Pltf. countermanded the bet, before deft. departed with the money, & there was no clear evidence to show that deft., as betting agent for

which provides that "no suit shall be brought or maintained for recovering any sum of money or valuable thing which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," applies to deposits in the hands of one of the parties to the wager as well as deposits in the hands of third persons. Pltf., having entered into gambling transactions with defts. in respect of differences upon pretended purchases & sales of stocks & shares, deposited with defts. £3,000 in cash as security for any losses which should appear on the accounts between them to have been sustained by him. The £3,000 were from time to time appropriated by defts. in payment of pltf.'s losses. The deposit having been exhausted, pltf. closed his account with defts. & commenced an action to recover the £3,000:—*Held*: the events having happened, to abide which the £3,000 had been deposited, & the money having been appropriated by defts. before there was any repudiation of the transactions by pltf., he was precluded by Gaming Act, 1845 (c. 109), s. 18, from maintaining the action.—*STRACHAN v. UNIVERSAL STOCK EXCHANGE* (No. 2), [1895] 2 Q. B. 697; 65 L. J. Q. B. 178; 73 L. T. 492; 59 J. P. 789; 44 W. R. 90; 12 T. L. R. 38; 40 Sol. Jo. 65, C. A.

Annotations:—*Consd.* *Re Cronmire, Ex p. Waud*, [1898] 2 Q. B. 383; *Burge v. Ashley & Smith*, [1900] 1 Q. B. 744. *Refd.* *Dowson v. Macfarlane* (1899), 81 L. T. 67.

Powers & duties of stewards.]—See Part V, Sect. 3, *post*.

B. Recovery of Deposit.

(a) Demand before Decision of Wager.

79. Deposit recoverable.]—Money deposited upon an illegal wager, laid on a future event, may be recovered back again before the period of time has elapsed, on the expiration of which the decision of the wager depends.—*AUBERT v. WALSH* (1810), 3 Taunt. 277; 128 E. R. 110.

Annotation:—*Refd.* *Hastelow v. Jackson* (1828), 8 B. & C. 221.

80. —.]—Pltf. having paid a premium on an illegal bet made with deft. on a future event, before the risk was determined, claimed to be allowed to prove as a debt under the commission of bkpt. which had afterwards issued against deft., the amount of the premium, but was refused by the comrs. The commission being afterwards superseded, pltf. after the risk determined sued the bkpt. to recover back the premium without further notice:—*Held*: the claim made upon the assignees was sufficient notice to deft. of pltf.'s intention to rescind the illegal contract.—*BUSK v. WALSH* (1812), 4 Taunt. 290; 128 E. R. 340.

pltf., had become bound before the bet was so countermanded:—*Held*: pltf. was entitled to recover back, not the whole amount, but only his own share of the money deposited.—*ROSS v. HARRINGTON* (1882), 15 N. S. R. (3 R. & G.) 325; 3 C. L. T. 44.—*CAN.*

79 vi. —.]—*D. & H.* agreed to match a colt owned by *D.* against a colt owned by *S.* Under the agreement the stakes were deposited with *P.*, who, default being made by *D.*, handed over the amount of *D.*'s deposit to *H.*, although *D.* had previously demanded it back. *D.* now brought this action against *H. & P.* to recover the amount of the deposit:—*Held*: inasmuch as *P.* should have handed back *D.*'s deposit on demand made before disposal, *D.* could now recover amount of the same from *P.*—*DAVIS v. HEWITT* (1885), 9 O. R. 435.—*CAN.*

81. —.]—(1) *Semble*: a wager between the proprietors of two carriages for the conveyance of passengers for hire, that a given person should go by one of these carriages, & no other, is illegal. (2) The wager having been deposited in the hands of the stakeholder, either party having demanded his deposit before the wager was won, was entitled to have it returned to him, & on refusal to maintain an action against the stakeholder.—*ELTHAM v. KINGSMAN* (1818), 1 B. & Ald. 683; 106 E. R. 251.

Annotations:—*As to* (1) *Refd.* *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Rodriguez v. Speyer*, [1919] A. C. 59. *As to* (2) *Consd.* *Hampden v. Walsh* (1876), 1 Q. B. D. 189. *Refd.* *Hodson v. Terrill* (1833), 3 Tyr. 929; *Marryat v. Broderick* (1837), 2 M. & W. 369.

82. —.]—Gaming Act, 1845 (c. 109), s. 18, which avoids contracts by way of gaming or wagering, & prohibits the maintenance of actions for the recovery of money won upon any wager, or deposited in the hands of a stakeholder to abide the event of any wager, does not preclude a party who repudiates the wager before the event is ascertained, from recovering back from the stakeholder the amount of his deposit.

Semble: a defence arising out of this statute must be pleaded specially.—*VARNEY v. HICKMAN* (1847), 5 C. B. 271; 5 Dow. & L. 364; 17 L. J. C. P. 102; 10 L. T. O. S. 248; 12 J. P. 38; 136 E. R. 881.

Annotations:—*Folld.* *Hampden v. Walsh* (1876), 1 Q. B. D. 189. *Consd.* *Re Cronmire, Ex p. Waud*, [1898] 2 Q. B. 383. *Refd.* *Manning v. Purcell* (1855), 7 De G. M. & G. 55; *Diggle v. Higgs* (1877), 2 Ex. D. 422; *Wilson v. Cole* (1877), 36 L. J. 703; *Strachan v. Universal Stock Exchange*, [1895] 2 Q. B. 329; *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697; *Burge v. Ashley & Smith*, [1900] 1 Q. B. 744.

83. —.]—A party who repudiates a wager before the result of it is ascertained, is not precluded from recovering his deposit from the stakeholder by Gaming Act, 1845 (c. 109), s. 18, which avoids contracts by way of gaming or wagering, & prohibits the maintenance of actions for the recovery of money won upon any wager, or deposited in the hands of a stakeholder, to abide the event of any wager.—*MARTIN v. HEWSON* (1855), 10 Exch. 737; 24 L. J. Ex. 174; 24 L. T. O. S. 244; 1 Jur. N. S. 214; 156 E. R. 637.

Annotations:—*Folld.* *Hampden v. Walsh* (1876), 1 Q. B. D. 189. *Refd.* *Diggle v. Higgs* (1877), 2 Ex. D. 422.

84. —.]—*TRIMBLE v. HILL*, No. 53, *ante*.

85. — Race not run according to terms.]—Pltf. & H. agreed, in writing, to run a match between two horses, on a specified day, with a specified person as judge, & a specified person as starter. Pltf. & H. had each deposited a stake in the hands of deft., the whole to be paid to the winner; & the agreement made "the money to be given up by the decision of the judge." On the day fixed, pltf. & H. were present, but the starter failed to appear. H. refused, on that ground, to run the race. The judge held that the objection was not material; pltf.'s horse was trotted over the course, & the judge declared pltf. the winner. Pltf., after the day fixed for the race, demanded the stakes from deft., who refused to hand them over. In an action by pltf. to recover from deft. the whole of the stakes:—*Held*: (1) as the race was never run according to the conditions agreed

upon, it must be taken not to have been run at all; therefore the judge's jurisdiction never arose, & his decision was invalid; (2) pltf. was not entitled to recover the whole of the stakes; but, as the race had not, & now could not, be run upon the specified terms, pltf. & H. were each entitled to recover back his own stake from deft., as money had & received; (3) even if demand of that amount were necessary before action, the demand by pltf. of the larger sum was a demand of the less.—*CARR v. MARTINSON* (1859), 1 E. & E. 456; 28 L. J. Q. B. 126; 32 L. T. O. S. 273; 5 Jur. N. S. 788; 7 W. R. 293; 120 E. R. 980.

Annotations:—*As to* (1) *Folld.* *Sadler v. Smith* (1869), L. R. 4 Q. B. 214. *Generally, Refd.* *Dines v. Wolfe* (1869), L. R. 2 P. C. 280.

86. —.]—It was agreed to run a foot-race for £25. The parties to the agreement met by appointment to run the race. Pltf. refused to run in consequence of the hostile disposition of the spectators. For same reason the referee refused to act. Pltf.'s opponent ran over the course, & pltf. did the same, under protest to save his stake. The stakeholder paid over the stake to pltf.'s opponent. Pltf. brought an action against the stakeholder to recover his deposit:—*Held*: a party to a race is entitled to demand his deposit from the stakeholder within a reasonable period if the race be not run at the time appointed.—*SOUTHBY v. SMITH* (1867), 17 L. T. 323, N. P.

Recovery of security or cover.]—See Sub-sect. 2, E., *post*.

(b) Demand before Payment to Winner.

87. Whether deposit recoverable.]—If a wager be deposited with a stakeholder on the event of a battle to be fought by the parties laying the wager, & it be not paid over, though the battle be fought, either party may recover from the stakeholder the sum deposited by him.—*COTTON v. THURLAND* (1793), 5 Term Rep. 405; 101 E. R. 227.

Annotations:—*Folld.* *Smith v. Bickmore* (1812), 4 Taunt. 474; *Bate v. Cartwright* (1819), 7 Price, 540. *Refd.* *Lacausade v. White* (1798), 7 Term Rep. 535; *Hastelow v. Jackson* (1828), 8 B. & C. 221; *Hampden v. Walsh* (1876), 1 Q. B. D. 189. *Mentd.* *Taylor v. Lendey* (1807), 9 East, 49; *Clayton v. Dilly* (1811), 4 Taunt. 165.

88. —.]—A person who deposits in the hands of a stakeholder a sum as a wager on the event of a boxing-match between himself & another, may, after committing a breach of the peace by fighting, recover back his deposit from the stakeholder, having demanded it before it was paid over.—*SMITH v. BICKMORE* (1812), 4 Taunt. 474; 128 E. R. 413.

Annotations:—*Refd.* *Hastelow v. Jackson* (1828), 8 B. & C. 221; *Hampden v. Walsh* (1876), 1 Q. B. D. 189.

89. —.]—An action cannot be maintained to recover back money deposited with a stakeholder upon a wager after the wager has been determined against pltf.—*BRANDON v. HIBBERT* (1814), 4 Camp. 37, N. P.

90. —.]—The party who lays a wager on the identity of a person with whom he has conversed cannot set it aside on the ground that at the time when it was laid the opposite party had received certain information that he was mistaken, & it is too late for him on discovering his mistake

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to countermand the authority of the stakeholder to pay over the money betted.—**BLAND v. COLLETT** (1815), 4 Camp. 157, N. P.

91. — Result disputed.]—Money deposited with a stakeholder, as a bet on the event of a foot race, may be recovered from him by either party, in an action for money had & received after the race has been run, & the parties differ as to the winner. A nonsuit, on the ground that such actions are an idle waste of the time, & hindrance of the business of the cts. of law, set aside.—**BATE v. CARTWRIGHT** (1819), 7 Price, 540; 140 E. R. 1054.

Annotations:—*Refd.* Hodson v. Terrill (1833), 1 Cr. & M. 797; *Marryatt v. Broderick* (1837), 6 L. J. Ex. 113; *Emery v. Richards* (1845), 14 M. & W. 728; *Hampden v. Walsh* (1876), 1 Q. B. D. 189.

92. —.]—**ROBINSON v. MEARNS**, No. 37, *ante*.

93. — Horse disqualified to knowledge of plaintiff.]—**WELLER v. DEAKINS**, No. 75, *ante*.

94. —.]—A. entered his horse for a race & paid the subscription money; the horse won, but it turned out that by the rules of the race he was not entitled to run. Notice of the objection had been given to A. before the race:—*Held*: he was not entitled to recover his subscription money.—**GOLDSMITH v. MARTIN** (1842), 4 Man. & G. 5; 4 Scott, N. R. 620; 11 L. J. C. P. 201; 134 E. R. 2.

95. — After claim for whole stake.]—Where A. & B. deposited money in the hands of a stakeholder to abide the event of a boxing match between them; & after the battle A. claimed the whole sum from the stakeholder & threatened him with an action if he paid it over to B., which he nevertheless did, by direction of the umpire:—*Held*: A. was entitled to recover from him his own stake; as money had & received to his use.—**HASTLELOW v. JACKSON** (1828), 8 B. & C. 221; 2 Man. & Ry. K. B. 209; 6 L. J. O. S. K. B. 318; 108 E. R. 1026.

Annotations:—*Fold.* *Mearing v. Hellings* (1845), 14 M. & W. 711. *Consd.* *Hampden v. Walsh* (1876), 1 Q. B. D. 189; *Barclay v. Pearson*, [1893] 2 Ch. 154. *Refd.* *Hodson v. Terrill* (1833), 1 Cr. & M. 797; *Bone v. Ekless* (1860), 5 H. & N. 925; *Taylor v. Bowers* (1876), 1 Q. B. D. 291; *Diggle v. Higgs* (1877), 37 L. T. 27; *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697; *Burge v. Ashley & Smith*, [1900] 1 Q. B. 744; *Hermann v. Charlesworth*, [1905] 2 K. B. 123.

96. —.]—*Pltf.*'s particulars, in an action for money had & received, stated, that the action was brought to recover "the sum of £13 6s., for money received by deft. as treasurer of a club, for the use of *pltf.* as drawer of the second horse in the Derby stakes, according to the rules of the club." *Deft.* pleaded, that the money was subscribed to an illegal lottery:—*Held*: *pltf.* could not recover the £13 6s. nor under these particulars, his own stake of £2. *Qu.*: whether, where a party claims, as winner, the whole of the stakes deposited on an illegal wager, he can recover back his own stake as money received to his use by the stakeholder.—**MEARING v. HELLINGS** (1845), 14 M. & W. 711; 15 L. J. Ex. 168; 153 E. R. 661.

Annotations:—*Refd.* *Hampden v. Walsh* (1876), 1 Q. B. D. 189. *Refd.* *R. v. Hobbs* (1880), 13 Q. B. D. 100; 73 L. J.]

91 l. — Result disputed.]—Where, according to the rule of a race the decision of the stewards was to be final, & *pltf.*'s horse won the first heat & came in first in the second, but, in

consequence of alleged foul riding, was adjudged by the stewards to have been distanced, & another horse was pronounced the winner:—*Held*: *pltf.* could not contest such decision in an

97. —.]—**CARR v. MARTINSON**, No. 85, *ante*.

98. —.]—Where the rules of certain races provided that all disputes should be settled by the stewards:—*Held*: (1) *pltf.* could not recover the stakes upon an award in his favour by one steward, although the other had stated he would acquiesce in whatever his colleague did. To make the award of one steward available, there must be clear evidence that both parties, & also the stakeholder, consented to abide by his sole decision; *Semble*: (2) where a horse race is legal, a party cannot recover back his stake after the race has been run, though the stakeholder has not paid over the money: at all events, he must demand it before the race is run.—**MARRYAT v. BRODERICK** (1837), 2 M. & W. 369; *Murp. & H.* 96; 6 L. J. Ex. 113; 1 Jur. 242; 150 E. R. 799.

Annotation:—*Refd.* *Sadler v. Smith* (1869), L. R. 4 Q. B. 214.

99. — Failure to comply with terms of wager.]—Where money has been deposited with a stakeholder to abide the event of a horse race, for £25 a side; one condition being, that either party failing to comply is to forfeit the money down; the party refusing to comply cannot, by giving notice that he has rescinded the contract, entitle himself to recover the stake he has paid.—**CHALLAND v. BRAY** (1842), 1 Dowl. N. S. 783; 11 L. J. Q. B. 204; 6 Jur. 626.

Annotation:—*Refd.* *Bentlnck v. Connop* (1844), 5 Q. B. 693.

100. —.]—Before the running of a horse race, several persons, by agreement, subscribed into the hands of a secretary, & deposited with a treasurer, 15s. each; the names of the subscribers were then written respectively on cards: & the names of the horses intended to run were written in like manner on other cards; each set of cards was then placed in a box, & the cards drawn out alternately as chance directed; each subscriber was considered as holding that name of a horse which came out next before the drawing of his own name: & the holders became entitled to prizes:—*Held*: an illegal game. *Qu.*: whether it would have been affected by Gaming Act, 1845 (c. 109).

If it be pleaded, to an action for money had & received, that the money was staked on an illegal game, *pltf.* must show in answer that he demanded back the stake before it was paid over; the mere bringing an action before payment over not being a sufficient demand (**LORD DENMAN, C.J.**).—**GATTY v. FIELD** (1846), 9 Q. B. 431; 15 L. J. Q. B. 408; 10 Jur. 980; 115 E. R. 1337.

Annotations:—*Refd.* *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697; *Hardwick v. Lane* (1903), 73 L. J. K. B. 96. *Mentd.* *Espin v. Curlew* (1847), 8 L. T. O. S. 389; *Miller v. Haigh* (1848), 18 L. J. Ex. 487; *Miller v. Hay* (1848), 3 Exch. 14; *Sturge v. Rahm* (1849), 4 Exch. 646; *Phillips v. Surridge* (1850), 9 C. B. 743; *R. v. Dale* (1851), 20 L. J. M. C. 240.

101. —.]—**HAMPDEN v. WALSH**, No. 74, *ante*.

102. —.]—**BATSON v. NEWMAN**, No. 51, *ante*.

103. —.]—**DIGGLE v. HIGGS**, No. 52, *ante*.

104. —.]—**BARCLAY v. PEARSON**, No. 502, *post*.

105. — Gaming Act, 1892 (c. 9).]—Above Act, s. 1, enacts that any promise, express or implied, to pay any person any sum of money

action for money had & received against the treasurer of the race, who had not paid over the purse.—**GORHAM v. BOULTON** (1842), 6 O. S. 321.—**CAN.**

paid by him under or in respect of any contract or agreement rendered null & void by Gaming Act, 1845 (c. 109), shall be null & void, & no action shall be brought or maintained to recover any such sum of money:—*Held*: money deposited by pltf. with deft. as stake holder to abide the result of a race between pltf. & a third party was not money paid under or in respect of a wagering contract within above Act, & pltf., having demanded his deposit back from deft. before it had been paid over by him to the third party, was entitled to maintain an action against deft. for its recovery.—*O'SULLIVAN v. THOMAS*, [1895] 1 Q. B. 698; 64 L. J. Q. B. 398; 72 L. T. 285; 59 J. P. 134; 43 W. R. 269; 11 T. L. R. 225; 39 Sol. Jo. 266; 15 R. 253, D. C.

Annotations:—*Apprvd.* Burge v. Ashley & Smith, [1900] 1 Q. B. 744. *Consd.* Davis v. Stoddart (1902), 50 W. R. 397. *Refd.* Saffery v. Mayer, [1901] 1 K. B. 11.

106. —[Sect. 1 of above Act does not prevent the recovery by the depositor from the stakeholder of money deposited to abide the event of a wager.—*BURGE v. ASHLEY & SMITH, LTD.*, [1900] 1 Q. B. 744; 69 L. J. Q. B. 538; 82 L. T. 518; 48 W. R. 438; 16 T. L. R. 263; 44 Sol. Jo. 311, C. A.

Annotations:—*Refd.* Shoolbred v. Roberts (1900), 83 L. T. 37; Saffery v. Mayer, [1901] 1 K. B. 11.

107. —*Bankruptcy of depositor.*—*Deft.*, an undischarged bkpt., & another person, each deposited £100 with a stakeholder to abide the event of a wager, the whole to be paid to the winner. *Deft.* won, & both he & pltf., the trustee in bkpcy., claimed the £200 from the stakeholder. The stakeholder paid the £200 into ct., & an interpleader issue was directed to determine whether pltf. or deft. was entitled to the £200:—*Held*: (1) the trustee in bkpcy. was entitled to the £100, which had been deposited by the bkpt. & demanded back from the stakeholder; (2) the money having been paid into ct. by the stakeholder, & the only question being whether the bkpt. or his trustee was entitled to the money, the trustee was entitled to the whole sum of £200.—*SHOOLBRED v. ROBERTS*, [1900] 2 Q. B. 497; 69 L. J. Q. B. 800; 83 L. T. 37; 16 T. L. R. 486; 7 Mans. 388, C. A.

Annotation:—*Generally*, *Mentd.* Affleck v. Hammond [1912] 3 K. B. 162.

108. —*Stakes deposited with owner of betting house*—*Betting Act, 1853 (c. 119), s. 5*—*Effect of Gaming Act, 1892 (c. 9).*—(1) Competitions on the result of horse races & games were advertised in, & competition coupons were issued

with, a newspaper belonging to deft., the business of which was carried on at a house in London of which he was the occupier; but the money & coupons of competitors had to be & were sent to an office abroad; the money eventually coming to the hands of deft.:—*Held*: the house was kept for the purpose of money being received by deft., contrary to Betting Act, 1853 (c. 119), s. 5.

(2) Gaming Act, 1892 (c. 9), has not repealed Betting Act, 1853 (c. 119), s. 5, which enables a person who has paid money to the keeper of a betting house to recover same as money had & received to his use.—*LENNOX v. STODDART, DAVIS v. STODDART*, [1902] 2 K. B. 21; 71 L. J. K. B. 747; 87 L. T. 283; 66 J. P. 469; 18 T. L. R. 585, C. A.

Annotations:—*As to* (1) *Consd.* R. v. Thompson & Thompson (1924), 18 Cr. App. Rep. 31. *Refd.* Ashley & Smith v. Hawke (1903), 19 T. L. R. 581; Hawke v. Hulton (1905), 22 T. L. R. 169.

109. —[*Deft.* used a house in London for the purpose of correspondence relating to bets on horse races, & in receiving money in connection therewith. Pltf. placed a sum of money to deft.'s credit at his bank to be used by deft. for the purpose of making bets on behalf of pltf. Bets were from time to time made by deft., acting on the telegraphed instructions of the pltf., with varying results. Plaintiff sued to recover the amount of the deposit, & deft. alleged that the money had been used in executing betting commissions for pltf., & that pltf.'s losses had exhausted the deposit, & that he was not liable:—*Held*: Betting Act, 1853 (c. 119), s. 5, applied, & pltf. was entitled to recover.—*VOGT v. MORTIMER* (1906), 22 T. L. R. 763.

Recovery of security or cover.—*See Sub-sect. 2, E., post.*

(c) *Demand after Payment to Winner.*

110. Deposit not recoverable.—Where money deposited upon an illegal wager has been paid over to the winner by the consent of the loser, the latter cannot afterwards maintain an action against the former to recover back his deposit.—*HOWSON v. HANCOCK* (1800), 8 Term Rep. 575; 101 E. R. 1555.

Annotations:—*Consd.* Aubert v. Walsh (1810), 3 Taunt. 277. *Expld.* Hastelow v. Jackson (1828), 8 B. & C. 221. *Refd.* Vanduyck v. Hewitt (1800), 1 East, 96. *Mentd.* Bromley v. Holland (1800), 5 Ves. 610; Kempson v. Saunders (1826), 12 Moore, C. P. 44.

111. Payment after notice not to pay—*Revocation*

PART I. SECT. 3, SUB-SECT. 2.— B. (c).

110 i. Deposit not recoverable.—R. S. C., c. 159, s. 9, provides that "every one who becomes the custodian or depositary of any money . . . staked, wagered or pledged upon the result of any political or municipal election . . . is guilty of a misdemeanour," & a sub-sect. says that "nothing in this section shall apply to . . . bets between individuals":—*Held*: after the election when the money has been paid to the winner of the bet, the loser cannot recover from the stakeholder the amount deposited by him, the parties being *in pari delicto* & the illegal act having been performed.—*WALSH v. TREBILCOCK* (1894), 23 S. C. R. 695.—*CAN.*

s. —*Forfeiture.*—In an action for £600, being money had & received, deft. pleaded that the money had been deposited by pltf. in deft.'s hands as a stakeholder, under an agreement

between pltf. & one R., to abide the event of a race to be run between two horses, owned by them respectively, R. depositing a still larger sum with deft. contingent on the same event, the total on both sides being £1,800; & it was also agreed that the balance of their stakes should be similarly deposited on a stated day; & that all deposits should be forfeited by either party failing to comply with that provision, or with any other portion of the contract. The plea then alleged that pltf. failed to make the last deposit, & refused to run the race, in consequence of which deft. paid over to R. the moneys previously deposited, in pursuance of the clause as to forfeiture:—*Held*: the plea was good.—*HOGAN v. CURTIS* (1867), 6 N. S. W. S. C. R. 276.—*AUS.*

111 i. Payment after notice not to pay—*Revocation of authority before payment.*—A boat-race was rowed for £200 a side, & deft. held the stakes.

The Umpire decided the race against pltf. on a foul. The day after the race deft. received a notice from pltf. in the following terms: "I hereby protest against your paying over the stakes for the race I rowed to-day with C. N." After the receipt of this protest deft. paid over the stakes to N.:—*Held*: the notice was a sufficient revocation of the stakeholder's authority to pay over pltf.'s money, & deft. was liable in an action to recover the amount of pltf.'s stake.—*MCLEAN v. HILL* (1890), 11 N. S. W. L. R. 64; 6 N. S. W. W. N. 133.—*AUS.*

111 ii. —[Pltf. & A. bet upon a horse-race, & deposited the money with deft. as stakeholder. The bet was illegal, as neither of the parties owned either of the horses, & they were not running for any other stake. A. won, & deft. paid over the money on his order, having been previously notified not to do so:—*Held*: pltf. might recover back the

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of authority before payment.]—HASTELOW v. JACKSON, No. 95, ante.

112. —.]—A match at cricket for £20 is within the meaning of Gaming Act, 1710 (c. 14), s. 2, & therefore illegal. An action for money had & received to recover back the sum deposited may be maintained against the stakeholder, who had paid over the money after notice not to do so.—**HODSON v. TERRILL (1833)**, 1 Cr. & M. 797; 3 Tyr. 929; 2 L. J. Ex. 282; 149 E. R. 621.

Annotations:—Consd. Barclay v. Pearson, [1893] 2 Ch. 154. **Reid.** Hampden v. Walsh (1876), 1 Q. B. D. 189.

Revocation of authority.]—See Sub-sect. 2, D., post.

113. —.]—BEEVOR v. MARLER (1898), 14 T. L. R. 289.

114. Payment under indemnity.]—Money deposited in the hands of a stakeholder on an illegal wager, may be recovered by the party making the deposit as money had & received, although the stakeholder has paid it over, if such payment over has been made under an indemnity.—**HOWSON v. HOUSEMAN (1828)**, 7 L. J. O. S. K. B. 26.

Recovery of security or cover.]—See Sub-sect. 2, E., post.

C. Recovery of Stakes.

See, now, Gaming Act, 1845 (c. 109), s. 18.

115. Common law rule.—Duty of stakeholder to pay stakes to winner.]—BAYNTON v. CHEEK (1652), Sty. 353; 82 E. R. 771.

116. —.]—A general *indebitatus assumpsit* will not lie on a wager to recover the money from the loser; but if the stakes be deposited, it lies by the winner against the stakeholder.—**WALKER v. WALKER (1698)**, Comb. 303; **HOLT, K. B. 328**; 5 Mod. Rep. 13; 12 Mod. Rep. 69, 258; 87 E. R. 490.

Annotations:—Reid. Morgan v. Jones (1830), 1 Cr. & J. 162; Moulis v. Owen, [1907] 1 K. B. 746.

117. —.]—Money deposited on a wager, in the hands of a stakeholder, becomes the

amount from deft. as money had & received.—**SHELDON v. LAW (1833)**, 3 O. S. 85.—CAN.

111 iii. —.]—ANDERSON v. GALBRAITH (1858), 16 U. C. R. 57.—CAN.

111 iv. —.]—BATTERSBY v. ODELL (1864), 23 U. C. R. 482.—CAN.

111 v. —.]—Where a contract is made to run a race, involving an infraction of law, & one of the depositors, being a party to the wager, notifies the stakeholder while the money deposited as a stake is in his hands & before the race is run, not to pay it over to the other party to the wager, the stakeholder in paying over the money does so in his own wrong, & is responsible for it to the party so notifying, or his personal representatives, who may bring an action to recover it.—**HYERSON v. DERBY (1875)**, 10 N. S. R. (1 R. & C.) 13.—CAN.

111 vi. —.]—Pltf. deposited a watch with deft. to abide the result of a bet on a Dominion election. On the morning of election day pltf. & the other party to the bet met & agreed to withdraw the bet & sent a message to deft. to that effect which deft.

received before handing over watch to the winner.—**Held**: the notice of withdrawal was in time, & deft. was liable to pltf. for the proved value of the watch.—**LOGUE v. MCCUSH (1888)**, 21 N. S. R. (9 R. & G.) 75.—CAN.

111 vii. —.]—Resp. had deposited money with applt. as stakeholder in respect of a wager on the result of the S. election. After the election resp. told applt. not to pay over the stake on account of there being irregularities alleged in connection with the election. Applt. promised resp. not to pay over the stakes until resp. returned from A. but on his return the latter found that the stakes had been paid over. In an action by resp. to recover the money so paid over:—**Held**: applt. held the stakes as resp.'s agent only, & the latter could give the former any direction he pleased with respect to the money even after the final result of the election had been ascertained.—**SHARP v. MORRISON, [1921] N. Z. L. R. 254.—N.Z.**

PART I. SECT. 3, SUB-SECT. 2.—C.

t. Whether action maintainable.—Illegal contract.]—Pltf. & D. G. entered

property of the winner the moment the wager is decided.—**TEMPLE v. WELDS (1715)**, 10 Mod. Rep. 315; 88 E. R. 744.

Annotation:—Mentd. Sadler v. Evans (1766), 4 Burr. 1984.

118. —.]—A stakeholder receiving country bank notes as money, & paying them over wrongfully to the original staker after he had lost the wager, is answerable to the winner in an action for money had & received to his use.—**PICKARD v. BANKES (1810)**, 13 East, 20; 104 E. R. 273.

Annotations:—Consd. M'Lachlan v. Evans (1827), 1 Y. & J. 380. **Mentd.** Spratt v. Hobhouse (1827), 4 Bing. 173.

119. After payment over under authority.]—GILL v. PIGOTT (1844), 4 L. T. O. S. 155.

120. —.]—Pltf. entered his horse for a steeple chase, one of the conditions being, that no groom or professional jockey would be allowed to ride; & another, that all disputes & other matters should be decided by the steward, whose decision should be final. Pltf. intended his horse to be ridden by one W., but, before the day of the race, was informed by the steward that he considered W. a professional jockey, & that the horse, if ridden by him, would be no horse in the race. Pltf. insisted that W. was qualified; & on the race day, notwithstanding a similar intimation from the steward to pltf. W. rode the horse, which came first. On the following day, the steward pronounced the second horse to be the winner, & by his directions the stakes were paid to the owner of that horse.—**Held**: the steward had decided the question within the meaning of the condition; that his decision was final, although it was not made after hearing both parties; & pltf. could not recover the stakes from the stakeholder.—**BENBOW v. JONES (1845)**, 14 M. & W. 193; 14 L. J. Ex. 257; 5 L. T. O. S. 201; 153 E. R. 445.

Annotations:—Reid. Carr v. Martinson (1859), 1 E. & E. 456; Dines v. Wolfe (1869), L. R. 2 P. C. 280; Sadler v. Smith (1869), L. R. 4 Q. B. 214.

121. Before payment over.—Gaming Act, 1845 (c. 109), s. 18.]—Action for money had & received to pltf.'s use. Plea, that the money sued for was money deposited in deft.'s hands to abide the event of a wager, & not as a subscription towards a plate, etc.; & that pltf. claimed as winner of the wager; & that pltf. did not repudiate the bet

into an agreement to trot a race on the W. Road, for the sum of \$50 a side, between pltf.'s horse & a horse owned by W. G. The money was deposited in deft.'s hands as stakeholder. In an action brought by pltf. to recover the stakes.—**Held**: the contract was tainted with illegality as being made in violation of the provisions of 5th lt. S. C. 48, s. 7, which makes it penal to drive a horse at full speed on the public street or highway of any town or village.—**DORAN v. CHAMBERS (1887)**, 20 N. S. R. (8 lt. & G.) 309; 9 C. L. T. 7.—CAN.

a. —.]—A. & B. deposited with C. the sum of £50 each, to abide the event of a certain horse-race. After the race had been run, A. claimed to be the winner, & as such, demanded the entire amount of the stakes from C.; & upon his refusal to comply with such demand, sued for the same as such winner, & also for money had & received. A verdict was found against pltf. on the ground of the race being illegal.—**M'ELWAIN v. MERCER (1858)**, 9 I. C. L. R. 13.—IR.

b. —.]—Held: no suit will lie for the recovery of money deposited with another on account of *satra* transactions.—**CHHANGA MAL v. SREO**

or claim back the money before the event happened; & had never repudiated the bet, nor claimed the money, otherwise than as the winner of the wager:—*Held*: a good plea under above sect. & *pltf.*, therefore, could not recover his money back.—*SAVAGE v. MADDER* (1867), 38 L. J. Ex. 178; 18 L. T. 600; 31 J. P. 519; 15 W. R. 910.

Annotation:—*Consd. Hampden v. Walsh* (1876), 1 Q. B. D. 189.

Recovery of deposit.—*See* Sub-sect. 2, B., *ante*.

D. Revocation of Stakeholder's Authority to pay.

122. What amounts to revocation—Death of depositor before decision.—*MANNING v. PURCELL*, No. 77, *ante*.

—**Demand of deposit before decision.**—*See* Sub-sect. 2, B. (a), *ante*.

—**Demand of deposit before payment to winner.**—*See* Sub-sect. 2, B. (b), *ante*.

—**Notice not to pay over.**—*See* Nos. 95, 112, *ante*.

E. Liability for Security or "Cover."

123. Necessity of appropriation by stakeholder.—*STRACHAN v. UNIVERSAL STOCK EXCHANGE* (No. 2), No. 78, *ante*.

124. —.]—(1) Gaming contracts for differences on sales & purchases of stocks entered into between resp. & the debtor having resulted in a profit to resp., resp. directed the debtor to use the profit for a *bond fide* purchase of stock, & the debtor thereupon sent a contract note to resp. to the effect that he had sold the stock to him & debited him with the price of the stock, stamp, & fees. The debtor died before the stock was delivered, & resp. claimed to prove against his estate for damages for the non-delivery of the stock:—*Held*: the transaction was not equivalent to a payment by the debtor to resp. of the price of the stock, & resp. was precluded by the Gaming Act, 1845 (c. 109), s. 18, from so proving.

(2) Resp. had deposited with the debtor money as cover to secure him against loss upon the gaming transactions. The money was never required or appropriated for that purpose, & the events in respect of which it was deposited had resulted in favour of resp.:—*Held*: resp. was entitled to prove for it against the estate of debtor.—*Re CRONMIRE, Ex p. WAUD*, [1898] 2 Q. B. 383; 67 L. J. Q. B. 620; 78 L. T. 483; 46 W. R. 679; 14 T. L. R. 377; 42 Sol. Jo. 468; 5 Mans. 30, C. A.

125. —.]—*Re DUNCAN* (1903), *Times*, Mar. 17, C. A.

PRASAD (1920), 1 L. R. 42 All. 449.—*IND.*

c. —.]—The prize at a racing meeting having been gained by a certain horse, the owner of the horse raised an action against the stakeholder for the amount of the stakes. Defender having admitted that pursuer's horse had gained the race, competency of the action sustained, repelling a plea that the action was incompetent, as brought to recover a gaming debt.—*CALDER v. STEVENS* (1871), 9 Macph. (Ct. of Sess.) 1074; 43 Sc. Jur. 543.—*SCOT.*

PART I. SECT. 3, SUB-SECT. 2.—D.

d. *What amounts to revocation*—

SUB-SECT. 3.—POWERS AND DUTIES OF STEWARDS.

See Part V., Sect. 3, *post*.

SUB-SECT. 4.—PLEADING.

See, generally, R. S. C., Ord. 19, r. 15; **PLEADING**

126. Omission to plead Gaming Acts—Duty of court.—In an action in the county ct. against a bookmaker to recover a sum of money won on a bet on a horse race, *deft.* did not plead the Gaming Acts, but raised a point upon the construction of one of the rules under which he betted. The county ct. judge gave judgment for *pltf.* Upon appeal by *deft.*:—*Held*: the ct. would of its own motion refuse the allow any process of law to be invoked for the purpose of enforcing the bet, & the proper course was to set aside the judgment giving no costs to either party.—*LUCKETT v. WOOD* (1908), 24 T. L. R. 617, D. C.

Annotations:—*Refd. Soc. Des Hôtels Réunis* (Soc. Anon.) v. Hawker (1913), 29 T. L. R. 578; *Cheshire v. Vaughan* (1920), 25 Com. Cas. 51.

127. —.]—*Pltfs.*, hotel keepers in France, obtained from *deft.*, a young Englishman of twenty-two years of age, who had been staying at *pltf's* hotel, an English cheque payable in England [for gambling debts] by a threat of a criminal proceedings in France if it was not given, & a suggestion that no such proceedings would be taken if the cheque were given:—*Held*: payment of the cheque could not in these circumstances be enforced in an English ct. If the ct. is satisfied that a transaction is illegal or unenforceable by statute, it must take the objection itself although the parties may not wish to raise the point.—*SOCIÉTÉ DES HÔTELS RÉUNIS (SOCIÉTÉ ANONYME) v. HAWKER* (1913), 29 T. L. R. 578; *on appeal* (1914), 30 T. L. R. 423, C. A.

128. Striking out statement of claim—Based on gambling transaction.—In an action to recover a sum of money *deft.*, before putting in a statement of defence, applied to strike out the statement of claim endorsed on the writ as disclosing no reasonable cause of action, & to dismiss the action as being frivolous & vexatious, & made an affidavit that the claim was in respect of bets made between him & *pltf.* *Pltf.* admitted that the transactions were gaming transactions:—*Held*: the action being one which was forbidden by the Gaming Acts, ought not to be allowed to proceed.—*KERSHAW v. SIEVIER* (1904), 21 T. L. R. 40, C. A.

129. Power of court to impose term not to plead Gaming Act—As condition for leave to defend.—The ct., in setting aside a judgment

Abandonment of contract.—In order to maintain an action to recover back, as money had & received to the use of the depositor, money deposited with a stakeholder, the depositor must have given notice before appropriation or payment over that he had abandoned the wagering contract & was no longer bound by it, & it is not sufficient merely to have given the stakeholder notice not to pay or appropriate, or that the depositor claims the money.—*BECHTELL v. NICHOLLS* (1904), 7 W. A. L. R. 83.—*AUS.*

PART I. SECT. 3, SUB-SECT. 4.

a. *Plea of Gaming Act—Requisites of*

good plea.—Where in an action for money received, *deft.* pleaded a plea under No. 265, s. 51, that the contract was by way of gaming or wagering:—*Held*: to render the plea a good one, it must negative every hypothesis which, consistently with the pleading, would tend to show that the contract was valid.—*MILLER v. HARRIS* (1870), 1 V. R. (Law) 91.—*AUS.*

1. *Action against stakeholder—For recovery of deposit.*—In an action for money had & received, *deft.* pleaded that the money sought to be recovered was deposited with *deft.* to abide an event on which a wager had been made, & that *pltf.* had not

Sect. 3.—Rights of parties to contract: Sub-sect. 4.
Sect. 4: Sub-sect. 1, A. & B.; sub-sect. 2.]

obtained through default by deft. in pleading & in allowing deft. to defend the action, has no power to impose upon him the condition that he shall not plead the Gaming Act.—*POOLEY v. O'CONNOR* (1912), 28 T. L. R. 460, C. A.

130. Plea of Gaming Act—Whether “good cause” for depriving defendant of costs.]—In an action tried with a jury the mere fact that the successful deft. has set up the Gaming Act as an answer to pltf.'s claim is not “good cause,” within the meaning of R. S. C., Ord. 65, r. 1, for depriving him of costs.—*GRANVILLE & Co. v. FIRTH* (1903), 72 L. J. K. B. 152; 88 L. T. 9; 19 T. L. R. 213, C. A.

Annotations:—*Mentd.* Civil Service Co-op. Soc. v. General Steam Navigation Co., [1903] 2 K. B. 756; *Edmund v. Martell* (1907), 24 T. L. R. 25; *Westgate v. Crowe*, [1908] 1 K. B. 24; *Dallimore v. Williams & Jesson* (1914), 30 T. L. R. 432; *Higgins v. Higgins*, [1916] 1 K. B. 640.

131. —.]—In an action for a sum due on a bet deft. pleaded the Gaming Act. On the case coming on for trial, pltf. admitted that, in view of the plea of the Gaming Act, he could not succeed, & he therefore consented to judgment for deft. Deft. applied for judgment with costs:—*Held*: the ct. had a discretion as to awarding costs, & in the circumstances would refuse to award them in favour of deft.—*LEVY v. JOHNSON* (1913), 29 T. L. R. 507.

— In county courts.]—See COUNTY COURTS, Vol. XIII., pp. 496, 497, Nos. 466, 476, 477.

SECT. 4.—AGENT AND PRINCIPAL.

SUB-SECT. 1.—RECOVERY BY AGENT OF MONEY PAID.

A. Before Gaming Act, 1892.

132. Necessity for express direction to pay.]—Money lost by deft. on a bet upon a horse race, & paid by pltf. at his request, an action lies for it.—*ALCINBROOK v. HALL* (1766), 2 Wils. 309; 95 E. R. 828.

Annotations:—*Consd.* *M'Kinnell v. Robinson* (1838), 3 M. & W. 434; *Applegarth v. Colley* (1842), 10 M. & W. 723. *Follid. Re Lister, Ex p. Pyke* (1878), 8 Ch. D. 754. *Reid. Jaques v. Golightly* (1776), 2 Wm. Bl. 1073; *Farmer v. Russell* (1798), 1 Bos. & P. 296; *Maskell v. Hill*, [1921] 3 K. B. 157.

133. —.]—Pltf. who by deft.'s authority lays illegal bets in deft.'s name & losing, pays them without a subsequent express direction so to do, cannot recover from deft. the amount of the money so paid.—*CLAYTON v. DILLY* (1811), 4 Taunt. 165; 128 E. R. 292.

Annotation:—*Reid. Pidgeon v. Burslem* (1849), 3 Exch. 465.

134. —.]—It is no answer to an action for money paid by pltf. for deft.'s use at his request, that the money was paid in respect of losses on wagering contracts made void by Gaming Act, 1845 (c. 109), s. 18.—*KNIGHT v. CAMBERS* (1855), 15 C. B. 562; 3 C. L. R. 565; 24 L. J. C. P. 121;

24 L. T. O. S. 241; 1 Jur. N. S. 525; 139 E. R. 544.

Annotations:—*Distd.* *Beyer v. Adams, Re Law, Arkell's Claim* (1867), 30 L. T. O. S. 8. *Apd.* *Rosewarne v. Billing* (1863), 15 C. B. N. S. 316. *Reid. Knight v. Fitch* (1855), 34 L. J. C. P. 122. *Oldham v. Ramsden* (1876), 39 J. P. 683; *Thacker v. Hardy* (1878), 4 Q. B. D. 685.

135. —.]—*READ v. PLUMER* (1857), 30 L. T. O. S. 133.

136. —.]—A third party paying at the request of the loser a loss arising out of gaming contract is not disenabled from recovering from the loser the money advanced, unless the request to pay were countermanded before the payment made.—*ROSEWARNE v. BILLING* (1863), 15 C. B. N. S. 316; 3 New Rep. 207; 33 L. J. C. P. 55; 9 L. T. 441; 10 Jur. N. S. 496; 12 W. R. 104; 143 E. R. 806.

Annotations:—*Consd.* *Read v. Anderson* (1882), 10 Q. B. D. 100; *Maskell v. Hill*, [1921] 3 K. B. 157. *Reid. Oldham v. Ramsden* (1876), 39 J. P. 683; *Thacker v. Hardy* (1878), 4 Q. B. D. 685; *Saffery v. Mayer* (1900), 16 T. L. R. 169.

137. Authority to pay implied—From request to make bet.]—A. requested B., a betting agent, to bet for him on three horses. B. made the bets in his own name & lost, & having paid the bets, sued A. for the amount:—*Held*: as A. had authorised B. to make the bets, & had not revoked the authority before the bets were paid, B. was entitled to recover.—*BOWIE v. BRISTOW* (1863), 2 New Rep. 35.

138. —.]—Testator had requested a friend to bet for him on certain horses, & the friend had paid the amount lost by the bets:—*Held*: the request to bet implied authority to pay the bets if lost, & the friend was entitled to prove against testator's estate for the amount paid by him in respect of the bets.—*BUBB v. YELVERTON, KER'S (LORD CHARLES) CLAIM* (1871), 24 L. T. 822; 19 W. R. 739.

Annotation:—*Consd.* *Read v. Anderson* (1882), 10 Q. B. D. 100.

139. — Authority irrevocable after bet made.]—The employment of an agent to make a bet in his own name on behalf of his principal may imply an authority to pay the bet if lost, & on the making of the bet that authority may become irrevocable.—*READ v. ANDERSON* (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532; 51 L. T. 55; 49 J. P. 4; 32 W. R. 950, C. A.

Annotations:—*Distd.* *Perry v. Barnett* (1885), 14 Q. B. D. 467. *Apd.* *Seymour v. Bridge* (1885), 14 Q. B. D. 460. *Consd.* *Cohen v. Kittell* (1889), 22 Q. B. D. 680. *Distd.* *Thomas v. Hawkins* (1889), 5 T. L. R. 551. *Consd.* *Knight v. Lee* (1892), 62 L. J. Q. B. 28; *Tatam v. Iteev*, [1893] 1 Q. B. 44; *Burge v. Ashley & Smith*, [1900] 1 Q. B. 744; *Hyams v. Stuart King*, [1908] 2 K. B. 696; *Choshire v. Vaughan*, [1920] 3 K. B. 240; *Maskell v. Hill*, [1921] 3 K. B. 157. *Reid.* *Bridger v. Savage* (1885), 15 Q. B. D. 363; *Lilley v. Rankin* (1886), 2 T. L. R. 785; *Moore v. Peachey* (1891), 7 T. L. R. 748; *Coates v. Pacey* (1892), 8 T. L. R. 474; *Harvey v. Hart* (1894), 38 Sol. Jo. 418; *Saffery v. Mayer* (1900), 16 T. L. R. 169; *Lennox v. Stoddart, Davis v. Stoddart*, [1902] 2 K. B. 21; *Frith v. Frith*, [1906] A. C. 254; *Jeffrey v. Bamford*, [1921] 2 K. B. 351; *Cohen v. Hall*, [1922] 2 K. B. 37. *Mentd.* *Leigh v. Dickeson* (1884), 15 Q. B. D. 60; *The Windobala* (1889), 37 W. R. 409; *North v. Walthamstow U. D. C.* (1898), 62 J. P. 836; *Renton v. R.* (1905), 49 Sol. Jo. 552.

140. Right of agent to recover.]—LYNCH v. GODWIN (1882), 26 Sol. Jo. 509, C. A.

Annotation:—*Consd.* *Read v. Anderson* (1882), 10 Q. B. D. 100.

repudiated said wager, or demanded back said money, before the event on which the wager had been made, had taken place:—*Held*: the plea was bad, as it did not aver that pltf. did not repudiate the wager or demand back

the money before it had been by deft. as stakeholder.—*GRAHAM v. THOMPSON* (1867), 16 W. R. 206.—*IR.*

PART I. SECT. 4, SUB-SECT. 1.—A.
140 I. Right of agent to recover.]—

Semble: an agent who has been employed to negotiate with a third person an agreement of betting on a horse-race may recover from his principal money paid to the third person on account of a lost bet, although the

141. —.]—Where a turf commission agent makes bets with third persons on behalf of his principal, he can recover the money paid by him in respect of the bets from such principal.—*READ v. THORNES* (1885), 1 T. L. R. 264.

142. —.]—*CROOK v. MACMAHON* (1887), 3 T. L. R. 683.

143. —.]—*THOMAS v. HAWKINS* (1889), 5 T. L. R. 621, D. C.

B. After Gaming Act, 1892.

144. **Act not retrospective.**—Above Act does not apply to actions pending when the Act was passed.—*SUSSENBACH v. FITZGIBBON* (1892), 8 T. L. R. 692; 36 Sol. Jo. 648.

145. —.]—Deft. employed pltf., a betting agent, to make certain bets in his, pltf.'s, name on deft.'s behalf. The bets having been made & lost, pltf. paid the amount of the losses on deft.'s account. This occurred prior to the passing of above Act. After the passing of the Act, pltf. commenced an action to recover from deft. the money so paid :—*Held* : the Act is not retrospective & the action might be maintained.—*KNIGHT v. LEE*, [1893] 1 Q. B. 41; 62 L. J. Q. B. 28; 67 L. T. 688; 57 J. P. 117; 41 W. R. 125; 9 T. L. R. 23; 37 Sol. Jo. 12; 5 R. 54, D. C.

Annotations :—*Consd. Bowling v. Camp* (1922), 128 L. T. 342. *Apld. Henshall v. Porter*, [1923] 2 K. B. 193. *Mentd. West v. Gwynne*, [1911] 2 Ch. 1.

146. **Money not recoverable—Agent ignorant of nature of transaction.**—Money paid to satisfy lost bets at the request of a third party cannot be recovered, even if the person paying is ignorant of the purpose for which the money is paid. It is money paid in respect of a wagering contract, & its recovery is prohibited by Gaming Act, 1892 (c. 9).—*TATAM v. REEVE*, [1893] 1 Q. B. 44; 67 L. T. 683; 57 J. P. 118; 41 W. R. 174; 9 T. L. R. 39; 5 R. 83; *sub nom. TATHAM v. REEVE*, 62 L. J. Q. B. 30, D. C.

Annotations :—*Apprvd. Saffery v. Mayer*, [1901] 1 K. B. 11. *Consd. Hyams v. Stuart King*, [1908] 2 K. B. 696. *Distd. Re O'Shea, Ex p. Lancaster*, [1911] 2 K. B. 981. *Refd. Faulks v. Atkins* (1893), 10 T. L. R. 178; *O'Sullivan v. Thomas*, [1895] 1 Q. B. 698; *Chapman v. Macalester* (1912), *Times*, May 15. *Mentd. Baker v. Ingall*, [1912] 3 K. B. 106.

147. — **Claim on balance of account.**—Action by agent to recover balance of a betting account :—*Held* : not entitled to recover by reason of above Act.—*BUTTS v. ELDRED* (1896), 12 T. L. R. 624.

148. — **Money paid to principal in mistake.**—Pltf., at deft.'s request, put money on a horse called Jim Crook, which, when the race was run, came in second. Objection being taken to the horse Rosevern, which came in first, the stewards decided that Jim Crook was the winner. Thereupon pltf. paid the winnings, £275, to deft. Thereafter, on appeal to the committee of the Jockey Club, the stewards' decision was overruled, & Rosevern was declared the winner. Pltf. thereupon paid back part of the money which had been paid to

him by various persons after the stewards' decision, & then asked deft. to refund to him the amount so paid back, but deft. refused. Notwithstanding the objection taken by deft. to refund the money, pltf. repaid the balance which had been paid to him in respect of the bet. In an action claiming to be indemnified by deft. for the amount so returned by pltf. :—*Held* : pltf. was not entitled to recover inasmuch as the dispute depended upon the construction of a wagering contract, which in law was null & void; & if pltf. was betting as agent for deft., the case came within sect. 1 of above Act.—*GASSON v. COLE* (1910), 26 T. L. R. 468.

149. **Right to indemnity for future payments.**—The words "any sum of money paid" in sect. 1 of above Act, are not confined to money actually paid, but apply equally to money to be paid; & a betting agent who has lost bets made on behalf of his principal, & who has not paid them, cannot maintain an action against his principal to recover his unpaid losses or to indemnify him against his liability to pay them.—*LEVY v. WARBURTON* (1901), 70 L. J. K. B. 708; 17 T. L. R. 462, D. C.

150. —.]—*ALLEN v. WINGROVE* (1901), 17 T. L. R. 261, C. A.

SUB-SECT. 2.—RECOVERY BY PRINCIPAL OF MONEY WON.

151. **Application of Gaming Act, 1845 (c. 109), s. 18—Recovery of money received by agent.**—In administering the estate of a testator in the cause, A. claimed to be paid a sum of money which had been won by testator on a wager made by him at the request of A. The money won on A.'s account was, as alleged, paid to testator some time prior to his decease. The chief clerk disallowed the claim. On application to vary the certificate at ct. :—*Held* : the language of above sect. was express that no action or suit should be brought for recovering any sum of money won upon any wager, & the certificate of the chief clerk must stand.—*BEYER v. ADAMS, Re LAW, ARKELL'S CLAIM* (1857), 26 L. J. Ch. 841; 30 L. T. O. S. 8; 3 Jur. N. S. 709; *sub nom. BYERS v. ADAMS, Re LAW*, 5 W. R. 795.

Annotations :—*Overd. Bridger v. Savage* (1885), 15 Q. B. D. 363. *Refd. Higginson v. Simpson* (1877), 41 J. P. 200.

152. —.]—An agreement between a principal & his agent that the agent shall employ moneys of the principal in betting on horse races, & pay over the winnings therefrom to his principal, is not a contract "by way of gaming or wagering" rendered void by above sect. nor is it illegal.—*BEESTON v. BEESTON* (1875), 1 Ex. D. 13; 45 L. J. Q. B. 230; 33 L. T. 700; 40 J. P. 152; 24 W. R. 96.

Annotations :—*Distd. Higginson v. Simpson* (1877), 2 C. P. D. 76. *Apprvd. Bridger v. Savage* (1885), 15 Q. B. D. 363. *Refd. Read v. Anderson* (1883), 10 Q. B. D. 100; *Lilley v. Rankin, Rankin v. Lilley & Baird* (1886), 56 L. J. Q. B. 248; *Cohen v. Kittell* (1889), 22 Q. B. D. 680; *Hyams v. Stuart King*, [1908] 2 K. B. 696; *Maskell v. Hill*, [1921] 3 K. B. 157.

agreement negotiated were such as, between principals, would be illegal by way of gaming or wagering.—*NICHOLLS v. BUNBURY* (1876), 10 L. T. 56.—*IR.*

140 H. —.]—The plea of *sponsio ludicra* does not apply to an action by a betting commission agent against his principal for recovery of sums disbursed by him for behoof of his

principal on account of bets lost.—*KNIGHT & Co. v. STOTT* (1892), 19 R. (Ct. of Sess.) 959; 29 So. L. R. 810.—*SOOT.*

PART I. SECT. 4, SUB-SECT. 1.—B.

g. Money recoverable.—Where an agent has made bets for his principal he is entitled to recover from the latter money paid for bets which have been

lost. Act 36, of 1902, s. 11, does not deprive an agent of this right.—*SMITH v. MILLER* (1920), C. P. D. 382.—*S. AF.*

PART I. SECT. 4, SUB-SECT. 2.

h. Whether agent allowed to plead illegality of contract.—An agent, who has received money to the use of his principal on a wagering contract

Sect. 4.—Agent and principal: Sub-sect. 2. Sect. 5.

153. —[.]— employed deft. for a commission to make bets for him on horses. Deft. accordingly made such bets, & he received the winnings from the persons with whom he had so betted. In an action by pltf. for the amount which deft. had so received:—*Held*: above sect., which makes null & void all contracts by way of wagering, did not apply to the contract between pltf. & deft. & therefore, notwithstanding the statute, pltf. was entitled to recover in respect of the bets which had been so paid to deft.—*BRIDGER v. SAVAGE* (1885), 15 Q. B. D. 363; 54 L. J. Q. B. 464; 53 L. T. 129; 49 J. P. 725; 33 W. R. 891; 1 T. L. R. 585, C. A.

Annotations:—*Consd.* *Harvey v. Hart* (1894), 38 Sol. Jo. 418; *Cheshire v. Vaughan*, [1920] 3 K. B. 240; *Jeffrey v. Bamford*, [1921] 2 K. B. 351. *Refd.* *Cohen v. Kittell* (1889), 22 Q. B. D. 680; *Hyams v. Stuart King*, [1908], 2 K. B. 696; *Edwards v. Motor Union Insee.*, [1922] 2 K. B. 249. *Mentd.* *Galland v. Hall* (1888), 4 T. L. R. 761 *Rawlings v. General Trading Co.*, [1921] 1 K. B. 635.

154. — Agent estopped from denying agency.]—In an action by pltf. to recover the amount of bets executed for him by deft. on commission, the defence was that the bets had been made between the parties as principals, & were void:—*Held*: however, on the evidence, deft. was estopped from denying that he had acted as the pltf.'s agent, & the bets were recoverable from him.—*MOORE v. PEACHEY* (1891), 7 T. L. R. 748.

Annotation:—*Refd.* *Potter v. Codrington* (1892), 9 T. L. R. 54.

155. — —[.]—In action by pltf. to recover moneys alleged to have been received by deft. as the result of bets executed by him for pltf. on commission, the defence was that the bets had been made between the parties as principals:—*Held*: on the evidence, this was established & the facts proved were not sufficient to estop deft. from denying agency.—*POTTER v. CODRINGTON* (1892), 9 T. L. R. 54.

156. — —[.]—The operation of the Gaming Acts does not disentitle a principal to recover from his agent the amount of bets won & received.—*DE MATTOS v. BENJAMIN* (1894), 63 L. J. Q. B. 248; 70 L. T. 560; 42 W. R. 284; 10 T. L. R. 221; 38 Sol. Jo. 238; 10 R. 103, D. C.

Annotations:—*Consd.* *Grimerd v. Wiltshire* (1894), 10 T. L. R. 505. *Apld.* *Harvey v. Hart* (1894), 38 Sol. Jo. 418. *Distd.* *Thomas v. Smith* (1901), 18 T. L. R. 69. *Refd.* *O'Sullivan v. Thomas*, [1895] 1 Q. B. 698; *Saffery v. Mayer* (1900), 16 T. L. R. 169; *Brookman v. Mather* (1913), 29 T. L. R. 276; *Jeffrey v. Bamford*, [1921] 2 K. B. 351; *Edwards v. Motor Union Insee.*, [1922] 2 K. B. 249. *Mentd.* *Rawlings v. General Trading Co.*, [1921] 1 K. B. 635.

157. — —[.]—As the law now stands, in all such cases as this a pltf. suing upon a commission account is entitled to recover if deft. has received moneys for & on account of pltf. It would never do to impose upon a pltf. the burden of proving in every case, in order to show that the bets were made as agent & not principal, with whom the bookmaker made the bets in fact. Where the bookmaker by his course of business holds himself out as a commission agent, pltf. has a *prima facie* right to recover the bets from him (*CHARLES, J.*).—*GRIMERD v. WILTSHIRE* (1894), 10 T. L. R. 505.

between him as such agent & a third party, cannot be allowed to set up the illegality of the contract as a defence in an action brought by the principal to recover from the agent the money so received.—*BHOLA NATH v.*

CHAND (1903), 1 L. R. 25 All. 639.—*IND.*

k. Right of principal to sue agent. —Where an agent made a successful bet on a horse-race for & on behalf of a

158. — — Evidence of receipt of money.]— Action dismissed, on the ground that there was no evidence that deft. had made the bets for pltf. or had received any money in respect of them.—*PRITCHARD v. DOUGHTON, LOVYCK & Co.* (1900), 16 T. L. R. 377, C. A.

159. — —[.]—Pltf. sued under R. S. C., Ord. 14, to recover a sum of money shown due to him from deft. for certain bets which he had instructed deft. to make for him. Deft., who carried on business as a turf commission agent, pleaded the Gaming Acts, & on his affidavit obtained leave to defend the claim. At the trial deft. did not appear:—*Held*: pltf. was entitled to judgment, as the rendering of a commission account was *prima facie* evidence that the money had been received by deft. on behalf of pltf.—*CATIGI v. M'GREGOR* (1907), 51 Sol. Jo. 266.

160. — Failure by agent to carry out instructions.]—Pltf. having employed the deft. to bet on commission, & deft. having failed to make certain bets pursuant to pltf.'s instructions, pltf. sued deft. for breach of contract as his agent, claiming as damages the excess of gains over losses which should have been received by deft., had the bets in question been made, after deducting the amount of his commission:—*Held*: as by above sect. the bets would not have been recoverable at law, pltf. could not maintain the action.—*COHEN v. KITTELL* (1889), 22 Q. B. D. 680; 58 L. J. Q. B. 241; 60 L. T. 932; 53 J. P. 469; 37 W. R. 400; 5 T. L. R. 345, D. C.

Annotations:—*Apprvd.* *Cheshire v. Vaughan*, [1920] 3 K. B. 240. *Refd.* *Maskell v. Hill*, [1921] 3 K. B. 157. *Mentd.* *Rawlings v. General Trading Co.*, [1921] 1 K. B. 635.

161. — Marine Insurance Act, 1906 (c. 41), s. 4 (2) (b).]—Pltfs. were owners of warehouses at Liverpool, Birkenhead & Newport. From 1916 the export of nitrate of soda from South America was in the hands of the British Government, who owned the cargoes & controlled the shipping. By arrangement pltfs. used to warehouse the nitrate of soda arriving at Liverpool, Birkenhead, or Newport. On receiving notice of a cargo coming to one of these ports they reserved warehouse space for it, & instructed their Liverpool insurance brokers to effect a p.p.i. policy on their anticipated profits against marine & war risks, & against the risk of the cargo being diverted by the Government to another destination; & the Liverpool brokers instructed their London brokers to effect a policy covering those risks. The latter failed to disclose to the underwriters the risk of diversion, & accordingly when a vessel bound for Birkenhead with a cargo of nitrate was diverted by the Government to another port & the underwriters were sued on the policy, the underwriters successfully defended the action on the ground of non-disclosure of such an unusual risk. Pltfs. then sued the Liverpool brokers for damages for negligence in not having effected a policy to cover the risk:—*Held*: as the p.p.i. policy which defts. were employed to obtain, was by Marine Insurance Act, 1906 (c. 41), s. 4 (2) (b), void, pltfs. were not entitled to recover damages for breach of the contract of employment to obtain such a policy.—*CHESHIRE & Co. v. VAUGHAN BROTHERS & Co.*, [1920] 3

principal, & received the proceeds of the wager for his principal:—*Held*: the principal was entitled to sue the agent for payment of the amount so received.—*DODD v. HADLEY* (1905), T. S. 439.—*S. AF.*

K. B. 240; 89 L. J. K. B. 1168; 123 L. T. 487; 84 J. P. 233; 15 Asp. M. L. C. 69; 25 Com. Cas. 242, C. A.

Annotations:—*Consd. Edwards v. Motor Union Insee.*, [1922] 2 K. B. 249. *Reid. Re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67.

See, further, INSURANCE.

SECT. 5.—PARTNERSHIP.

Partnership generally, *see* PARTNERSHIP.

162. Whether betting partnership legal.]—*HYAMS v. STUART KING*, No. 58, *ante*.

163. —.]—Pltfs., a firm of bookmakers, made an application for registration under Registration of Business Names Act, 1916 (c. 58). In their application they included in their statement of particulars required by the Act a description of the general nature of their business as "accountants." In this action they claimed from deft. £997 17s. 11d., the amount, with interest, of five cheques drawn by him upon his bank payable to pltfs. & delivered by him to them in payment of bets which he had lost to them & which had been dishonoured on presentation, & a further sum of £13 18s. 10d., the amount of a cheque paid by pltfs. to defts. for bets won by him from them & duly paid by pltfs.' bankers on presentation by defts.' bankers to them. Pltfs. claimed to be entitled to recover the £13 18s. 10d. under Gaming Act, 1835 (c. 41), s. 2, as money received by deft. to the use of pltfs.:—*Held*: (1) pltfs. being "an assocn. for the purpose of carrying on a betting business" the action would not lie; (2) as to the £13 18s. 10d. pltfs.' claim was bad upon the further ground that it came within the exception of a payment made to defts.' bank, which was to pltfs.' knowledge a mere agent of deft. to collect the money.—*O'CONNOR & OULD v. RALSTON*, [1920] 3 K. B. 451; 90 L. J. K. B. 261; 124 L. T. 508; 36 T. L. R. 768.

Annotation:—*As to* (1) *Reid. Jeffrey v. Bamford*, [1921] 2 K. B. 351.

164. —.]—(partnership for the purpose of carrying on a betting & bookmaker's business is not *per se* illegal or impossible in law.

(2) This action is well brought by pltfs. as a firm (*MCCARDIE, J.*).—*JEFFREY v. BAMFORD*, [1921] 2 K. B. 351; 90 L. J. K. B. 664; 125 L. T. 348; 37 T. L. R. 601; 65 Sol. Jo. 580.

Annotations:—*As to* (1) *Reid. Maskell v. Hill*, [1921] 3 K. B. 157; *Henshall v. Porter*, [1923] 2 K. B. 193.

165. Actions between partners—Whether account obtainable.]—A. & C. jointly engaged in betting transactions. A., under an arrangement with C., received the joint winnings & made payments & gave securities for C.'s losses. On a bill by C. for an account:—*Held*: A. was entitled to credit for the money paid, but the securities given created no liability.—*COYLE v. ALLEYNE* (1854), 2 W. R. 382.

166. —.]—*HARVEY v. HART* (1894), 38 Sol. Jo. 418.

Annotations:—*Reid. Saffery v. Mayer* (1900), 83 L. T. 394; *Jeffrey v. Bamford*, [1921] 2 K. B. 351.

167. — —.]—(1) The fact that one

partner has been guilty of illegal acts in the conduct of a partnership business is no defence to an action for account by the other partner, where the objects of the partnership were not illegal, & the innocent partner at the time of entering into the partnership intended that it should be carried on lawfully. Pltf. & deft. were partners in a bookmaker's & betting business, which was carried on by deft.; pltf. claimed an account of the profits of the partnership, & deft. contended that, having regard to the nature of the business, no such relief could be obtained:—*Held*: as a bookmaking & betting business could be carried on without contravening Betting Act, 1853 (c. 119), & as pltf., when he entered into this partnership, contemplated that the business would so be carried on in the usual way, the fact that deft. had acted illegally was immaterial, & pltf. was entitled to the account claimed.

(2) A man, whether betting or not, must be in some place & it is obvious in the [Betting] Act, [1853 (c. 119)] that the word "place" is not used in its most general sense. The question turns on sect. 3: a "place" to fall within the Act must be in some sense fixed & ascertained. The cts. have wisely declined to define a "place" in general terms inasmuch as the legislature has not done so beyond what may be gathered from the context, but have contented themselves with applying the Act to the circumstances of each particular case (*CHITTY, J.*).—*THWAITES v. COULTHWAIT*, [1896] 1 Ch. 496; 65 L. J. Ch. 238; 74 L. T. 164; 60 J. P. 218; 44 W. R. 295; 12 T. L. R. 204; 40 Sol. Jo. 274.

Annotations:—*As to* (1) *Consd. Saffrey v. Mayer*, [1901] 1 K. B. 11; *Keen v. Price*, [1914] 2 Ch. 98; *Jeffrey v. Bamford*, [1921] 2 K. B. 351. *Reid. Hawke v. Dunn*, [1897] 1 Q. B. 579; *Hyams v. Stuart King*, [1908] 2 K. B. 696; *Brookman v. Mather* (1913), 29 T. L. R. 276.

168. — —.]—The ct. will not entertain an action for an account by one partner in a betting business against his co-partner.—*THOMAS v. DEY* (1908), 24 T. L. R. 272.

Annotations:—*N.F. Keen v. Price*, [1914] 2 Ch. 98; *Jeffrey v. Bamford*, [1921] 2 K. B. 351. *Reid. Brookman v. Mather* (1913), 29 T. L. R. 276.

169. —.]—An action will lie by one partner in a bookmakers' & betting business against the other for an account of the partnership dealings, but the order for the account will leave it open to deft. to object to repaying anything which represents profits. Pltf. is entitled to recover any advances made by him which have not been lost in betting.—*KEEN v. PRICE*, [1914] 2 Ch. 98; 83 L. J. Ch. 865; 111 L. T. 204; 30 T. L. R. 494; 58 Sol. Jo. 495.

Annotation:—*Reid. Jeffrey v. Bamford*, [1921] 2 K. B. 351.

170. — After account stated.]—In 1908, pltf. & deft. entered into a partnership to carry on a betting business. No money was subscribed at the time, but money was found by pltf. for the conduct of the business as required. In 1910, the partnership was dissolved by mutual consent, & on an account being taken deft. agreed that £100 was due to pltf. & he gave pltf. an I.O.U. for that amount. Subsequently he paid £7 on account, but as he did not pay the balance of £93, he was sued for that amount by pltf. It was proved in evidence that £173 had been drawn

PART I. SECT. 5.

162 i. Whether betting partnership legal.]—A partnership as bookmakers & turf commission agents is not a partnership for an illegal purpose.—*HILL v. STEWART* (1887), 13 V. L. R. 76.—*AUS.*

Sect. 5.—Partnership. Sect. 6: Sub-sects. 1 & 2.]

out of the partnership account by deft. for private purposes; that £35 was standing to the credit of the partnership at the date of the dissolution; & that the £100 for which the I.O.U. was given was a rough estimate of the share due to pltf. :—**Held**: (1) there was no evidence that the partnership business was carried on in a manner that was illegal within Betting Act, 1853 (c. 119), (2) the I.O.U. was not a promise, express or implied, to pay a sum to pltf. within Gaming Act, 1892 (c. 9), & pltf. was entitled to recover.—**BROOKMAN v. MATHER** (1913), 29 T. L. R. 276.

Annotations:—As to (1) *Consd.* Keen v. Price, [1914] 2 Ch. 98; Jeffrey v. Bamford, [1921] 2 K. B. 351.

171. — For money paid.—Money paid by one of two partners for the other on account of losses incurred by them on partnership insurances, cannot be recovered in an action brought by him against the other partner; & if this with other causes of dispute between the two be referred to an arbitrator who awards a sum due from one to the other for money so paid, the ct. will set aside that part of the award.—**AUBERT v. MAZE** (1801), 2 Bos. & P. 371; 126 E. R. 1333.

Annotations:—*Reid.* *Re* Scott, *Ex p.* Bell (1813), 1 M. & S. 751; Cannan v. Bryce (1819), 3 B. & Ald. 179. *Mentd.* M'Callan v. Mortimer (1842), 9 M. & W. 636.

172. ——Money was advanced to by B., one of several partners, out of the partnership funds, on account of payments to be made on policies of assurance underwritten by S., on account of himself & B. in pursuance of a previous agreement between them to become sharers in profit & loss on such policies:—**Held**: not provable under the commission of S., who became bkpt., by the surviving partners of B.

It was not an advance for general purposes, but for the very purpose of carrying into effect this illegal traffic & concern between the partners (**LORD ELLENBOROUGH, C.J.**).—*Re* SCOTT, *Ex p.* BELL (1813), 1 M. & S. 751; 2 Rose, 136; 105 E. R. 280.

Annotations:—*Consd.* Simpson v. Bloss (1816), 2 Marsh. 542. *Reid.* M'Callan v. Mortimer (1842), 9 M. & W. 636.

173. ——A. betted twenty-five guineas with B. on a horse race, of which C., at his own request, staked ten. A. won, & paid C. ten guineas, in the expectation of receiving the whole amount of the bet from B. B., however, died, & A. never received it:—**Held**: A. could not recover back the ten guineas which he had paid to C., because he could not establish his claim, without going into proof of the illegal transaction, in which both were equally engaged.—**SIMPSON v. BLOSS** (1816), 7 Taunt. 246; 2 Marsh. 542; 129 E. R. 99.

Annotations:—*Reid.* Martin v. Smith (1838), 4 Bing. N. C. 436; M'Callan v. Mortimer (1842), 9 M. & W. 636; Fivaz v. Nicholls (1846), 2 C. B. 501; Jones v. Orchard (1855), 24 L. J. C. P. 229; A.-G. v. Hollingworth (1857), 2 H. & N. 416; Taylor v. Chester (1869), L. R. 4 Q. B. 309; Begbie v. Phosphate Sewage Co. (1875), L. R. 10 Q. B. 491; Taylor v. Bowers (1876), 1 Q. B. D. 291;

PART I. SECT. 6, SUB-SECT. 1.

181 I. Whether recoverable.—Pltf. was held entitled to recover on cheques made by deft. & cashed by pltf. at deft.'s request to put deft. in funds to play a game of cards with pltf. in which game deft. subsequently lost all the cash to pltf.—**MILLER v. MARTIN**, [1923] 1 W. W. R. 64.—**CAN.**

181 II. ——To a claim for the

recovery of moneys lent deft. pleaded that he had borrowed the money for wagering at poker, that the contract was illegal & that the claim was unenforceable at law:—**Held**: poker not being a game of chance prohibited by Law No. 25, 1878, & gambling not being prohibited at common law, the plea disclosed no defence to pltf.'s claim.—**BILJOEN v. PETERSEN** (1922), 43 N. L. R. 63.—**S. AF.**

Herman v. Jeuchner (1885), 15 Q. B. D. 561; **Scott v. Brown, Doering, McNab, Slaughter & May v. Brown, Doering, McNab** (1892) 2 Q. B. 784; **Hyams v. Stuart King**, [1908] 2 K. B. 696; **Farmers' Mart v. Milne** (1914), 111 L. T. 871; **Farmers' Mart v. Milne**, [1915] A. C. 106; **Wild v. Simpson**, [1919] 2 K. B. 544.

174. ——A. & B. were part owners of a racehorse, & agreed to share the profits & losses resulting from any races it was entered for. A. advanced all the money from time to time to feed & train it. It never won any race, & was sold to defray expenses:—**Held**: A. might recover from B. by action at law half of the money for its keep & management, on the ground of its being capital advanced at B.'s request for B.—**FRENCH v. STYRING** (1857), 2 C. B. N. S. 357; 26 L. J. C. P. 181; 29 L. T. O. S. 127; 21 J. P. 743; 3 Jur. N. S. 670; 5 W. R. 561; 140 E. R. 455.

175. ——Where one person advanced money to another for the purpose of making bets on horses on their joint account, & the money so advanced was lost on such bets:—**Held**: by reason of the provisions of Gaming Act, 1892 (c. 9), the person who had advanced the money could not maintain an action against the other for half of the amount so lost.—**SAFFERY v. MAYER**, [1901] 1 K. B. 11; 70 L. J. Q. B. 145; 83 L. T. 394; 64 J. P. 740; 49 W. R. 54; 17 T. L. R. 15; 45 Sol. Jo. 29, C. A.

Annotations:—*Distd.* *Re* O'Shea, *Ex p.* Lancaster, [1911] 2 K. B. 981. *Consd.* Jeffrey v. Bamford, [1921] 2 K. B. 351. *Reid.* Hyams v. Stuart King, [1908] 2 K. B. 696; **Brookman v. Mather** (1913), 29 T. L. R. 276; Keen v. Price, [1914] 2 Ch. 98.

176. — For money had & received.—**THOMAS v. SMITH** (1901), 18 T. L. R. 69.

177. Actions against third parties — Use of firm name.—**HYAMS v. STUART KING**, No. 58, *ante*.

178. ——O'CONNOR & OULD v. RALSTON, No. 163, *ante*.

179. ——JEFFREY v. BAMFORD, No. 164, *ante*.

SECT. 6.—MONEY LENT.**SUB-SECT. 1.—FOR GAMING.**

See, now, Gaming Act, 1710 (c. 19), s. 1 Gaming Act, 1835 (c. 41).

180. Whether recoverable — Loan part of fraud on borrower.—**BLACKWEL v. REDMAN** (1634), 1 Rep. Ch. 88; 21 E. R. 515.

181. ——A parol loan of money to play with is not void.—**BARBEAU v. WALMSLEY** (1746), 2 Stra. 1249; 93 E. R. 1161.

Annotations:—*Consd.* M'Kinnell v. Robinson (1838), 3 M. & W. 434. *Reid.* Young v. Moore (1757), 2 Wils. 67; Robinson v. Bland (1760), 1 Wm. Bl. 256; Aichinbrook v. Hall (1766), 2 Wils. 309; Farmer v. Russell (1798), 1 Bos. & P. 296; Applegarth v. Colley (1842), 10 M. & W. 723; Quarrier v. Colston (1842), 1 Ph. 147; *Re* Lister, *Ex p.* Fryke (1878), 8 Ch. D. 754; Saxby v. Fulton, [1909] 2 K. B. 208. *Mentd.* Allen v. Bennett (1810), 3 Taunt. 169.

182. ——Money lent to play with, without

1. — Game not illegal.—Money lent by one person to another for the purpose of gaming, cannot be recovered, though it be admitted that the game was not an illegal game.—**RITCHIE v. ECKROYD** (1868), 5 W. W. & A'B. 98.—**AUS.**

m. — Pari-mutuel betting.—By reason of Gaming Act, R. S. O., c. 43, a civil action in Ontario cannot be maintained for the recovery of

any security, recoverable in *assumpsit*.—*WETTEN HALL v. WOOD* (1793), 1 Esp. 17, N. P.

Annotations.—*Consd.* *M'Kinnell v. Robinson* (1838), 3 M. & W. 434. *Refd.* *Quarrier v. Colston* (1842), 1 Ph 147; *Saxby v. Fulton*, [1909] 2 K. B. 208.

183. —.]—Gaming Act, 1710 (c. 19), makes void the securities given for money lent at the time of play, but the money may nevertheless be recovered in an action of *assumpsit* for money lent.—*LEAPRIDGE v. KING* (1795), Peake, Add. Cas. 32.

184. —.]—*Qu.*: whether money lent for the purpose of gaming is recoverable in an action at law, & whether an I.O.U. is a security within Gaming Act, 1710 (c. 19).—*WILKINSON v. L'EAGUIER* (1836), 2 Y. & C. Ex. 363; 160 E. R. 437.

185. —.]—(1) Wherever money is lent for the express purpose of enabling the borrower to do some act prohibited by law, such as playing at a prohibited game, the lender cannot recover it back in an action for money lent.

(2) The game of hazard is rendered an unlawful game by Gaming Act, 1838 (c. 28), s. 3, & Gaming Act, 1744 (c. 34), s. 2, whether played in private or at a public gaming table.—*M'KINNELL v. ROBINSON* (1838), 3 M. & W. 434; 1 Horn & H. 146; 7 L. J. Ex. 149; 2 Jur. 595.

Annotations.—*As to* (1) *Distd.* *Quarrier v. Colston* (1842), 1 Ph. 147. *Consd.* *Moulis v. Owen*, [1907] 1 K. B. 746. *Distd.* *Saxby v. Fulton*, [1909] 2 K. B. 208. *Refd.* *Applegarth v. Colley* (1842), 10 M. & W. 723; *Foot v. Baker* (1843), 6 Scott, N. R. 301; *Watson v. Bennett* (1864), 12 W. R. 1008; *Thacker v. Hardy* (1878), 4 Q. B. D. 685. *Generally*, *Mentd.* *Barnard v. Sutton* (1843), 7 Jur. 685; *Bone v. Ekless* (1860), 5 H. & N. 925; *Pearce v. Brooks* (1866), L. R. 1 Exch. 213; *Waugh v. Morris* (1873), L. R. 8 Q. B. 202.

186. — Money lent by publican to guests.]—*Semble*: money lent for the purpose of enabling the borrower to play at skittles for a less stake than £10 may be recovered by the lender; *secus*, where the lender is a licensed publican who lends money to his guests to enable them so to play.—*FOOT v. BAKER* (1843), 5 Man. & G. 335; 6 Scott, N. R. 301; 7 Jur. 131; 134 E. R. 593.

187. — Counters.]—A cheque given in payment for counters obtained from the secretary of a club to enable the purchaser to gamble at cards, cannot be sued upon by the secretary.—*ST. CROIX v. MORRIS* (1885), 1 Cab. & El. 485.

188. — —.]—*JACQUINOD v. LANE* (1886), 3 T. L. R. 225.

— Money lent abroad.]—*See* Sect. 8, *post*.

What is gaming.]—*See* Part II., Sect. 1, sub-sect. 1, *post*.

What is a game.]—*See* Part II., Sect. 1, sub-sect. 2, *post*.

SUB-SECT. 2.—TO PAY LOSSES INCURRED.

189. Whether recoverable.]—Money lent, & applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions,

to which the lender was no party, cannot be recovered back by him.—*CANNAN v. BRYCE* (1819), 3 B. & Ald. 179; 106 E. R. 628.

Annotations.—*Expld.* *Thorpe v. Coleman* (1845), 1 C. B. 990. *Consd.* *Pearce v. Brooks* (1866), L. R. 1 Exch. 213. *Refd.* *M'Kinnell v. Robinson* (1838), 3 M. & W. 434; *Gas Light & Coke Co. v. Turner* (1839), 5 Bing. N. C. 666; *Pritchett v. Smart* (1849), 18 L. J. C. P. 211; *Horton v. Westminster Improvement Comrs.* (1852), 7 Exch. 780; *Taylor v. Chester* (1869), 38 L. J. Q. B. 225; *Thacker v. Hardy* (1878), 4 Q. B. D. 685; *Moulis v. Owen* [1907] 1 K. B. 746. *Mentd.* *Cundell v. Dawson* (1817), 4 C. B. 376.

190. —.]—Deft., being indebted to pltf. & other persons for money lost by betting on a horse race, applied to pltf. for a loan. Pltf. lent deft. £2,000 upon the security of a deed, which assigned to pltf. certain policies of assurance, & contained a covenant by deft. to pay the £2,000 & interest. On the settling day deft. paid pltf. his bets out of the £2,000. In an action by pltf. on the covenant, deft. pleaded that the deed was a mtge. security, part of the consideration for which was a gaming debt. At the trial the judge told the jury that if the £2,000 was advanced in pursuance of a stipulation or agreement between pltf. & deft. that out of it pltf. should be paid the money which he had won of deft. by betting, it was a mere colourable loan & evasion of the statute [Gaming Act, 1845 (c. 109)], but that if there was no such stipulation or agreement, & pltf. advanced the £2,000 as a loan for deft. to dispose of as he pleased, the deed was valid, although pltf. expected to be paid out of the money so lent. On a bill of exceptions:—*Held*: the direction was right.—*HILL v. FOX* (1859), 4 H. & N. 359; 157 E. R. 879; *sub nom.* *FOX v. HILL*, 32 L. T. O. S. 337; 23 J. P. 261; 5 Jur. N. S. 904; 7 W. R. 283, Ex. Ch.

Annotations.—*Refd.* *Higginson v. Simpson* (1877), 2 C. P. D. 76; *Read v. Anderson* (1882), 10 Q. B. D. 100. *Mentd.* *Howkins v. Bennet* (1860), 7 C. B. N. S. 507; *Ward v. Lumley* (1860), 5 H. & N. 656; *Carlill v. Carbolic Smoke Ball Co.* (1892), 67 L. T. 837.

191. —.]—Money lent to enable the borrower to pay a bet which he has already lost does not constitute a debt for an "illegal consideration" within Gaming Act, 1835 (c. 41). Consequently, such a debt can be proved in the bkpcy. of the borrower.—*Re LISTER, Ex p. PYKE* (1878), 8 Ch. D. 754; 38 L. T. 923; 26 W. R. 806; *sub nom.* *Re LISTER, Ex p. PYKE*, 47 L. J. Bcy. 100, C. A. *Annotations*.—*Consd.* *Read v. Anderson* (1882), 10 Q. B. D. 100. *Follid.* *Re O'Shea, Ex p. Lancaster*, [1911] 2 K. B. 981. *Consd.* *Maskell v. Hill*, [1921] 3 K. B. 157. *Refd.* *Saxby v. Fulton* [1909] 2 K. B. 208.

192. —.]—In Mar. 1903, L. lent debtor £1,000 for the purpose of betting on horse races, any profits resulting from the betting to be equally divided. In the same year, L. guaranteed an overdraft to the extent of £1,000 at debtor's bank. There were no profits on the betting, & all the money having been lost, L. in Sept. 1903, guaranteed a further overdraft of £500 in order to enable debtor to pay bets to that amount which he had lost. In 1906, L. paid £1,633 to the bank under his guarantees & recovered judgment in default of defence against debtor for £3,000. Debtor having failed to comply with a bkpcy. notice to pay the amount of the judgment debt, L. presented a bkpcy. petition against him. The

money advanced or lent to another for betting by means of *part-mutuel* machines on horse-races run on a licensed race track, although the maintenance of such machines by the race track assocn. during the races was not in itself illegal.—*BESSEY v.*

LIVINGSTONE (1922), 68 D. L. R. 236; 37 Can. Crim. Cas. 309.—*CAN.*

PART I. SECT. 6, SUB-SECT. 2.

189 i. Whether recoverable.]—*Held*: the fact that the object with which

pltf. lent money to deft. was to enable him to pay off a gambling debt did not taint the transaction with immorality so as to disentitle pltf. to recover.—*BENT MAHDO DAS v. KAUNSAL KISHOR DEUSAR* (1900), I. L. R. 22 All. 452.—*IND.*

Sect. 6.—Money lent: Sub-sects. 2 & 3. Sect. 7: Sub-sect. 1, A. & B. (a).]

registrar dismissed the petition on the ground that, having regard to the Gaming Acts, there was no valid debt to support it. On appeal:—*Held*: (1) as to the guarantee for £500, the transaction was not invalid; (2) the debt arising out of the loan for the purpose of enabling debtor to pay a bet which he had lost, not being for an illegal consideration, could be proved for in bkpcy., & the money was not paid by L. "in respect of" a gaming contract within Gaming Act, 1892 (c. 9), s. 1.—*Re O'SHEA, Ex p. LANCASTER*, [1911] 2 K. B. 981; 81 L. J. K. B. 70; 105 L. T. 486; 18 Mans. 349, C. A.

Annotations:—As to (2) *Reid*, Maskell v. Hill, [1921] 3 K. B. 157. *Generally*, *Mentd. Re Teale, Ex p. Blackburn*, [1912] 2 K. B. 367.

SUB-SECT. 3.—MONEY PAID AT REQUEST.

193. Whether recoverable—Money paid to winner.]—TATAM v. REEVE, No. 146, *ante*.

194. — Money paid to stakeholder to abide event.]—The Gaming Act, 1892 (c. 9), enacts that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered void by Gaming Act, 1845 (c. 109), shall be null & void, & no action shall be brought or maintained to recover any such sum of money. Deft. entered into a wagering contract with a third party & money was paid by pltf. at the request of deft. to a stakeholder to abide the event of the wager. The money was to be repaid by deft. if he received the stakes, which he did. In an action to recover the money:—*Held*: the payment made by pltf. to the stakeholder was made in respect of a contract made void by Gaming Act, 1845 (c. 109), & the contract to repay it was within Gaming Act, 1892 (c. 9), & was void.—*CARNEY v. PLIMMER*, [1897] 1 Q. B. 634; 66 L. J. Q. B. 415; 76 L. T. 374; 61 J. P. 324; 45 W. R. 385; 13 T. L. R. 317; 41 Sol. Jo. 403, C. A.

Annotations:—*Distd.* Burge v. Ashley & Smith, [1900] 1 Q. B. 744. *Consd.* Richards v. Starok, [1911] 1 K. B. 296. *Reid*. Saffery v. Mayer (1900), 83 L. T. 394.

SECT. 7.—SECURITIES.

SUB-SECT. 1.—EFFECT BETWEEN IMMEDIATE PARTIES.

A. In General.

195. Gaming Act, 1710 (c. 19) —Security for money won at play—Void.]—RAWDEN v. SHADWELL, No. 71, *ante*.

196. —.]—A foot race is within Gaming Act, 1710 (c. 14). A., having engaged to run a foot race for £1,000, prevailed on B. & C. to advance the money required for making good the stakes; & it was agreed by the three that bets

should be made by B. & C. on A., & that the winnings & losses should be borne by all three. A. lost the race, & B. & C. paid on account of themselves & A. the bets lost. A. executed to B. & C. a mtge. for the amount of his share of the money so paid by them, & subsequently sold the estate to them, for a consideration of which the money so due to them formed part. Bill brought by the son of A. praying a declaration that he was entitled under the Act to the estate, or at least to the mtge., & relief founded on that declaration. A demurrer for want of equity was overruled.—*PARKER v. ALCOCK* (1831), 1 You. 361; 159 E. R. 1032.

Annotation:—*Mentd.* Gordon v. Horstall (1846), 5 Moo. P. C. C. 393.

197. — Time for recovery.]—Gaming Act, 1710 (c. 19), which avoids all securities for goods or money lost at unlawful games, & gives the loser a power to recover back the same within three months, does not make the contract void, but voidable only; & therefore, the loser cannot recover them after three months, though the winner can show no title to them except what arises from having won them at play.—*VAUGHAN v. WHITCOMB* (1807), 2 Bos. & P. N. R. 413; 127 E. R. 689.

198. Security for money lent at time of play—Void.]—LEAPRIDGE v. KING, No. 183, *ante*.

199. — — —.]—A note given to secure the payment of money won at any game is void under Gaming Act, 1710 (c. 19), s. 5.—*SIGEL v. JEBB* (1819), 3 Stark. 1, N. P.

200. — Judgments for money won at gambling—Not void unless voluntarily suffered.]—The judgments which are avoided by 16 Car. 2, c. 7, & Gaming Act, 1710 (c. 19), relating to gaming, are those which are given voluntarily, not those which are obtained adversely. Therefore, where the drawer of a bill of exchange for a gaming consideration, being in custody at the suit of an innocent indorsee, before Gaming Act, 1835 (c. 41), gave a *cognovit* under which he was taken in execution, & escaped. In an action against the marshal for an escape:—*Held*: the judgment so obtained was not avoided by the statutes in question.—*CHAPMAN v. LANE* (1841), 11 Ad. & El. 980; 1 Gal. & Dav. 523; 10 L. J. Ex. 543; 113 E. R. 687, Ex. Ch.; *affg.* S. C. *sub nom.* LANE v. CHAPMAN (1840), 11 Ad. & El. 966.

201. What amounts to a security—I.O.U.]—WILKINSON v. L'EAGUIER, No. 184, *ante*.

202. Gaming Act, 1835 (c. 41), ss. 1, 2—Act not retrospective.]—Sect. 1 of above Act, making bills given for gambling transactions voidable only, & not void, is, as well as sect. 2, prospective.—*HITCHCOCK v. WAY* (1837), 6 Ad. & El. 943; 2 Nev. & P. K. B. 72; Will. Woll. & Dav. 491; 6 L. J. K. B. 215; 112 E. R. 360.

Annotations:—*Reid*. Marsh v. Higgins (1850), 19 L. J. C. P. 297; Ansdell v. Ansdell (1880), 5 P. D. 138; Bowling v. Camp (1922), 128 L. T. 342.

203. Act avoids contract as well as security.]—(1) In an action brought to recover the amount of a sweepstake of two sovereigns

PART I. SECT. 6, SUB-SECT. 3.

193 I. Whether recoverable—Money paid to winner.]—Where a person who had lost a bet on a horse-race requested another to pay the amount of such bet, agreeing to repay him, & the latter paid such amount:—*Held*: the

amount so paid was recoverable from the person for whom it was paid, the consideration for the agreement not being unlawful, & the agreement not being one by way of wager.—*PRINGLE v. JAFAR KHAN* (1883), 1 L. R. 5 All. 443.—*IND.*

PART I. SECT. 7, SUB-SECT. 1.—A.

n. Security for money won at play—Void.]—A bond executed for a sum of money lost at billiards is void.—*KENNY v. BROWNE* (1790), 3 Ridg. Parl. Rep. 462.—*IR.*

each, & £15 added by way of prize, of which pltf.'s horse was the winner:—*Held*: 16 Car. 2, (c. 9), & Gaming Act, 1710 (c. 19), related to the same games, & horse racing was within their meaning, but they only prohibited fraudulent or excessive gaming.

(2) *Semble*: by Gaming Act, 1710 (c. 19), not only the securities given for a gaming debt, but the contract itself was avoided; but at all events this must be taken to be the case since Gaming Act, 1835 (c. 41).—*APPLEGARTH v. COLLEY* (1842), 10 M. & W. 723; 12 L. J. Ex. 34; 7 J. P. 741; 7 Jur. 18; 152 E. R. 663; *previous proceedings*, 2 Dowl. N. S. 223.

Annotations:—As to (1) *Refd.* *Smith v. Bond* (1843), 11 M. & W. 549; *Bentink v. Connop* (1844), 5 Q. B. 693; *Emery v. Richards* (1845), 14 M. & W. 728; *Jenks v. Turpin* (1884), 13 Q. B. D. 505; *Maskell v. Hill*, [1921] 3 K. B. 157. As to (2) *Consd.* *Thorpe v. Coleman* (1845), 1 C. B. 990; *Saxby v. Fulton*, [1909] 2 K. B. 208. *Refd.* *Moullis v. Owen*, [1907] 1 K. B. 746; *Hyams v. Stuart King*, [1908] 2 K. B. 696.

204. Where part only of consideration illegal.—*KERSHAW v. EVANS* (1906), 51 Sol. Jo. 27, C. A.

205. —.]—*CHAPMAN v. MACALISTER* (1912), *Times*, May 15.

Transactions taking place abroad.—*See Sect. 8, post.*

B. Recovery of Moneys paid to Third Parties.

(a) Before Gaming Act, 1922.

Sec, now, Gaming Act, 1922 (c. 19).

206. Gaming Act, 1835 (c. 41), s. 2—Not applicable to contracts between principal & agent.—*Deft.*, acting as pltf.'s agent, made bets with a third person. Pltf. gave deft. certain cheques to indemnify him in respect of the bets made by deft. on pltf.'s behalf with the third person. Deft. himself made no bets with pltf., & pltf. made his bets upon the footing that deft. was his agent & not a principal in the betting transactions. Pltf. claimed to recover from deft. under above Act, the amount of the cheques:—*Held*: the Act had no application to a case where cheques were given by a principal to reimburse his agent for losses incurred by the agent through bets made by him on the principal's behalf.—*MASKELL v. HILL*, [1921] 3 K. B. 157; 90 L. J. K. B. 1332; 37 T. L. R. 841; 65 Sol. Jo. 714; *sub nom.* *MUSKELL v. HILL*, 125 L. T. 827.

Annotation:—*Refd.* *Bowling v. Camp* (1922), 128 L. T. 342.

207. Not repealed by Gaming Act, 1892 (c. 9), s. 1.—*Gaming Act, 1835 (c. 41), s. 2*, under which money paid by cheque in respect of losses upon racing bets "shall be deemed & taken to be a debt due & owing" from the payee to the drawer of the cheque, & recoverable by action at law, creates a statutory debt, & does not raise an implied promise by the payee to repay the money to the drawer, within the meaning of Gaming Act, 1892 (c. 9), s. 1. Sect. 2 of the earlier Act is not, therefore, impliedly repealed by sect. 1 of the subsequent statute.—*COHEN v. HALL*, [1922] 2 K. B. 37; 91 L. J. K. B. 497; 127 L. T. 130; 38 T. L. R. 429; 66 Sol. Jo. 349, C. A.

Annotations:—*Refd.* *Bowling v. Camp* (1922), 128 L. T. 342; *Henshall v. Porter*, [1923] 2 K. B. 193.

208. Claims not subject to Civil Procedure Act, 1833 (c. 42), s. 3.—An action under Gaming Act, 1835 (c. 41), s. 2, to recover back the amount of a lost bet which has been paid by cheque, does J.—VOL. XXV.

not come within Civil Procedure Act, 1833 (c. 42), s. 3, which provides for a two years' limitation in the case of "actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force."—*SHINMAN v. LYONS* (1922), 38 T. L. R. 560; 66 Sol. Jo. 558.

209. Right of acceptor of bill to recover from drawer—Money & interest paid to indorsee.—A bill of exchange bearing interest upon the face of it accepted by pltf. & drawn by deft. was given to secure money lost at play & was paid by pltf. In an action for money paid under Gaming Act, 1835 (c. 41), s. 2:—*Held*: pltf. was entitled to recover back the interest paid as well as the principal money, both being secured by the bill.—*GILPIN v. CLUTTERBUCK* (1849), 13 L. T. O. S. 159; *previous proceedings*, 13 L. T. O. S. 71.

Annotation:—*Refd.* *Robinson v. Marsh*, [1921] 2 K. B. 640.

210. ———.]—C. & W. were engaged in transactions null & void under Gaming Act, 1845 (c. 109). In respect of such transactions C. drew a bill which was accepted by W. C. indorsed it to the X. bank, who sued W. & recovered the money. In an action to recover the money so paid from C.:—*Held*: W. could not recover.

Deft. claims that this sum of money should be recovered from pltf. by virtue of Gaming Act, 1835 (c. 41), s. 2. I do not think that this enactment has any application to the present case (*KENNEDY, J.*).—*CRAWLEY v. WHITE* (1898), 78 L. T. 167; 14 T. L. R. 247.

211. Who is "indorser, holder or assignee"—Original payer of cheque.—Pltf., in payment of certain racing bets, gave deft. five cheques for the amount. The cheques were made payable to deft. or order & crossed, & were paid by deft. into his bank. There was no evidence that deft.'s banking account was overdrawn. Pltf. subsequently sought to recover back the amount of the cheques from deft. under Gaming Act, 1835 (c. 41), s. 2:—*Held*: the action failed inasmuch as deft. was not the "holder" of the cheques within above sect., & it must be inferred that the bank into which deft. paid the cheques merely collected the same for deft. & was therefore not an "indorsee" within the meaning of the sect.

Qu.: whether pltf. could have recovered under the sect. if deft. had paid the cheques to his bankers in the character of holders in their own right, & not in the character of agents for collection merely.—*NICHOLLS v. EVANS*, [1914] 1 K. B. 118; 83 L. J. K. B. 301; 109 L. T. 990; 30 T. L. R. 42.

Annotations:—*Consd.* *Dey v. Mayo*, [1920] 2 K. B. 346; *Sutters v. Briggs*, [1922] 1 A. C. 1.

212. ———.]—The loser of bets on horse races drew in favour of the winner cheques crossed "Account payee. Not negotiable." The winner indorsed the cheques in blank & paid them into an account with his bankers which was his own account though in his wife's name. The bankers credited the account with the amount of the cheques & then presented & obtained payment of them. In an action by the loser against the winner under Gaming Act, 1835 (c. 41), s. 2, to recover the amount of the cheques as having been paid to a holder:—*Held*: the bankers were holders of the cheques, & pltf. was entitled to recover.—*DEY v. MAYO*, [1920] 2 K. B. 346; 89

Sect. 7.—Securities: Sub-sect. 1, B. (a) & (b); sub-sect. 2.]

L. J. K. B. 241; 122 L. T. 742; 30 T. L. R. 217; 64 Sol. Jo. 240, C. A.

Annotations:—Distd. O'Connor & Ould v. Ralston, [1920] 3 K. B. 451. **Consd.** Robinson v. Marsh, [1921] 2 K. B. 640; Sutters v. Briggs, [1922] 1 A. C. 1. **Refd.** Brown v. Swan (1921), 37 T. L. R. 787; Jeffrey v. Bamford, [1921] 2 K. B. 351; Maskell v. Hill, [1921] 3 K. B. 157; Cohen v. Hall, [1922] 2 K. B. 37; Ford v. Blanton, Ford v. Sauber (1922), 38 T. L. R. 801; Scranton's Trustee v. Pearse, [1922] 2 Ch. 87.

213. ————.]—The loser of a bet on a horse race drew a cheque for the amount of the bet in favour of the winner & crossed it "Not Negotiable a/c Payee Only." The winner indorsed the cheque in blank & handed it to his bankers for collection. The bankers presented the cheque & obtained payment of it. In an action by the loser against the winner under Gaming Act, 1835 (c. 41), s. 2, to recover the amount of the cheque as having been paid to a holder:—**Held:** the bankers were indorsees & holders of the cheque, & pltf. was entitled to recover.—**SUTTERS v. BRIGGS**, [1922] 1 A. C. 1; 91 L. J. K. B. 1; 125 L. T. 737; 38 T. L. R. 30; 66 Sol. Jo. (W. R.) 9, H. L.

Annotations:—Consd. Scranton's Trustee v. Pearse, [1922] 2 Ch. 87. **Refd.** Bowling v. Camp (1922), 128 L. T. 342; Cohen v. Hall, [1922] 2 K. B. 37; Henshall v. Porter, [1923] 2 K. B. 193.

214. ———— Banker recovering cheque for collection.]—**NICHOLLS v. EVANS**, No. 211, *ante*.

215. ————.]—**DEY v. MAYO**, No. 212, *ante*.

216. ————.]—**O'CONNOR & OULD v. RALSTON**, No. 163, *ante*.

217. ————.]—**SUTTERS v. BRIGGS**, No. 213, *ante*.

218. ———— Receipt of cheque by another branch of same bank.]—Pltf., in respect of racing bets which had been won from him by deft., drew in favour of deft. cheques on the branch of a bank at which he had an account. Deft. paid them into his own account at another branch of the same bank. In an action by pltf. to recover the amount of the cheques from deft. under Gaming Act, 1835 (c. 41), s. 2:—**Held:** there had been actual payment, the branch of the bank at which deft. banked was the "holder" of the cheques within the sect., & pltf. was entitled to recover.—**BROWN v. SWAN** (1921), 37 T. L. R. 787.

219. ———— Indorser for value.]—Pltf. gave deft. three cheques in payment of certain racing bets. The cheques were made payable to deft. or order, & were indorsed by deft. to a Mr. Lee, who gave him cash for them. Lee knew when the cheques were indorsed to him that they had been given by pltf. to deft. in payment of bets. The cheques were presented by Lee to pltf.'s bankers & duly honoured.

Pltf. subsequently sought to recover back the amount of the cheques from deft. under Gaming Act, 1835 (c. 41), s. 2. Deft. alleged that pltf. could not rely upon that sect., as Lee was not an indorsee for valuable consideration without notice:—**Held:** the remedy given by above sect. was not confined to a case where payment had been made to an indorsee for valuable consideration without notice, but applied where payment had been made to any indorsee, & pltf. was therefore entitled to recover.—**GOLDING v. BRADLAW**, [1919] 2 K. B.

238; 89 L. J. K. B. 19; 121 L. T. 157; 35 T. L. R. 453.

Annotation:—Consd. Dey v. Mayo, [1920] 2 K. B. 346.

220. ———— What amounts to "actual payment"—Payment of cheque where consideration partly valid.]—Pltf. lost £2,685 in playing at cards with deft. He gave deft. in payment therefor a cheque for £2,700 drawn upon his bank, the difference, namely, £15, being handed by deft. to pltf. in cash. The cheque was indorsed by deft. & paid into his bank, & was duly met by pltf.'s bank upon presentation. Pltf. brought an action to recover £2,685 under Gaming Act, 1835 (c. 41), s. 2:—**Held:** (1) the cheque was a bill within sect. 2 of the Act, & it had been "actually" paid by pltf.; (2) the considerations for the cheque could be severed & pltf. was entitled to maintain his action & recover in respect of the illegal consideration.—**ROBINSON v. MARSH**, [1921] 2 K. B. 640; 90 L. J. K. B. 1317; 125 L. T. 468; 37 T. L. R. 640; 65 Sol. Jo. 514.

Annotations:—As to (1) Refd. Brown v. Swan (1921), 37 T. L. R. 787. **As to (2) Refd.** Pocahontas Fuel Co. v. Ambatielos (1922), 27 Com. Cas. 148.

221. ———— Payment to another branch of drawer's bank.]—**BROWN v. SWAN**, No. 218, *ante*.

222. ———— Crediting account.]—Pltf. made bets with deft. & paid by cheque the bets which he lost. In some cases pltf. won the bets, & deft. paid pltf. by sending back to him the cheques which pltf. had sent to him in payment of lost bets. In an action by pltf. under Gaming Act, 1835 (c. 41), s. 2, to recover from deft. the amount of cheques given to deft. for bets lost by pltf., deft. claimed to be credited with the amount of the cheques sent back to him by pltf.:—**Held:** as deft. had not "actually paid" the sums represented by the returned cheques, & as pltf. had had no legal right to receive the sums with which he had been credited, deft. was not entitled to deduct them from the amount recoverable by pltf.—**MALONE v. POWELL** (1922), 38 T. L. R. 604; 66 Sol. Jo. 577.

223. ———— Person to whom cheque "originally given"—Manager of firm.]—Pltf., a backer of horses, lost two bets made with deft., a bookmaker, & paid them by cheques drawn in favour of deft.'s manager & made payable to the order of such manager. Pltf. brought an action against deft. under Gaming Act, 1835 (c. 41), s. 2, to recover the amounts of these cheques on the ground that they were cheques for bets & that the amounts had been paid by pltf. to deft.'s bankers. The case was heard before the repeal of that sect. by Gaming Act, 1922 (c. 19), & judgment was given for pltf. On appeal:—**Held:** as deft.'s manager was merely the *alter ego* of deft., the cheques were "originally given" to deft. within that sect. & the decision was right.—**HURST v. TARSH** (1922), 39 T. L. R. 4; 67 Sol. Jo. 96, C. A.

224. ———— Right of trustee in bankruptcy to enforce claims.]—In 1919, debtor paid deft., a bookmaker, various cheques for bets lost on horse racing, & these cheques were cleared through various banks, as holders. On Aug. 30, 1920, debtor was adjudicated a bkpt., & on Mar. 30, 1921, his trustee in bkpcy., by the direction of his committee of inspection, commenced this action in the K. B. Div. to recover £955, the amount admitted to be due, if recoverable. The action was transferred to the judge in bkpcy. under Bkpcy. Rules, 1915, r. 123. Deft. took the

point that such an action ought not to be brought by an officer of the ct., as the claim, however legal, was practically dishonest. During the argument, however, in order to avoid any question of jurisdiction, deft. was by consent given leave to serve a notice of motion in bkpcy. to stay all further proceedings, & the case proceeded on the footing that the motion was before the ct. sitting in bkpcy.:—*Held*: (1) the claim the trustee in bkpcy. was seeking to enforce was in respect of a debt which under Gaming Act, 1835 (c. 41), s. 2, was a statutory debt, & there was nothing which entitled the ct. to say that if & when a right of action in respect of such a debt vested in a trustee in bkpcy., it was a dishonest or dishonourable thing for him, as an officer of the ct., to enforce it; (2) judgment for the trustee in bkpcy. must be entered in the action for the amount claimed.—*SCRANTON'S TRUSTEE v. PEARSE*, [1922] 2 Ch. 87; 91 L. J. Ch. 579; 127 L. T. 698; 38 T. L. R. 629; 66 Sol. Jo. 503; [1922] B. & C. R. 52, C. A.

Compare *BANKRUPTCY*, Vol. IV., pp. 205, 206, Nos. 1892–1896.

(b) *After Gaming Act, 1922.*

225. Gaming Act, 1922 (c. 19), s. 1—Whether Act retrospective—Right of action accrued & writ issued before Act in force.]—The effect of the provision in above Act, sect. 1, that no action for the recovery of money under Gaming Act, 1835 (c. 41), s. 2, shall be entertained in any ct., is to preclude the ct. from entertaining such an action even where notice of trial had been given before July 20, 1922, when the Act of that year received the royal assent.—*BROOKES v. BROWN* (1922), 39 T. L. R. 3; 67 Sol. Jo. 79.

Annotation:—*Refd.* *Bowling v. Camp* (1922), 128 L. T. 342.

226. —[The repeal of Gaming Act, 1835 (c. 41), s. 2, by Gaming Act, 1922 (c. 19), does not prevent the continuance of proceedings under the repealed sect. which were pending on July 20, 1922, when the 1922 Act came into force, nor does it prevent the commencement of fresh actions thereunder in respect of claims which had actually arisen before that date.

Before the repeal of sect. 2 of the former Act, sect. 1 of that Act, the effect of which is that cheques for bets are to be deemed to have been given for an illegal consideration, did not prevent a pltf. from recovering under sect. 2, & although sect. 1 is still unrepealed, it still does not prevent recovery under sect. 2 in the case of proceedings pending on, & claims actually arising before July 20, 1922.—*BOWLING v. CAMP* (1922), 128 L. T. 342; 39 T. L. R. 31; 67 Sol. Jo. 114.

Annotation:—*Expld. & Foll.* *Henshall v. Porter*, [1923] 2 K. B. 193.

227. —[The provision in Gaming Act, 1922 (c. 19), s. 1, that no action for the recovery of money under Gaming Act, 1835 (c. 41), s. 2, shall be entertained in any ct., is not retrospective in regard to actions which had been

commenced before the passing of the Act & in which judgment had not been given when the Act came into force.—*BEADLING v. GOLL* (1922), 39 T. L. R. 128; *sub nom.* *BEADLING v. GOLL, WALKER v. GOLL, BEADLING & WALKER v. GOLL*, 67 Sol. Jo. 298, C. A.

Annotation:—*Apld.* *Henshall v. Porter*, [1923] 2 K. B. 193.

228. —[Right of action accrued before & writ issued after Act in force.]—*BOWLING v. CAMP*, No. 226, *ante*.

229. —[By Gaming Act, 1922 (c. 19), s. 1, no action under Gaming Act, 1835 (c. 41), s. 2, to recover back money paid in respect of gaming debts "shall be entertained in any ct." Pltf. after the former Act came into force issued a writ in respect of causes of action which had arisen before that Act came into force:—*Held*: pltf.'s cause of action, vested in him before the former Act came into force, was not divested on the Act coming into force & he was entitled to recover.—*HENSHALL v. PORTER*, [1923] 2 K. B. 193; 92 L. J. K. B. 866; 129 L. T. 443; 39 T. L. R. 409; 67 Sol. Jo. 537.

SUB-SECT. 2.—EFFECT AS AGAINST REMOTE PARTIES.

230. Bond taken without notice of illegal transaction.]—A bond given to a third person in discharge of a gaming debt, is not void by 16 Car. 2, c. 7, s. 3, if the obligee was not privy that the money was won at play.—*ANON.* (1677), 2 Mod. Rep. 279; 86 E. R. 1071.

Annotation:—*Refd.* *Boyer v. Bampton* (1740), 7 Mod. Rep. 334.

—[See *BONDS*, Vol. VII., p. 225, No. 679.

Bond taken with notice of illegal transaction.]—See *BONDS*, Vol. VII., p. 176, No. 148.

231. Bond given as collateral security—Illegal game within Gaming Act, 1710 (c. 19).]—Cricket is a game within above Act, & a bond given as a collateral security by a third person for money won at it, is void.—*JEFFREYS v. WALTER* (1748), 1 Wils. 220; 95 E. R. 584.

Annotations:—*Refd.* *Foot v. Baker* (1843), 5 Man. & G. 335; *Maskell v. Hill*, [1921] 3 K. B. 157.

232. Judgment suffered by consent for gambling debt—Representation by debtor to third party that debt valid.]—A gambling debt secured by warrant of attorney, upon which judgment was entered up. Pltf. sold the debt to a third person, to whom deft., in answer to an inquiry by the buyer, said that he owed the money, & the debt would be paid; upon the faith of this, the buyer completed his purchase. Under these circumstances, the ct. refused to set aside the judgment, except upon equitable terms in favour of the buyer.—*DAVISON v. FRANKLIN* (1830), 1 B. & Ad. 142; 8 L. J. O. S. K. B. 376; 109 E. R. 740.

233. Payment by bill accepted by third party—Liability of third party.]—A. & B. jointly made

to the cedor.—*SANDEMAN v. SOLOMON* (1907), 28 N. L. R. 140.—S. AF.

x. Security given for gambling debt—By agent—Liability of agent to assignee.]—L., at the request of A. backed a horse with E. to win the C. Handicap at 100 to 14 in sovereigns. The horse won. E. accounted to L. by paying him £13 in each, & giving

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PART I. SECT. 7, SUB-SECT. 2.

o. Promissory note given for gambling debt—Transferred to third party before maturity.]—*BIROLEAU v. DEROUIN* (1863), 7 L. C. J. 128.—CAN.

p. Cheque in settlement of gambling debt—Void in hands of bond fide holder for value.]—*RE SUMMERFELD v. WORTS* (1886), 12 O. R. 48.—CAN.

q. Security for repayment of money lent for gambling—I.O.U.—Rights of cessionary.]—Money lent upon the cession of an I.O.U. which had been given to secure repayment of money advanced for the purpose of gambling, held not to be recoverable in law, pltf., as cessionary, having taken the I.O.U. subject to its equities, & claiming no better title or rights than appertained

Sect. 7.—Securities: Sub-sects. 2 & 3. Sects. 8, 9, 10 & 11.]

bets with third persons on a horse race. B. received the money, & gave A. a bill accepted by C., who was no party to the betting, for his share:—*Held*: A. was not precluded by Gaming Act, 1845 (c. 109), s. 18, from suing C. upon the bill.—*JOHNSON v. LANSLEY* (1852), 12 C. B. 468; 138 E. R. 989.

Annotations.—*Apld.* *Beeston v. Beeston* (1875), 1 Ex. D. 13. *Distd.* *Higginson v. Simpson* (1877), 2 C. P. D. 76. *Consd.* *Bridger v. Savage* (1885), 15 Q. B. D. 363. *Refd.* *Read v. Anderson* (1882), 10 Q. B. D. 100; *Jeffrey v. Bamford*, [1921] 2 K. B. 351.

234. Payment by cheque of third party—Right of third party to recover.]—*Pltf.* was induced by the fraud of L. to give her a cheque for £3,000, payable to her order for the alleged purpose of a good investment. L. at the time owed deft. £1,400 for betting debts & she indorsed the cheque for £3,000 over to him in exchange for a counter cheque of his own for £1,600. There was no evidence that deft. acted in bad faith or that there was anything in the nature of the transaction to put him upon inquiry. The cheque for £3,000 was paid by deft. into his banking account, & the counter cheque for £1,600 was indorsed & cashed by L. *Pltf.* claimed to recover the £1,400 from deft. as money had & received to her use:—*Held*: *pltf.* was not entitled to recover.—*BARKWORTH v. GANT* (1909), 26 T. L. R. 165, C. A.

Bills given in respect of money won at gaming—Effect of illegal or void consideration.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 69, 145–147, Nos. 558, 947, 949–954, 958–960.

Effect of avoidance of instrument by statute.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 148, 149, Nos. 966–972.

Bills given in substitution or renewal of bills void by statute.]—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 124, Nos. 827–829.

SUB-SECT. 3.—ACTIONS AND PROCEEDINGS IN RESPECT OF SECURITIES.

235. Defence of gaming transaction—Security must be produced.]—In an action on a promissory note, in order to prove that it was given on a gaming consideration, the note must be produced, & identified as the note which was so given: where, therefore, to a declaration on a promissory note deft. pleaded a gaming consideration, & swore that he only gave one note to *pltf.*, & that it was for a gambling debt, but no note was produced at the trial:—*Held*: there was no evidence in support of the plea.—*MEYNELL v. BONE* (1853), 1 C. L. R. 671; 21 L. T. O. S. 158; 1 W. R. 415.

236. — Leave to defend—Terms imposed.]—*GRIFFITHS v. WHITEHEAD* (1856), 26 L. T. O. S. 200.

him credit for an amount of £87 already due by him to E. L. paid A. £25 in cash, & gave an I.O.U. for the balance of £75. W. bought this I.O.U. from A. & sued upon it. L. pleaded that the note was given for a gambling debt:—*Held*: L. having acted as agent for A. & received moneys on behalf of A. was bound to account therefor to A. & W. was accordingly entitled to recover on the I.O.U.—*WARD v. LEVIN* (1908), E. D. C. 168.—S. AF.

PART I. SECT. 7, SUB-SECT. 3.

a. Defence of gaming transaction—Security for gambling & other debts—Consideration not severable.]—*Deft.*, having lost large sums to *pltf.* in gaming, gave several bills to make up the amount. Being unable to pay them when due, he arranged with *pltf.* that the latter should pay off a legal debt for which deft. was pressed, & gave *pltf.*, in satisfaction of his

237. R. S. C., Ord. 14, r. 1.]—In an action brought by the holder for value of a negotiable instrument, with notice that it was made for the purpose of paying gambling losses to the person in whose favour it was made, deft. is entitled to leave to defend under R. S. C. Ord. 14, r. 1.—*HODGMAN v. O'NEIL* (1885), 2 T. L. R. 169, D. C.

238. Sufficiency of proof that security given for gaming losses.]—*LEWIS v. ARCHIE & Co.* (1922), 153 L. T. Jo. 281, D. C.

Onus of proof.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 178, 179, 192, Nos. 1117, 1121–1123, 1184.

Delivery up & cancellation of security.]—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 479, Nos. 3041, 3042.

Restraint of negotiation.]—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 208, No. 1278.

Interrogatories.]—*See* *DISCOVERY*, Vol. XVIII., pp. 182, 239, Nos. 1339, 1340, 1818.

Restraint of foreign proceedings.]—*See* *CONFLICT OF LAWS*, Vol. XI., p. 480, No. 1332.

SECT. 8.—TRANSACTIONS TAKING PLACE ABROAD.

239. Security given for gaming debt incurred abroad—Intention of parties that English law should apply.]—*ROBINSON v. BLAND* (1760), 2 Burr. 1077; 1 Wm. Bl. 234, 256; Bull. N. P. 275; 97 E. R. 717.

Annotations.—*Consd.* *Wilkinson v. L'Eaugier* (1836), 2 Y. & C. Ex. 363; *Applegarth v. Colley* (1842), 10 M. & W. 723. *Folld.* *Moullis v. Owen*, [1907] 1 K. B. 746. *Consd.* *Saxby v. Fulton*, [1909] 2 K. B. 208. *Refd.* *Biggs v. Lawrence* (1789), 3 Term Rep. 454; *Leapridge v. King* (1795), Peake, Add. Cas. 32; *M'Kinnell v. Robinson* (1838), 3 M. & W. 434; *Re Trye, Ex p. Guillebert* (1838), 7 L. J. Bcy. 25; *Daintree v. Hutchinson* (1842), 11 L. J. Ex. 397; *Quarrier v. Colston* (1842), 1 Ph. 147; *Allen v. Kemble* (1848), 6 Moo. P. C. 314; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589; *Kaufman v. Gerson*, [1903] 2 K. B. 114. *Mentd.* *Rice v. Shute* (1770), 2 Wm. Bl. 695; *Phillips v. Hunter* (1795), 2 Hy. Bl. 402; *Phillips v. Cockayne* (1811), 3 Camp. 119; *Caltou v. Bragg* (1812), 15 East. 223; *Curling v. Thornton* (1823), 2 Add. 6; *Russell v. Smyth* (1842), 11 L. J. Ex. 308; *R. v. Roberts* (1857), 7 Cox. C. 422; *Brook v. Brook* (1858), 3 Sm. & G. 481; *Elliston v. Deacon* (1866), L. R. 2 C. P. 20; *Re Missouri S.S. Co.* (1889), 42 Ch. D. 321; *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358; *South African Territories v. Wallington*, [1898] A. C. 309.

240. — — —.]—*Deft.* gave to *pltf.* in Algiers a cheque drawn by him on an English bank, partly in payment of money lent by *pltf.* to deft. to enable deft. to play at baccarat in a club at Algiers, & as to the balance, to be applied by *pltf.* in discharging debts incurred by deft. when playing at baccarat in the club. The consideration for the cheque was legal according to the law of France. In an action on the cheque:—*Held*: inasmuch as the transaction was governed by English law, the cheque must be deemed to have

claims, bills for an amount less than that of the original bills, one of the latter bills being for an amount not greater than that of the legal debt which *pltf.* had paid for him:—*Held*: the whole was one transaction, for which the consideration was not severable, & *pltf.* could not recover on the last-mentioned bill.—*COLLIN v. STEWART* (1878), 4 V. L. R. 211.—AUS.

been given for an illegal consideration within Gaming Act, 1835 (c. 41), s. 1, & the action was, therefore, not maintainable.—*MOULIS v. OWEN*, [1907] 1 K. B. 746; 76 L. J. K. B. 396; 96 L. T. 596; 23 T. L. R. 348; 51 Sol. Jo. 306, C. A.

Annotations:—*Folld. Browne v. Bailey* (1908), 24 T. L. R. 644. *Consd. Saxby v. Fulton*, [1909] 2 K. B. 208; *Soc. Des Hôtels Réunis (Soc. Anon.) v. Hawker* (1913), 29 T. L. R. 578. *Reid. Hyams v. Stuart King*, [1908] 2 K. B. 696; *Robinson v. Marsh*, [1921] 2 K. B. 640. *Mentd. Re Bonacina La Brasseur v. Bonacina*, [1912] 2 Ch. 394; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 3 K. B. 532.

241. ———.]—*Deft.*, when at a race meeting in France, lost bets to *pltf.* to the amount of £1,790 & *deft.* gave to *pltf.* his cheque for £2,000 drawn upon an English bank & post-dated two or three days, & *pltf.* handed to *deft.* the balance of £210 in cash. In an action on the cheque:—*Held*: *pltf.* was not entitled to recover.—*BROWNE v. BAILEY* (1908), 24 T. L. R. 644.

242. Security given abroad for gaming debt incurred in England.]—Bills of exchange, made in France, on French stamps, & substituted in France for English bills of exchange which were originally given for gambling debt, ordered to be delivered up. At the hearing, the objection, that the bill is multifarious, comes too late to prevent the *ct.* from making a decree. Decree, without costs, for the delivery of bills given for a gambling transaction.—*WYNNE v. CALLANDER* (1826), 1 Russ. 293; 38 E. R. 113.

243. Money lent for gambling abroad—Game legal abroad—Money recoverable.]—Gambling debts contracted in this country, as well as the securities given for them, are void & cannot be recovered. But money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the *cts.* of this country; & therefore, where an unascertained portion of a balance of account, for which an I.O.U. had been given, was admitted to consist of money lent for the purpose of playing at public tables in Germany, but it did not appear that the games played at such tables were forbidden by the laws of that country; the *ct.*, on appeal, dissolved an injunction which had been granted to restrain an action brought to recover the whole balance.—*QUARRIER v. COLSTON* (1842), 1 Ph. 147; 12 L. J. Ch. 57; 6 Jur. 959; 41 E. R. 587, L. C.

Annotations:—*Folld. Saxby v. Fulton*, [1909] 2 K. B. 208. *Reid. Kaufman v. Gerson*, [1903] 2 K. B. 114; *Moulis v. Owen*, [1907] 1 K. B. 746; *Re Campbell. Ex p. Seal* (1911), 81 L. J. K. B. 154. *Mentd. Roussillon v. Roussillon* (1880), 42 L. T. 679; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 3 K. B. 532.

244. ———.]—It is no defence to an action for money lost in France, that it was lent for the purpose of gaming there.—*KING v. KEMP* (1863), 8 L. T. 255.

Annotation:—*M.F. Moulis v. Owen*, [1907] 1 K. B. 746.

245. ———.]—Money lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the *cts.* of this country.—*SAXBY v. FULTON*, [1909] 2 K. B. 208; 78 L. J. K. B. 781; 101 L. T. 179; 25 T. L. R. 446; 53 Sol. Jo. 397, C. A.

Annotations:—*Reid. Sutters v. Briggs*, [1922] 1 A. C. 1. *Mentd. Soc. Des Hôtels Réunis (Soc. Anon.) v. Hawker* (1913), 29 T. L. R. 578.

246. Action on foreign judgment.]—*CRAWFORD v. WITTEN* (1773), *Lofft*, 154; 1 Doug. K. B. 4, n.; 98 E. R. 584.

———.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 444 *et seq.*

SECT. 9.—TIME OR DIFFERENCE BARGAINS.

See STOCK EXCHANGE.

SECT. 10.—CONTRACTS OF INSURANCE.

See INSURANCE.

SECT. 11.—EFFECT OF BANKRUPTCY.

What debts provable.]—*See* BANKRUPTCY, Vol. IV., pp. 253, 312, Nos. 2411–2413, 2922.

Evidence to support proof.]—*See* BANKRUPTCY, Vol. IV., pp. 323, 326, Nos. 3035, 3055.

As offence barring discharge.]—*See* BANKRUPTCY, Vol. IV., pp. 557, 558, Nos. 5138–5148.

Position of creditor—After assent to composition deed.]—*See* BANKRUPTCY, Vol. V., p. 1133, No. 9203.

Rights of assignee.]—*See* BANKRUPTCY, Vol. V., pp. 914, 915, 972, 986, Nos. 7480, 7483, 7956, 7957, 8068.

Part II.—Games, Gaming and Gaming Houses.

SECT. 1.—GAMES AND GAMING.

SUB-SECT. 1.—WHAT IS GAMING.

247. Playing for money.]—A conviction of a publican for knowingly suffering an unlawful game, to wit, the game of dominoes, to be played in his house, contrary to the tenor of his license, is bad, dominoes not being an unlawful game, & there being no allegation that he suffered gaming, that is, playing for money, in his house.—*R. v. ASHTON* (1852), 1 E. & B. 280; 22 L. J. M. C. 1; 20 L. T. O. S. 110; 17 Jur. 501; 118 E. R. 444; *sub nom. Ex p. ASHTON*, 16 J. P. Jo. 790.

Annotations:—*Fold. Bew v. Harston* (1878), 3 Q. B. D. 454. *Reid. Patton v. Rhymer* (1860), 24 J. P. 342; *Jenks v. Turpin* (1884), 13 Q. B. D. 505; *Dyson v. Mason* (1889), 22 Q. B. D. 351; *Welton v. Ruffles*, [1920] 1 K. B. 226; *R. v. Hendrick* (1921), 37 T. L. R. 447.

248. —.]—*PATTEN v. RHYMER*, No. 295, *post*.

249. — Or money's worth.]—Four persons including applt. C., a licensed beer-seller, played, on the licensed premises, twenty or thirty games at ten-pins for a pint of beer each game, the beer being supplied as it was won or lost, & being drunk by all the players, but paid for only by the losers:—*Held*: this was an offence against applt.'s licence, which provided that he should not "knowingly suffer any unlawful games or any gaming whatsoever" on the licensed premises, & applt. had been rightly convicted by the justices.

I think it was equally gaming whether they played for money or money's worth (*LUSH, J.*).—*DANFORD v. TAYLOR* (1869), 20 L. T. 483; 33 J. P. 612.

Annotations:—*Reid. Dyson v. Mason* (1889), 22 Q. B. D. 351; *Welton v. Ruffles*, [1920] 1 K. B. 226.

250. —.]—Applt., a licensed person, suffered to be played on the licensed premises a game called puff & dart, the object in which is to hit a mark on a target with a small dart blown through a tube. The players each contributed 2d. as entrance money, the total sum so contributed being applied to the purchase of a rabbit as a prize for the winner of the game:—*Held*: applt. was rightly convicted of suffering gaming on the licensed premises under Licensing Act, 1872 (c. 94), s. 17 (1).

Here money was not in one sense staked on the game but each man paid his 2d. for the chance of winning the rabbit. It comes to the same thing in principle. I think it was gaming within the Act (*MELLOR, J.*).—*Bew v. HARSTON* (1878), 3 Q. B. D. 454; 47 L. J. M. C. 121; 39 L. T. 233; 42 J. P. 808; 26 W. R. 915, D. C.

Annotation:—*Reid. Dyson v. Mason* (1889), 22 Q. B. D. 351.

251. — Even though game of skill.]—Applt., a licensed person, suffered a game of skill called skittle pool to be played for small stakes of money on a billiard table in the licensed premises:—

Held: he could properly be convicted of suffering gaming under Licensing Act, 1872 (c. 94), s. 17 (1).

The question upon which the magistrates really want our decision is whether playing a game of skill for money is gaming within s. 17 of the Licensing Act, 1872 (c. 94). It seems to me to have been held & rightly held that playing any game for money is gaming (*WILLS, J.*).—*DYSON v. MASON* (1889), 22 Q. B. D. 351; 58 L. J. M. C. 55; 60 L. T. 265; 53 J. P. 262; 5 T. L. R. 231; 16 Cox, C. C. 575, D. C.

Annotations:—*Consd. Welton v. Ruffles*, [1920] 1 K. B. 226. *Reid. Lockwood v. Cooper* (1903), 72 L. J. K. B. 690.

252. — Prizes not provided by players.]—To constitute gaming the game played must be one which involves the element of wagering; each player must have a chance of losing as well as of winning.

A number of persons hired a room in an hotel for the purpose of playing whist. They played for prizes, which were not subscribed for by the players, but were given by third persons:—*Held*: the whist so played did not amount to gaming within Licensing Act, 1872 (c. 94), s. 17.—*LOCKWOOD v. COOPER*, [1903] 2 K. B. 428; 72 L. J. K. B. 690; 89 L. T. 306; 67 J. P. 307; 52 W. R. 48; 19 T. L. R. 610; 47 Sol. Jo. 672; 20 Cox, C. C. 539, D. C.

Annotations:—*Distd. Welton v. Ruffles*, [1920] 1 K. B. 226. *Reid. Morris v. Godfrey* (1912), 106 L. T. 890.

253. Prize provided by owner of licensed premises.]—A copper kettle was bowled for on a ten-pin ground forming part of licensed premises of which applt. was the licence holder, & brewers were the owners. The kettle was presented by the brewers, & each person who took part in the bowling paid an entrance fee of 6d. for the chance of winning the kettle. The entrance fees were collected at the request of applt. by one of the players, who paid out of the sum so collected 18s. to applt., retaining the balance for himself. Applt., some days after the bowling had taken place, sent the 18s. to a hospital. Upon an information against applt. under Licensing Consolidation Act, 1910 (c. 24), s. 17 for unlawfully suffering gaming upon his licensed premises, justices found that the brewers were not disinterested persons, & convicted the applt.:—*Held*: the conviction must be upheld.—*WELTON v. RUFFLES*, [1920] 1 K. B. 226; 89 L. J. K. B. 797; 122 L. T. 270; 83 J. P. 271; 36 T. L. R. 20; 17 L. G. R. 774; 26 Cox, C. C. 534, D. C.

SUB-SECT. 2.—WHAT IS A GAME.

A. In General.

254. What games unlawful—Question of law—Gaming Houses Act, 1854 (c. 38).]—By sect. 4 of

PART II. SECT. 1, SUB-SECT. 1.

247 i. Playing for money.]—Gaming is playing at any game, sport, pastime, or exercise, lawful or unlawful, for money or any other valuable thing which is staked on the result of the game, i.e., which is to be lost or won according to the success or failure of

the person who has staked.—*RAM PRATAP NEMANI v. R.* (1912), 1 L. R. 39 Calc. 968.—*IND.*

247 ii. —.]—"Gaming" is defined as playing any game, whether lawful or unlawful, for money or money's worth.—*HAYES v. BOURKE* (1911), 30 N. Z. L. R. 589.—*N.Z.*

247 iii. —.]—*R. v. ROBINSKY* (1919), C. P. D. 107.—*S. AF.*

PART II. SECT. 1, SUB-SECT. 2.—A.

t. Pak-ah-yu—Chinese lottery.]—The Chinese lottery called *Pak-ah-yu* is not

the above Act any person, being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, is made liable on summary conviction to a penalty not exceeding £500. Deft., with three friends whom he met, went to his house for the purpose of having a game of cards; after playing whist, they played for money a game called "German Bank," which the jury found to be an unlawful game. There was no evidence that they or any one else had ever played an unlawful game of cards at deft.'s house on any other occasion:—*Held*: (1) deft. could not be convicted under the above sect. of using the house or room for the purpose of unlawful gaming being carried on therein; (2) the question whether a particular game of cards is an unlawful game is a question of law for the judge, & not of fact for the jury.—*R. v. DAVIES*, [1897] 2 Q. B. 199; 66 L. J. Q. B. 513; 76 L. T. 786; 13 T. L. R. 405; 41 Sol. Jo. 511; 18 Cox, C. C. 618, C. C. R.

Annotations.—*As to* (1) *Reid*. *Martin v. Benjamin*, [1907] 1 K. B. 64; *R. v. Mortimer*, [1911] 1 K. B. 70. *As to* (2) *Reid*. *Bracchi v. Rees* (1915), 79 J. P. 479; *R. v. Hendrick* (1921), 37 T. L. R. 447.

255. —.]—On trials for unlawful gaming within sect. 4 of the above Act the question whether a given game is lawful or not is for the ct., & while the jury should be directed to consider the character of the place in question, & the issue, "Is it a game of mere skill?" they should always, whatever specific questions are put to them, be asked to return a verdict of guilty or not guilty.—*R. v. HENDRICK* (1921), 37 T. L. R. 447; 15 Cr. App. Rep. 149, C. C. A.

B. Lawful Games.

Backgammon.—*See* Gaming Act, 1739 (c. 19), s. 9.

256. **Billiards.**—*PARSONS v. ALEXANDER*, No. 49, *ante*.

257. **Dice.**—*At common law.*—Neither is play at dice in itself unlawful, though prohibited by several statutes to certain persons, & to be used in certain places (*per* CUR).—*SHERBON v. COLEBACH* (1690), 2 Vent. 175; 86 E. R. 377.

Annotations.—*Reid*. *Smith v. Abery* (1704), 6 Mod. Rep. 128; *Jenks v. Turpin* (1884), 13 Q. B. D. 505.

a game at common law.—*R. v. LI-CHI* (1881), 2 N. S. W. L. R. 189.—*AUS.*

a. "*Big Bonanya*."—Deft. was convicted before magistrates on an information which charged him with playing in an open & public place with an instrument of gaming at a game of chance, to wit—"Big Bonanya." The evidence was that deft. held a bag from which persons drew tickets for which they paid. Some of the tickets represented prizes of various amounts which were paid to the holders of such tickets & some represented blanks.—*Held*: the conviction was right. It may be that deft. was conducting a lottery; but he was also playing a game within *Vagrancy Act*, 15 Vict. No. 4, s. 3.—*R. v. EAMES* (1885), 6 N. S. W. L. R. 118; 1 N. S. W. W. N. 162.—*AUS.*

b. *Rain-betting.*—Accused kept a shed where large numbers of people assembled for the purpose of betting on the quantity of rain which might fall in a given time.—*Held*: there must be a game before there is gaming; & to constitute a game, there must be a contest, & an active participation of

certain persons is also necessary. In the present case there was no contest, no players, & no active part taken by the betters who merely watched the falling of rain. Rain-betting is therefore not a game.—*R. v. NAROTTAMDAS MOTIRAM* (1889), 1 L. R. 13 Bom. 681.—*IND.*

c. *Sale of goods by "wheel of fortune"*.—*Lottery.*—Deft. carried on a sale of goods by means of a "wheel of fortune" in a house open to the public. He was prosecuted under 8 & 9 Vict. c. 109, for keeping a common gaming house.—*Held*: deft. was carrying on a lottery, & a lottery was a "game." The offence charged was a game under the Act, & it was not necessary that the prosecution should be at the suit of the Attorney-General.—*MUNRO v. KELLY* (1911), 45 I. L. T. 179.—*IR.*

PART II. SECT. 1, SUB-SECT. 2.—B.

258. **Billiards.**—Billiards & pool are not games of chance within *Gaming Act*, 1908, s. 10. *SCOTT v. JACKSON* (1911), 30 N. Z. L. R. 1025.—*N.Z.*

d. *Dice.*—The mere throwing of

258. **Dominoes.**—*R. v. ASHTON*, No. 247, *ante*.

Horse, foot, & other racing.—*See* Part V., Sect. 1, *post*.

259. **Whist.**—*LOCKWOOD v. COOPER*, No. 252, *ante*.

C. Unlawful Games.

(a) Games Unlawful in Themselves.

260. **Baccarat.**—(1) *Gaming Houses Act*, 1854 (c. 38), s. 4, enacts that any person, being the owner or occupier or having the use of any house, room, or place, who shall use the same for the purpose of unlawful gaming being carried on therein; & any person who, being the owner or occupier of any house or room, shall knowingly & wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid; & every person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid; & any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof before any two justices of the peace, etc., forfeit & pay a penalty not exceeding £500. A. was the proprietor of the Park Club, & was also occupier of the premises used by the club, & received the profits. B., C., D., & E. were members of the committee of management, whose duty it was to regulate the internal management of the club, & to make bye-laws & regulations for the carrying it on & for the government of its members, who were elected by them. F., G., & H. were members of the club. Upon an information charging the eight persons above named with having committed offences against *Gaming Houses Act*, 1854 (c. 38), A., the proprietor, was adjudged to have been guilty of "keeping & using the Park Club for the purpose of unlawful gaming," & fined £500. The four committeemen were adjudged to have been guilty, as persons "having the care or management of & assisting in conducting the business" of the house so kept & used for the purpose of unlawful gaming, & each fined £500. The three players were also adjudged to have been guilty of the offence, as persons who "assisted by playing in conducting the business of

dice is not an illegal act.—*R. v. FRANCIS, Ex p. GRIFFIN* (1907), S. R. Q. 194.—*AUS.*

PART II. SECT. 1, SUB-SECT. 2.—C. (a).

a. "*Euchre*."—The game of "euchre," even when played for money, is not an "unlawful game" within *Licensing Act*, 1881, s. 149. "Unlawful games" mentioned in that sect. refer only to such games as have been made unlawful by statute.—*GLASSON v. WHITTY* (1883), 2 N. Z. L. R. 118 (S. C.).—*N.Z.*

f. "*Fan tan*."—The only games unlawful in Alberta, irrespective of whether they are played in a common gaming-house or not, are cock-fighting, lotteries, & some other cognate offences defined by the Criminal Code. The game of "fan tan" is not *per se* an unlawful game; it is a game of chance or of mixed chance & skill.—*R. v. HUNG GRE* (1913), 24 W. L. R. 605; 4 W. W. R. 1128, 1133; 13 D. L. R. 6, 44; 6 Alta. L. R. 167, 173.—*CAN.*

g. —.]—The effect of *Gaming & Lotteries Act*, 1881, s. 10, making the

Sect. 1.—*Games and gaming: Sub-sect. 2, C. (a)*

the house so kept & used for the purpose of unlawful gaming," & were each fined £100:—*Held*: the proprietor of the club & the four members of the committee were properly convicted; but the players though possibly liable to be indicted for unlawful gaming in a common gaming house were not liable to be summarily convicted under this statute.

(2) To constitute "unlawful gaming," it is not necessary that the games played shall be unlawful games: it is enough that the play is carried on in a "common gaming house." The expression "unlawful games" was intended by the legislature to cover & include some games which, being lawful in themselves, were only made unlawful when played in particular places or by particular persons.

(3) It makes no difference that the use of the house & the gaming therein is limited to the subscribers or members of the club, & that it is not open to all persons who might be desirous of using it. It is not a public but a common gaming house, that is prohibited.

(4) "Baccarat" is a game of chance, & unlawful within Gaming Houses Act, 1854 (c. 38), s. 4.

(5) A common gaming house has been defined to be a house kept or used for playing therein at any game of chance, or any mixed game of chance & skill, in which a bank is kept by one or more of the players exclusively of the others, or in which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet (SMITH, J.).

(6) Nothing could more clearly indicate the intention of [Gaming Act, 1845 (c. 109), s. 1] to legalise to all persons & at all times these games of skill but to preserve in their integrity all the penalties which then attached to the playing at unlawful games anywhere or gaming at all (even at lawful games) in common gaming houses (HAWKINS, J.).

(7) All such games [of dice or cards] if they are games of chance & skill combined (which cannot be called games of mere skill) are in my opinion clearly within the meaning of the words unlawful games in Gaming Houses Act, 1854 (c. 38) (HAWKINS, J.).

(8) In the course of the argument it was asked what is the magistrate to do with persons taken into custody under the authority of 33 Hen. 8 (c. 9), or Gaming Act, 1845 (c. 109), ss. 3, 6. I would refer to 33 Hen. 8 (c. 9), s. 14, which does not seem to have been repealed & from which it seems that the justices have power to require recognisances from such persons no more to haunt such gaming houses or to play at such prohibited games (HAWKINS, J.).—JENKS v.

TURPIN (1884), 13 Q. B. D. 505; 53 L. J. M. C. 101; 50 L. T. 808; 49 J. P. 20; 15 Cox, C. C. 486, D. C.

Annotations.—As to (2) *Reid*. Dyson v. Mason (1889), 5 T. L. R. 331. As to (3) *Reid*. R. v. Preedy (1888), 17 Cox C. C. 433; Jackson v. Roth, [1919] 1 K. B. 102. As to (4) *Apld.* Fairtlough v. Whitmore (1895), 64 L. J. Ch. 386. As to (5) *Consd.* Fairtlough v. Whitmore (1895), 64 L. J. Ch. 386. As to (7) *Consd.* Fairtlough v. Whitmore (1895), 64 L. J. Ch. 386. *Apld.* R. v. Hendrick (1921), 37 T. L. R. 447. *Reid*. Fielding v. Turner, [1903] 1 K. B. 867; Thompson v. Mason (1904), 68 J. P. 270; Morris v. Godfrey (1912), 106 L. T. 890. As to (8) *Reid*. Murphy v. Arrow (1897), 77 L. T. 435. *Generally*, *Mentd.* L. C. C. v. Hankins (1913), 12 L. G. R. 314; Fairburn v. Evans, [1916] 1 K. B. 218.

Baiting animals.—See ANIMALS, Vol. II., p. 287, Nos. 580, 585–587.

261. Chemin de fer.—“Chemin de fer” & “baccarat” are substantially forms of the same game, & therefore in the same sense & under the same circumstances unlawful.—FAIRTLOUGH v. WHITMORE (1895), 64 L. J. Ch. 386; 72 L. T. 354; 43 W. R. 421; 11 T. L. R. 288; 13 R. 402; *sub nom.* FAIRTLOUGH v. BROADBENT, 39 Sol. Jo. 332, D. C.

262. Cricket—Gaming Act, 1710 (c. 19).—JEFFREYS v. WALTER, No. 231, *ante*.

263. ———.—]—HODSON v. TERRILL, No. 112, *ante*.

Cockfighting.—See ANIMALS, Vol. II., pp. 250, 287, Nos. 326, 327, 581–583.

264. Faro—Gaming Act, 1738 (c. 28), s. 2.]—A person who, having bought the bank at a game of “Faro,” an unlawful game within the above sect., acts as banker at a club where the game is played, is “assisting in conducting the business” of a gaming house within Gaming Houses Act, 1854 (c. 38), s. 4.—DERBY v. BLOOMFIELD (1904), 91 L. T. 99; 68 J. P. 391; 20 T. L. R. 549; 20 Cox, C. C. 674, D. C.

265. Hazard—Gaming Act, 1738 (c. 28), s. 2.]—R. v. LISTON, No. 467, *post*.

266. ———.—]—M’KINNELL v. ROBINSON, No. 185, *ante*.

267. Progressive whist.—Applt. having the use of certain premises used the same for carrying on therein games of cards known as “progressive whist” or “whist drives” advertised to be held each week during the winter. The public were invited to attend on payment of 6d. each, & admission tickets were given to any one who paid for them. The players on entering were shown to tables & played the ordinary game of whist; there was no choice of partners, & at the end of each hand the winning couple proceeded on to the next table higher up the room, the other to the table down the room, & after a number of hands had been thus played the scores were added up & prizes given to the ten players who had the highest scores. The prizes were provided by applt. out of the proceeds of the ticket money, the balance being retained by applt. as his personal profit:—*Held*: (1) in the game of progressive

keeping of a house for playing fan tan an offence, & making playing fan tan in such a house also an offence, is to make fan tan an unlawful game.—TONG v. COX (1902), 21 N. Z. L. R.

h. ———.]—R. v. WILLIAMSON (1915), E. D. L. 214.—S. AF.

k. “Heading ‘em.”]—“Heading

‘em,” otherwise “two-up” or “pitch & toss,” is not an unlawful game, not being forbidden by any statute. The fact that to play at a game of chance in a public place with an instrument of gaming is forbidden by Vagrancy Act (1901) No. 13, s. 4 (2 f), does not make a game which answers that description an unlawful game within s. 4 (2 e) of the Act.—*Ex p.* MITCHELL (1902), 2

S. L. N. S. W. 120; 19 N. S. W. W. N. 121.—AUS.

l. “Hoop-la.”]—The game of hoop-la is a game of chance.—HAYES v. BOURKE (1911), 30 N. Z. L. R. 589.—N.Z.

m. “Jack pot.”]—BANKS v. WATFORD, [1922] V. L. R. 531.—AUS.

n. Poker.]—*Held*: “poker” is not

whist as so played the element of chance so much predominated over the element of skill as to make the game practically a game of chance; (2) the gaming was unlawful gaming within Gaming Houses Act, 1854 (c. 38), s. 4, & applt. was properly convicted of using the place for the purpose of unlawful gaming.—*MORRIS v. GODFREY* (1912), 106 L. T. 890; 76 J. P. 297; 28 T. L. R. 401; 23 Cox, C. C. 40, D. C.

Annotation:—As to (1) *Consd. R. v. Hendrick* (1921), 37 T. L. R. 447.

Roulette.—*See* Gaming Act, 1744 (c. 34), s. 2.

(b) *Games Played in Particular Places.*

268. Games otherwise lawful played in common gaming houses.—*JENKS v. TURPIN*, No. 260, *ante*.

D. Games of Skill.

See Gaming Act, 1845 (c. 109), s. 1.

269. Legality of games of mere skill.—*JENKS v. TURPIN*, No. 260, *ante*.

270. Whether game of chance or skill—Question of fact.—*R. v. HENDRICK*, No. 255, *ante*.

Automatic machines.—*See* Sub-sect. 2, E., *post*.

E. Automatic Machines.

271. Chances not equally favourable to operator & proprietor—Unlawful.—Applt. a shopkeeper, had in his shop an automatic machine which was worked on the following principle. A person desiring to use it put a penny in a slot & pressed & released a spring. According to the force with which this was done the penny fell into one or other of seven compartments. If it fell into either of two compartments it was automatically returned to the sender, & if it fell into the centre compartment he received from the machine a ticket entitling him to twopennyworth of articles sold in the shop. If, however, the penny fell into any of the other compartments it was retained by the machine. It having been proved that a number of boys & men had used the machine on certain days & had lost & won money by means of it, applt. was convicted under Gaming Houses Act, 1854 (c. 38), s. 42, of having opened, kept, & used his shop for the purpose of unlawful gaming being carried on therein:—*Held*: the conviction was right.—*FIELDING v. TURNER*, [1903] 1 K. B. 867; 72 L. J. K. B. 542; 89 L. T.

273; 67 J. P. 252; 51 W. R. 543; 19 T. L. R. 404; 20 Cox, C. C. 531, D. C.

Annotations:—*Consd. Thompson v. Mason* (1904), 90 L. T. 649. *Distd. Pessers, Moody, Wraith & Gurr v. Catt* (1913), 77 J. P. 429. *Consd. Peers v. Caldwell, Taylor v. Caldwell*, [1916] 1 K. B. 371.

272. ————*]*—T. being the occupier of a tobacconist's shop, kept there an automatic machine by which a person, having put a penny in the slot, pulls a knob, & on releasing such knob the penny flies up into one of five compartments. If the penny goes into either of two compartments it is returned to the person using the machine; if it goes into either of the two others it is retained in the machine; but if it goes into the fifth he receives a ticket by which he can have a 3d. cigar or its value at his option. It was established by evidence that dexterity could be acquired to some extent by the operator by practice, but the magistrate came to the conclusion that it was not proved that the chances were alike favourable to applt. & the operator:—*Held*: T. was properly convicted of permitting the shop to be used for the purpose of unlawful gaming, contrary to the Gaming Houses Act, 1854 (c. 38).—*THOMPSON v. MASON* (1904), 90 L. T. 649; 68 J. P. 270; 20 T. L. R. 298; 20 Cox, C. C. 641, D. C.

Annotation:—*Distd. Pessers, Moody, Wraith & Gurr v. Catt* (1913), 77 J. P. 429.

273. ————*]*—Applt. who was convicted of keeping a room for the purpose of unlawful gaming, was the occupier of a house & shop & the owner of a number of automatic machines known as slot machines. Round one of these machines, which was kept for the use of the public, the players, who were composed of boys & youths whose ages ranged from about ten to seventeen years, were in the habit of congregating on deft.'s premises. Most of them placed a halfpenny in the slot of the machine, then pulled a lever which caused a ball to be thrown to the top of the machine. If the ball came back into one cup the halfpenny was returned, if it went into another the ball would be returned to the player to be played again, & if it went into a third cup the halfpenny was lost, & then became the property of applt. Some of the boys got the ball returned to play again, while some got their halfpenny returned to them & some lost their halfpenny:—*Held*: this amusement constituted unlawful gaming as it was a game in which the chances were not equal for all the players including the

in itself an unlawful game.—*R. v. SHAW* (1887), 4 Man. L. R. 404.—*CAN.*

O. ————]—*ROSE v. COLLISION* (1910), 12 W. L. R. 648; 16 Can. Crim. Cas. 359.—*CAN.*

PART II. SECT. 1, SUB-SECT. 2.—C. (b).

p. "Three card trick"—*Played in public conveyance.*—Known cardsharps induced fellow-passengers in a railway carriage to play the three card trick with one of their number for money, & won from them £17. The cardsharps were charged with inducing the fellow-passengers to engage in an unlawful game called the "three card trick," & cheating them of £17 in money:—*Held*: the three card trick, as played on the occasion in question, was an unlawful game in the sense of the statute.—*STEWART v. MACPHERSON*, [1913] S. C. (J.) 90.—*SCOT.*

q. Games of chance played in public place.—The effect of Law 1 of 1892, s. 2, is to make a game of chance illegal. Any person who by means of a game of chance wins money from another in a place to which the public have access is guilty of a contravention of the first part of s.s. 7 (a) of this sect.—*R. v. Moss* (1908), T. S. 798.—*S. AF.*

PART II. SECT. 1, SUB-SECT. 2.—D.

270 i. Whether game of chance or skill—Question of fact.—Accused was convicted on a charge of being found without lawful excuse in a disorderly house, to wit, a common gaming house. There was evidence that at the time in question accused & others were playing "fan tan," but there was no clear evidence as to how the game was played:—*Held*: there was no evidence inconsistent with the possibility of the game in question being one purely of skill.—*R. v. HING HOY*, [1917] 2

W. W. R. 958; 28 Can. Crim. Cas. 229; 36 D. L. R. 765.—*CAN.*

PART II. SECT. 1, SUB-SECT. 2.—E.

271 i. Chances not equally favourable to operator & proprietor—Unlawful.—*DONAGHY v. WALSH*, [1914] 2 I. R. 261.—*IR.*

271 ii. ————]—*FORSYTHE v. ROSS*, [1919] 2 I. R. 335.—*IR.*

r. Whether a gambling device.—A slot machine which vends chewing gum upon inserting a coin, & at certain intervals in addition to the gum discharges disc checks by which the machine may again be operated, but which when operated by checks does not discharge chewing-gum & sometimes does not discharge checks, with a notice on the machine plainly informing the operator before depositing the coin or checks what the result of the operations will be, is not a "means or contrivance for unlawful gaming."—

Sect. 1.—Games and gaming: Sub-sect. 2, E.; sub-sect. 3. Sect. 2: Sub-sect. 1.]

owner of the machine, & therefore the conviction was right.—**ROBERTS v. HARRISON** (1909), 101 L. T. 540; 73 J. P. 439; 25 T. L. R. 700, D. C.

274. ——[—**R. v. PITT** (1915), 79 J. P. Jo. 148.

275. ——[—**Applt. P.** was the owner of a machine which was placed in the sweet shop of **applt. B.** The machine consisted of a case, in which was the figure of a clown, fixed on a movable base with his hat inverted in his hand. When a penny was placed in the slot of the machine a ball was released from the top of the machine, which rolled down its course being rendered uncertain by the presence of groups & rows of pins. The player attempted, by manipulating the handle attached to the base on which the clown was fixed, to move the figure so that the ball was caught in the inverted hat. If the player was successful, he obtained a disc entitling him to two-pennyworth of sweets. **Applt.** was convicted of using **B.'s** shop for the purpose of betting, contrary to **Betting Act, 1853 (c. 119), s. 1**:—**Held**: it was a question of fact for the jury whether the transaction between **applt.** & the player at the machine amounted to a receiving by **applt.** of money as or for the consideration for a promise thereafter to give a disc entitling the player to two-pennyworth of sweets on the event or contingency of the player successfully catching the ball in the clown's hat, & as the jury had been properly directed on this question, the conviction must stand.—**R. v. PEERS, R. v. BROWN** (1917), 86 L. J. K. B. 797; 116 L. T. 830; 81 J. P. 143; 33 T. L. R. 231; 12 Cr. App. Rep. 210, C. C. A.

276. Whether dominant element of skill.]—By an agreement made between **pltf.** & **deft.** agreed to take on hire certain automatic machines. The machines were worked as follows. The operator having placed a penny in the slot pressed a spring which released a ball. The ball thereupon gyrated among a number of pins. The object of the operator was to catch the ball when it dropped by means of a cup attached to a movable bar. It entirely depended upon the skill of the operator in placing the cup in the right position for catching the ball. In an action claiming three weeks' rent of the machines:—**Held**: there was a dominant element of skill in the use of the cup, that it was therefore a game of skill, & **pltf.** were entitled to succeed.—**PESSERS, MOODY, WRAITH & GURR,**

LTD. v. CATT (1913), 77 J. P. 429; 29 T. L. R. 381, C. A.

Annotations:—Consd. Bracchi v. Rees (1915), 84 L. J. K. B. 2022. **Rdld. Peers v. Caldwell, Taylor v. Caldwell**, [1916] 1 K. B. 371.

277. ——[—**Applt.**, a shopkeeper, who held a refreshment house licence, had in his shop an automatic machine. Any one desiring to use the machine put a penny in the slot & a ball was set in motion in a vertical direction towards the top of the machine. The ball, then in view of the player, worked its way down between irregularly placed pins, & the object of the player was to catch it in a cup attached to a bar along which the cup slid. The cup was controlled by the player. If the ball fell into the cup the player received from the machine a ticket entitling him to three-pennyworth of sweets, cigarettes or tobacco. **Applt.** had been summoned & convicted under **Refreshment Houses Act, 1860 (c. 27), s. 32**, for suffering an unlawful game to take place on the premises:—**Held**: the justices having found as a fact that in the main the game amounted to chance, although there might be a *scintilla* of skill in it, were right as a matter of law in deciding on the facts that it was a game of chance & not of skill. The question being one of degree, the presence of a mere *scintilla* of skill did not make it a game of skill when the finding of the justices was that it was mainly a game of chance.—**BRACCHI BROTHERS v. REES** (1915), 84 L. J. K. B. 2022; 113 L. T. 871; 79 J. P. 479; 13 L. G. R. 1365; 25 Cox, C. C. 133, D. C.

Annotation:—Consd. Peers v. Caldwell, Taylor v. Caldwell, [1916] 1 K. B. 371.

278. ——[—A contingency is not the less within **Betting Act, 1853 (c. 119), s. 1**, because it relates to a game which affords scope for skill & is not a game of pure chance.

Whether in the case of such a game the real consideration for the money deposited by the player is the opportunity of exercising his skill or the chance of winning the promised reward is on each case a question of fact. If the former, the game is not within the section; if the latter, it is.

The owner of an automatic machine kept it in a shop for the purpose of persons resorting to the shop playing with it in the following manner. The player placed a halfpenny in a slot which set mechanism in motion, whereby a ball was released from the top of the machine & found its way downwards through a number of projecting pins. Below the pins was a bar with a small receptacle attached, which could be manipulated by the

R. v. STUBBS (1915), 31 W. L. R. 567.—**CAN.**

a. ——[—**R. v. GERASSE** (1916), 34 W. L. R. 965.—**CAN.**

t. ——[—**R. v. SMITH**, [1917] 1 W. W. R. 553; 23 D. C. R. 197.—**CAN.**

a. ——[—An automatic machine, the principal of operation of which is practically the same as that held not to be a gambling device in **R. v. Stubbs**, held to be a gambling device, when operated by two persons under an arrangement that the one receiving the largest number of trade checks from the machine during the course of play should receive all the trade checks won by both of them.—**R. v. BERRY**, [1917] 1 W. W. R. 817; 27 Can. Crim. Cas. 278; 34 D. L. R. 573; 11 Alta. L. R. 236.—**CAN.**

b. ——[—electrical machine

placed in a public place for the amusement of persons who are entirely ignorant of its mechanism & who have no knowledge of electricity, to be played by the operator inserting a coin in the machine which the machine retains if the operator is unsuccessful, is a gambling machine even though by long practice it is possible for the operator to become skilful in the operation of such machine.—**R. v. PILON** (1920), 32 Can. Crim. Cas. 342; 51 D. L. R. 106.—**CAN.**

c. ——[—**FORTE v. DEWAR** (1905), 7 F. (Ct. of Sess.) 82, J.—**SCOT.**

d. ——[—**GRANATA v. MACKINTOSH**, [1916] S. C. (J.) 48.—**SCOT.**

e. ——[—*"Prize or stake in money or kind"*—*"Improved Pickwick."*—The fact that a prize or stake is awarded or forfeited contingently on

the result of the operation of an automatic machine is *per se* sufficient to bring it under **Gaming Machine Act, 1917, s. 1 (1)**, although the success of the player may depend wholly or partly upon his own skill.

A penny in the slot machine known as the *"Improved Pickwick"* held to fall within the prohibition.—**PANETTA v. M'INTYRE**, [1918] S. C. (J.) 10.—**SCOT.**

f. ——[—Persons resorting to a shop were permitted to amuse themselves by operating a machine on placing a halfpenny in the slot. The only reward for successful operation was that the player became entitled to a further opportunity of operating the machine free of charge:—**Held**: the **Gaming Machines (Scotland) Act, 1917**, did not apply to this machine, as no *"prize or stake in money or kind"*

player across the face of the machine, the object of the player being to catch the ball in the receptacle. If he succeeded, the machine automatically ejected a check which could be exchanged in the shop for two-pennyworth of sweets. The game afforded some scope for the exercise of skill, but on the average the players, who were mainly boys, were successful in winning a check only once in every eight attempts:—*Held*: (1) the fact of the game not amounting to what in ordinary parlance would be called a betting transaction did not prevent the use of the premises for the purposes of the game from being an offence within the above sect; (2) on the above facts there was evidence on which a magistrate could find that the real consideration for which the halfpenny was paid by the players was the chance of winning sweets & not merely the opportunity of exercising their skill.—*PEERS v. CALDWELL, TAYLOR v. CALDWELL*, [1916] 1 K. B. 371; 85 L. J. K. B. 754; 114 L. T. 609; 80 J. P. 181; 32 T. L. R. 190; 14 L. G. R. 346; 25 Cox, C. C. 325, D. C.

Annotation:—As to (1) *Consid. R. v. Peers, R. v. Brown* (1917), 86 L. J. K. B. 797.

Act which enacts that every person who, by fraud or unlawful device, or ill practice, in playing at cards, etc., "shall win from any other person any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, & being convicted thereof, shall be punished accordingly," is, within Criminal Law Act, 1826 (c. 64), s. 23, which empowers the ct. to order the costs of prosecutions in indictments for "knowingly & designedly obtaining any property by false pretences."—*R. v. GARDNER* (1851), 17 L. T. O. S. 7; 5 Cox, C. C. 140.

—*J*.—See CRIMINAL LAW, Vol. XV., pp. 1010 1011, Nos. 11350–11359.

Property in money parted with.—See CRIMINAL LAW, Vol. XV., p. 875, Nos. 9610–9612.

SECT. 2.—GAMING HOUSES.

SUB-SECT. 1.—WHAT CONSTITUTES A COMMON GAMING HOUSE.

See Gaming Houses Act, 1854 (c. 38).

283. Proprietary club.—An establishment which is owned by one man & to which members are admitted by ballot, where an entrance fee is demanded, & a yearly subscription is payable in advance, is not a "common gaming house" within Gaming Act, 1744 (c. 34), s. 1, though cards & dice may be played therein, & a gratuitous supper is provided for the members. If the rules which regulated the ballot for members, & the payment of fees & subscriptions by them were nominal merely, & the establishment were shown to be open to all who chose to frequent it:—*Semble*: it would then be a common gaming house.—*CROCKFORD v. MAIDSTONE (LORD)* (1846), 8 L. T. O. S. 217; 10 J. P. 807.

284. Need not be open to public.—*JENKS v. TURPIN*, No. 260, *ante*.

Betting & gaming in clubs.—See CLUBS, Vol. VIII., pp. 525, 526, No. 129–141.

285. Sufficiency of evidence—Books & documents found on premises.—*Appl't.* was convicted

SUB-SECT. 3.—CHEATING AT GAMES.

279. Money lost recoverable by action.—An action on the case will lie for playing with false dice, & thereby winning the pl'tf.'s money.—*HARRIS v. BOWDEN* (1588), Cro. Eliz. 90; 78 E. R. 348.

280.—*J*.—Action for cheating at cards *colore ludendi*. Deft. mulcted in damages.—*BAXTER v. WOODYARD & ORBET* (1605), Moore, K. B. 776; 72 E. R. 899.

281.—*J*.—If a jury be satisfied, upon all the facts, that several persons have been engaged in foul play, & have shared in the fruits of it, they are all liable to an action for money had & received, at the suit of the loser, although some of them may not have been actually present at the time of the play going on, by which the money was won.—*DUFOUR v. ACKLAND* (1830), 9 L. J. O. S. K. B. 3.

282. Gaming Act, 1845 (c. 109), s. 17—Costs of prosecution.—An indictment under the above

was awarded or forfeited contingently on the result of the operation by the player.—*M'INTYRE v. TUMELTY*, [1918] S. C. (J.) 68.—SCOT.

PART II. SECT. 2, SUB-SECT. 1.

g. Games played with ordinary implements of gaming.—*Not merely for recreation of keeper & his family.*—A "common gaming house" is one in which games are commonly played with cards, dice, balls, or other implements ordinarily used in gaming, whether such games be in themselves unlawful or not; such games being played, not for the recreation merely of the keeper & his family, & being played habitually or very frequently. It is immaterial whether they be for any stake or wager, or not.—*R. v. BUTTERWORTH* (1851), 1 Legge, 671.—AUS.

h.—*J*.—In a prosecution for keeping & frequenting a gaming house, it was proved that a room in a house was constantly used for playing fan tan, poker & dominoes for money; & dominoes, cards, dice, and beans & other articles used as counters were

found therein:—*Held*: such house was a gaming house.—*R. v. WILLIAMSON* (1915), E. D. L. 214.—S. AF.

k. Element of frequency essential—Gambling in private house.—*Held*: the element of frequency at least is essential to make out that any place is a gambling house, & isolated instances on Sundays, when Jews or others come together in private houses to play cards, are not within R. S. O. 1897, c. 223, s. 549 (4).—*R. v. SPEGELMAN* (1905), 5 O. W. R. 33; 9 G. L. R. 75.—CAN.

l. Playing "poker."—*Pitt.*, deft. & two others played poker for several evenings in the barber shop of an hotel:—*Held*: this did not make the shop a common gaming house.—*ROSE v. COLLISON* (1910), 12 W. L. R. 648; 16 Can. Crim. Cas. 359.—CAN.

m. Club—Fan tan.—*Play by non-members—"Rake off."*—*Accused* were found on premises known as the "Sherman Club" (unincorporated) playing a game called "fan tan." A rake-off was taken by officers of the club from each bet. A number of the

players in the game were not members of the club:—*Held*: the premises in question fell within Criminal Code, s. 226 (b) in two respects, firstly, that the game of "fan tan" is a mixed game of chance & skill; secondly, that outsiders were allowed to play the game & a rake-off was exacted from their winnings, which was appropriated to the uses of the club.—*R. v. HAM* (1918), 29 Can. Crim. Cas. 431; 26 B. C. R. 237.—CAN.

n.—*Premises having appearance of—Device to conceal play of "fan tan."*—Where the make up of premises as a whole is merely a device to give it the appearance of a *bond fide* club & is a blind made to conceal the real underlying business—which is to play "fan tan," the premises is a disorderly house.—*R. v. LONG KEE* (1919), 26 B. C. R. 78.—CAN.

o. Place kept for profit or gain.—The proper construction of Criminal Code, s. 226 (a), is that the keeper, or ostensible keeper, of the gambling-house must in some way gain by the gambling, or by permitting the gambling to be carried on, & unless he

Sect. 2.—Gaming houses: Sub-sects. 1, 2 & 3.]

of keeping a common gaming house. The evidence was that an informer had paid two visits to applt.'s house, & had made bets with him on some races, money passing between the parties; there was the further evidence that on the house being searched, a number of books & documents relating to betting were found, & that certain remarks were made by applt. which tended to show that he had recently used these books & documents:—*Held*: the conviction was right.—*FOOTE v. BUTLER* (1877), 41 J. P. 792.

— **Obstruction of search.**—*See* Gaming Houses Act, 1854 (c. 38), s. 2.

— **Discovery of instruments of gaming or means of concealing same.**—*See* Gaming Act, 1845 (c. 109), s. 8; Gaming Houses Act, 1854 (c. 38), s. 2.

SUB-SECT. 2.—OFFENCES IN CONNECTION WITH GAMING HOUSES.

See Gaming Houses Act, 1854 (c. 38).

286. Keeping & maintaining common gaming house—Indictable nuisance at common law.]—Keeping & maintaining a common gaming house,

does he is not liable.—*R. v. CHARLIE YEE*, [1917] 1 W. W. R. 1307; 27 Can. Crim. Cas. 441.—**CAN.**

p. —.]—A place used for playing a game of chance or mixed game of chance & skill where the proprietor sells the cards for which he is paid by chips out of the games, which chips he alone sells to the players, is a "common gaming-house."—*R. v. JOHNSON* (1920), 1 W. W. R. 93; 32 Can. Crim. Cas. 7.—**CAN.**

q. —.]—The accused were found in a room at the rear of a fruit & tobacco shop at a table on which there were dice, dominoes & \$17 in money. There was no "rake off" from the games to the proprietor but tobacco was at times sold to the players:—*Held*: it was a common gaming house, as the game was allowed to be carried on for the purpose of acquiring gain for the keeper of the shop.—*R. v. Wong* (1922), 40 Can. Crim. Cas. 311; 31 B. C. R. 292.—**CAN.**

r. —.]—*Not bonâ fide club.*—The fact that, from the stakes, bets or other proceeds at or from a game of chance, money is paid to a *bonâ fide* club, in whose premises the game is being played, in payment for refreshments supplied by the club, does not make the club premises a place "kept for gain."—*R. v. CHERRY & LONG*, [1924] 2 W. W. R. 667; 42 Can. Crim. Cas. 137; 20 Alta. L. R. 400.—**CAN.**

s. —.]—A common gaming house is one which is kept or used for profit or gain.—*R. v. HAU NAGJI* (1870), 7 Bom. Cr. Ca. 74.—**IND.**

t. —.]—*R. v. DATTATRAYA SHANKAR* (1923), 1 L. R. 47 Bom. 960.—**IND.**

a. **Place kept for playing games of ance.]**—Any premises used or kept for playing games of chance, where only certain of the players "keep the bank," is a common gaming-house.—*R. v. LEE YING* (1924), 41 Can. Crim. Cas. 317.—**CAN.**

b. **Sale of "pa-ka-poo" tickets.]**—Premises used for the sale of "pa-ka-poo" tickets are a "common gaming-house."—*YOUNG v. MURPHY* (1910), 29 N. Z. L. R. 705.—**N.Z.**

c. **Place kept for carrying on book-**

maker's business.—Applts. carried on in a room all the steps to receive, note, record & pay bets & otherwise carry on their business as bookmakers, except that letters & telegrams were not conveyed by the proper authorities to the room, but were in the case of letters placed in a P.O. private letter box whence they were taken by one or other of applts. & in the case of telegrams were delivered to one or other of them over the office counter:—*Held*: the room was used for the purpose of betting & was a common gaming house.—*COX & WALSH v. GIBSON* (1916), 35 N. Z. L. R. 1103.—**N.Z.**

d. **Sufficiency of evidence—Discovery of instruments of gaming.]**—At the hearing of an information laid under Gaming Act, 1891, s. 6, it was proved that there was an electric bell from the outside door of the premises to the alleged gaming-room; that the outside door was locked; that the building was in darkness, that the door of the alleged gaming-room was locked, & that on the door being opened, the man who opened it cried out "Look out" or some other words; & that men were found round a table with cards on it:—*Held*: the foregoing facts were, in the absence of proof to the contrary, sufficient to establish both that the place was a common gaming house & that persons were unlawfully playing therein.—*SYMONS v. LONERGAN* (1919), 15 Tas. L. R. 49.—**AUS.**

e. —.]—A number of persons were found by the police in a closed room in the upper storey of a house gambling with dice & having covies & money before them:—*Held*: the facts found were evidence that the room was used as a common gaming house, & that the persons found therein were there present for the purpose of gaming.—*R. v. Bai Vaju* (1896), 1 L. R. 22 Bom. 745.—**IND.**

f. —.]—**Playing game of chance—Money deposited in a "kitty."**—Evidence that deft. was proprietor of a pool room & that he & others remained there after hours for the purpose of playing the game of chance known as poker, & that in the course of the game money was deposited in a box known as a "kitty" & used in

& for lucre & gain, causing & procuring idle & evil disposed persons to come there to play together at "Rouge et Noir," & permitting such persons to play at such game for large sums of money, is an offence indictable at common law.

If a common gaming house be so conducted that it becomes a receptacle for idle & disorderly persons who are permitted to assemble there & enter into play for an illegal amount, it becomes a public nuisance, & the maintaining it is an offence indictable at common law (*ABBOTT, C.J.*).—*R. v. ROGIER* (1823), 1 B. & C. 272; 2 Dow. & Ry. K. B. 431; 1 Dow. & Ry. M. C. 284; 107 E. R. 102.

Annotations:—*Consd. Jenks v. Turpin* (1884), 13 Q. B. D. 505. *Refd. Parnell v. Roughton* (1874), L. R. 6 P. C. 46.

287. — Gaming Houses Act, 1854 (c. 38), s. 4—Isolated instance of user not sufficient.]—*R. v. DAVIES*, No. 254, *ante*.

288. Managing or assisting in conducting the business—Gaming Houses Act, 1854 (c. 38), s. 4—Members of committee of proprietary club.]—*JENKS v. TURPIN*, No. 260, *ante*.

289. — Not member of club playing.]—*JENKS v. TURPIN*, No. 260, *ante*.

part in paying for refreshments supplied by deft., held sufficient to support a conviction for keeping & maintaining a disorderly house, to wit, a common gaming house.—*R. v. BERTRAND* (1920), 31 Can. Crim. Cas. 2; 52 N. S. R. 127.—**CAN.**

PART II. SECT. 2, SUB-SECT. 2.

g. **Keeping & maintaining common gaming house—What constitutes—Carrying on Chinese lottery.]**—Keeping a house for the purposes of carrying on a Chinese lottery whether such house be used for the sale of tickets or for the drawing of the lottery constitutes the offence of keeping a common gaming house.—(*GLEESON v. YEE KEE, GLEESON v. MOW SANG* (1892), 18 V. L. R. 698.—**AUS.**

h. —.]—**Nickel-in-the-slot machine.**—*Deft.*, a tobacconist, who had in his shop a "nickel-in-the-slot" machine, was convicted for unlawfully keeping a disorderly house, that is to say, a common gaming house:—*Held*: there was evidence that the offence charged had been committed; each depositor of a coin in the machine was taking part in a game of chance; there was no element of certainty except as to the minimum to be received, there was no certainty as to the maximum, as the statement of the working of the machine disclosed. There was sufficient evidence that deft. was the keeper of the premises & interested in the operation of the machine.—*R. v. O'MEARA* (1915), 9 O. W. N. 92; 34 O. L. R. 467.—**CAN.**

k. —.]—**Proof of gain or profit to keeper.]**—In order to obtain a conviction of a person for keeping a disorderly house, to wit, a common gaming house, the Crown must show by satisfactory evidence that the person charged is deriving some gain or profit from keeping the house, room, or place, & allowing games of chance to be played therein.—*R. v. SANDERS*, 20 C. L. T. 213.—**CAN.**

l. —.]—A hotel-keeper who provides a room, heating & lighting the same, where persons, not guests of the hotel, resort regularly for the purpose of gambling, & from which gain results to the hotel-keeper, by the increased sale of liquors &

290. Player acting as banker.]—DERBY v. BLOOMFIELD, No. 264, *ante*.

291. Application of penalties.]—Metropolitan Police Courts Act, 1839 (c. 71), s. 47, which gives the penalties to be recovered before a police magistrate of the metropolis to the receiver of the metropolitan police district, is not repealed, so far as the application of such penalties, by Gaming Houses Act, 1854 (c. 38), s. 8, for the suppression of gaming houses, by which one-half of any pecuniary penalty which shall be adjudged to be paid under that act shall be paid to the person laying the information, & the remaining half shall be applied in & of the poor rate of the parish in which the offence was committed. Therefore, where a conviction under the latter statute takes place at a police ct. in the metropolis, the receiver of the metropolitan police district is entitled to a moiety of the penalty.—**WRAY v. ELLIS** (1858), 1 E. & E. 270; 28 L. J. M. C. 45; 32 L. T. O. S. 157; 22 J. P. 800; 5 Jur. N. S. 624; 7 W. R. 91; 120 E. R. 913.

Annotation:—Distd. & Dbtd. R. v. Titterton, [1895] 2 Q. B. 61.

292. Being found in gaming house—33 Hen. 8,

cigars by reason of the running of the game, & where cards are sold to the gamblers at a profit, is liable for keeping a room for gain in which mixed games of chance & skill are played.—**R. v. DEBOIS & BRADY** (1911), 17 W. L. R. 35.—**CAN.**

m. ———.]—Deft. was manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing "poker." Out of the stakes on most of the hands a sum of five cents was withdrawn to cover the expenses of refreshments consumed by the players. No charge was made for the use of the room. The "rake-off" did not more than cover a fair price for the refreshments. The proprietor or manager derived an indirect advantage from the sale of cigars to the players, from 50 to 100 being sold to them in the course of a night's play.—**Held: "gain"** may be derived indirectly as well as directly; by what deft. allowed to be done in the room mentioned, the profits of his usual business were increased more or less owing to the sale of the goods in which he dealt, & so he might be found to have kept the room for gain, though the gain was confined to the profits on the cigars which he sold to the players.—**R. v. JAMES** (1903), 2 O. W. R. 342; 23 C. L. T. 220; 60 L. R. 35.—**CAN.**

n. ———.]—It is the keeping of a gambling house for gain which constitutes the illegality.—**R. v. SALE** (1907), 7 W. L. R. 336.—**CAN.**

o. ——— Where actual betting takes place abroad.]—In a betting game called "policy" the actual betting & payment of the money, if won, took place in the United States; all that was done in Canada being the happening of the chance, on which the bet was staked, by means of implements operated in the house of deft.—**Held: "no offence of keeping a common gaming house."**—**R. v. WETTMAN** (1894), 25 O. R. 459.—**CAN.**

p. ——— "Black jack"—No constant dealer—Advantage of dealer over other players.]—Prisoner was lessee of a room to which the public had free access, & in which several people congregated & played a game called "black jack." There was no constant dealer, & the lessee got no benefit. The dealer, who is chosen on com-

mencing by cutting the cards, has an advantage, & as a rule can keep the deal five or six minutes.—**Held: as the dealer, i.e. the banker, had an advantage over the other players, the game came under Criminal Code, s. 196.**—**R. v. PETRIE** (1900), 20 C. L. T. 250; 7 B. C. R. 176.—**CAN.**

q. ——— Presumption—Finding of instruments of gaming.]—The finding of a large amount of money beside accused & the presence on the premises of paraphernalia which might be used for cardplaying, but which might also be used for other & unlawful objects, should not in itself be taken to raise the presumption of keeping a common gaming house.—**R. (GILLESPIE) v. GOW** BILL (1920), 2 W. W. R. 199.—**CAN.**

r. ———.]—Conviction of keeping a common gaming house upheld where portion of the evidence against the accused consisted of instruments of gaming found in such house which had been entered in pursuance of a search-warrant illegally issued; there being sufficient *alibi* evidence to justify the conviction.—**R. v. NARAYAN SUNDAR** (1868), 5 Bom. Cr. Ca. 1.—**IND.**

s. ——— Sale of Chinese lottery tickets.]—The sale of Chinese lottery tickets in a room used for that purpose constitutes the offence of keeping a common gaming house.—**R. v. LEE HOY** (1922), 40 Can. Crim. Cas. 102; 31 B. C. R. 123.—**CAN.**

t. ——— Rebuttal of.]—The evidence for deft. on the trial of a charge of keeping a common gaming house held to be insufficient to rebut the presumption established by the prosecution under Criminal Code, s. 985. When a statute creates a *prima facie* case of guilt in certain circumstances, the prosecution should prove the exact circumstances required without leaving too much to the ct. to which to apply its general knowledge.—**R. v. SILLERS** (1922), 66 D. L. R. 225; 37 Can. Crim. Cas. 94; [1922] 1 W. W. R. 769.—**CAN.**

u. ——— Servant employed in gambling house.]—Under Law 6 of 1889, s. 4, any servant engaged in a gambling house is deemed to be the keeper of the gambling house.—**Held: as soon as the Crown has proved that accused is a servant**

c. 9, s. 14—Power of justices to bind over.]—JENKS v. TURPIN, No. 260, *ante*.

293. ———.]—MURPHY v. ARROW, No. 362, *post*.

SUB-SECT. 3.—GAMING ON LICENSED PREMISES.

See, now, Licensing (Consolidation) Act, 1910 (c. 24), s. 79; INTOXICATING LIQUORS.

294. Lawful game with no money stakes.]—R. v. ASHTON, No. 247, *ante*.

295. Gaming in private room of licensee.]—9 Geo. 4, c. 61, s. 21, imposes penalties upon an innkeeper for offences against the tenor of his licence. The form of licence is given in Sched. C. of the Act, & contains a proviso that the innkeeper shall "not knowingly suffer any unlawful games or any gaming whatsoever" in the licensed house & premises.—**Held: an innkeeper was liable to conviction, under above sect. for playing cards for money with private friends of his own in his own private room in the inn.**

employed in a gambling house, the presumption is that accused knew that the place was a gambling house & that gambling was going on.—**R. v. IRVING** (1918), T. P. D. 443.—**S. AF.**

public to play games of chance.]—When an hotel proprietor allows the public to play games of chance for stakes or money in the bar, sitting, or other public room of his hotel, he keeps a gaming house.—**R. v. ROBINSKY** (1919), C. P. D. 107.—**S. AF.**

e. ——— Sufficiency of evidence.]—In a prosecution for keeping a gambling house the evidence showed that large numbers of people went in & out of the building. The building was one of three storeys let out in flats which were occupied by several tenants. There was no evidence that the persons seen entering & leaving the premises had entered or left the flat in which the gambling was being carried on.—**Held: there was not sufficient evidence to prove that the public had access to the flat alleged to be used as a gambling house.**—**R. v. RALPH & WITKOSKY** (1917), T. P. D. 386.—**S. AF.**

d. Being found in gaming house—Whether equivalent to playing or looking on.]—Deft. was in a place where it was alleged that contracts in violation of 51 Vict. c. 42, were made.—**Held: the fact of a person being in an office or place of business where such prohibited contracts were made was not equivalent to playing or looking on while others were playing in a common gaming house.**—**R. v. MURPHY** (1888), 17 O. R. 201.—**CAN.**

e. ——— Character of premises—Admissibility of evidence to prove.]—On a trial for being found without lawful excuse in a common gaming house evidence should not be admitted of the conviction of another as keeper of the premises to show the character of the premises.—**R. v. CESSARAKY**, [1920] 1 W. W. R. 536; 51 D. L. R. 244; 32 Can. Crim. Cas. 334; 15 Alta. L. R. 201.—**CAN.**

PART II. SECT. 2, SUB-SECT. 3.

f. Gaming in closing hours.]—It is an offence to suffer persons to play an unlawful game on licensed premises during the hours when such premises are required to be kept closed, & upon

Sect. 2.—Gaming houses: Sub-sects. 3 & 4.]

The words "any gaming whatsoever" are wide enough to prohibit gaming of every description. Playing cards for money is gaming; granted that, under the circumstances of the present case, the gaming was innocent (WIGHTMAN, J.).—PATTEN v. RHYMER (1860), 3 E. & E. 1; 29 L. J. M. C. 189; 2 L. T. 352; 24 J. P. 342; 6 Jur. N. S. 1030; 8 W. R. 496; 121 E. R. 345.

Annotations.—*Folld. Osborne v. Hare* (1876), 40 J. P. 759. *Reid. Dyson v. Mason* (1889), 22 Q. B. D. 351.

296. Gaming for beer on premises—Beer consumed off premises.]—Where men play at skittles for beer in alehouse premises, but do not drink the beer on the skittle-ground, this is nevertheless an unlawful gaming in a beer-house, & against the tenor of the licence.—LUFF v. LEAPER (1872), 36 J. P. 773, D. C.

Annotations.—*Reid. Dyson v. Mason* (1889), 22 Q. B. D. 351; *Wilton v. Ruffles*, [1920] 1 K. B. 226.

297. Gaming in closing hours—Though guests of licensee.]—Though a publican may now entertain his private friends, by supplying them with liquors during closing hours at his own expense, he is still prevented from allowing them to carry on any gaming on the premises.—HARE v. OSBORNE (1876), 34 L. T. 294; *sub nom. OSBORNE v. HARE* 40 J. P. 759, D. C.

Annotations.—*W.F. Cooper v. Osborne* (1876), 35 L. T. 347. *Reid. Dyson v. Mason* (1889), 5 T. L. R. 231; *Lawson v. Edminson*, [1908] 2 K. B. 952.

298. ———.]—Appl., a private friend of a licensed person, *bona fide* entertained by him after the hours of closing at his own expense within the Licensing Act, 1874 (c. 49), s. 30, was playing cards for money on the licensed premises, & was convicted under the Licensing Act, 1872 (c. 94), s. 25, of being on the premises during the period they were required to be closed.—*Held*: applt. was not on the premises in contravention of the provisions of the Licensing Acts with respect to the closing of licensed premises, & the conviction must be quashed.—COOPER v. OSBORNE (1876), 35 L. T. 347; 40 J. P. 759, D. C.

299. — Billiards.]—Appl. held a victualler's licence for a certain house at H. The closing hour at H. on week days was 11 p.m. & after that time two gentlemen, lodgers in the house, were found playing billiards. The justices thought that Gaming Act, 1845 (c. 109), s. 13, absolutely prohibited all persons without exception from playing at a public billiard table during closing hours, & that such prohibition was not affected by Licensing Act, 1874 (c. 49), s. 10. Accordingly applt. was convicted, but the justices stated a case:—*Held*: the conviction was right.—OVENDEN v. RAYMOND (1876), 34 L. T. 698; 40 J. P. 727, D. C.

Sundays.—BROWN v. TREYNOR (1889), 15 V. L. R. 387.—AUS.

g. Whether mens rea in licensee necessary.]—*Mens rea* is not a necessary ingredient of an offence under Licensing Act, 1917, s. 139, which provides that if on any licensed premises any person bets by way of wagering the licensee shall be guilty of an offence.—DINEEN v. MIDELSON, [1922] S. A. S. R. 1.—AUS.

h. Throwing dice for money.]—Evidence that a licensed victualler permitted dice to be thrown for money upon his licensed premises does not *per se* establish the commission of an

offence.—BOCK v. BREEN, [1924] St. R. Qd. 112.—AUS.

k. —.]—Where a barman & a customer on licensed premises had thrown dice for cigars:—*Held*: throwing dice for gaining some property upon the result of the cast is a "game of chance," & the holder of the licence had been rightly convicted.—R. v. MARCUSE (1908), 25 S. C. 355.—S. AF.

l. Playing "Euchre" — Without licensee's knowledge.]—Four persons played "euchre" for amusement in a room behind the bar of deft.'s hotel, the cards used being the property of one of the players, a boarder in the hotel:—

300. What amounts to suffering gaming—Casual acts of guests.]—A policeman heard persons inside a beerhouse rolling bullets on a table, as if playing at some game for pints of beer. On entering, the beerhouse keeper was ill in bed, & the wife said she hoped the policeman would take no notice of it. The men afterwards stated before the justices that it was a casual frolic:—*Held*: there was no sufficient evidence of knowingly suffering gaming, & conviction quashed accordingly.—AVARDS v. DANCE (1862), 26 J. P. 437.

301. — Actual knowledge not necessary—But some proof necessary.]—In order to support a conviction under the Licensing Act, 1872 (c. 94), s. 17, by which, if any person licensed under the Act "suffers any gaming or any unlawful game to be carried on on his premises" he is made liable to certain penalties, it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that gaming was carried on on his premises. At the hearing of an information against applt., an hotel keeper, for suffering gaming on his licensed premises, it was proved that a police constable, about half-past twelve in the morning, was in the street in which the premises were situate. Two of the windows had the blinds up, so that the constable could see three gentlemen, & from what they said it was evident that they were playing cards. He waited for about a quarter of an hour, when the front door was opened by one of the waiters, & he then entered & went upstairs to the room, & found six gentlemen round a table with a quantity of money on it. The manageress of the hotel said that she did not know that they were playing cards, & that they did not have the cards of her, & her statement was confirmed by the card-players, who were in a private room. Applt. having been convicted:—*Held*: the case must be sent back to the justices with an intimation of the opinion of the ct. that, though actual knowledge on the part of applt. or his servants, in the sense of seeing or knowing of the card playing, was not necessary to be shown, yet that some circumstances must be proved from which it could be inferred that they connived at what was going on.—BOSLEY v. DAVIES (1875), 1 Q. B. D. 84; 45 L. J. M. C. 27; 33 L. T. 528; 40 J. P. 550; 24 W. R. 140, D. C.

Annotations.—*Consd. Rodgate v. Haynes* (1876), 45 L. J. M. C. 65; *Bond v. Evans* (1888), 21 Q. B. D. 249. *Mentd. Emary v. Nolloth* (1903), 67 J. P. 354.

302. — Whether knowledge of servant knowledge of licensee.]—Applt. was charged under Licensing Act, 1872 (c. 94), s. 17, with "suffering" gaming to be carried on on her premises, an hotel at Epsom. It was proved by witnesses that, while standing in the public street at Epsom between half-past one & a quarter to two in the morning, they could hear the conversation of

Held: "euchre" is a game of chance, & deft. was properly convicted by reason of the game having been played in his premises, though without his knowledge.—R. v. LAIRD (1903), 23 C. L. T. 281; 6 O. L. R. 180 2 O. W. R. 667.—CAN.

m. — Losers to pay for drinks supplied.]—Where a licensed hotel-keeper permitted a party of four men to play in his licensed premises a game of euchre, the losers to pay for the drinks to be supplied to the party, & drinks were accordingly supplied to each of the men, & the losers at the game paid for the drinks:—*Held*:

three persons in a room in the hotel. These three persons were a horse trainer, a jockey, & a gentleman of Newmarket, & from what was heard of their conversation, it was evident that they were playing for money. No direct evidence was given that applt. knew of the gaming. Applt. stated that the house was closed at 11 p.m. that the three men were then in their private room, & she saw no cards, & did not supply any, & did not know of any card playing. The hall-porter, whose duty it was to attend upon the customers, stated that he closed the house after 11 p.m., & retired to his own chair in a parlour beyond the bar, at the extreme end of the house. He knew nothing whatever of any gambling. The justices drew the inference from the porter's evidence that his chair was removed to the greatest possible distance from the room where the guests were, in order that he might not hear what passed, & they thought that applt. knew that gambling was intended to be carried on, & that she purposely took pains not to know what her guests were doing. On these grounds they convicted her:—*Held*: applt. was responsible for the conduct of the hall-porter whom she left in charge of the hotel; there was evidence that the porter suspected what was going on, & connived at it; & this evidence justified the conviction.—*REDGATE v. HAYNES* (1876), 1 Q. B. D. 89; 45 L. J. M. C. 65; 33 L. T. 779; 41 J. P. 86, D. C.

Annotations:—*Folld.* Crabtree v. Hole (1879), 43 J. P. 799. *Consd.* R. v. Holland, Lincolnshire, JJ. (1882), 46 J. P. 312. *Expld.* Somerset v. Hart (1884), 12 Q. B. D. 360. *Folld.* Bond v. Evans (1888), 21 Q. B. D. 249. *Refd.* Chisholm v. Doulton (1889), 58 L. J. M. C. 133; Somerset v. Wade, [1894] 1 Q. B. 574. *Mentd.* Lawson v. Edminson, [1908] 2 K. B. 952.

303. ———. *—C.* was a licensed alehouse keeper, & employed a manager, D., to live on the premises, & attend to it. One night after closing hours police constables passing on the opposite side of the street heard noises as if of persons gaming, & climbed up & looked through the window, & saw persons gaming on the premises for money. C., on being summoned, proved that the manager went to bed, leaving the boots to attend to the house, & the justices found as a fact that the boots knew of the gaming, but wilfully shut his eyes & ears:—*Held*: the justices were right in convicting C., who was liable for the neglect of the boots.—*CRABTREE v. HOLE* (1879), 43 J. P. 799, D. C.

Annotation:—*Expld.* Somerset v. Hart (1884), 12 Q. B. D. 360.

304. ———. *Servant not in charge of premises.*—Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person employed on the premises,

but there was no evidence to show any connivance, or wilful blindness on the part of the licensed person, & it did not appear that the servant was in charge of the premises:—*Held*: the justices were right in refusing to convict the licensed person of suffering gaming on the premises under the Licensing Act, 1872 (c. 94), s. 17.—*SOMERSET v. HART* (1884), 12 Q. B. D. 360; 53 L. J. M. C. 77; 48 J. P. 327; 32 W. R. 594, D. C.

Annotations:—*Distd.* Bond v. Evans (1888), 21 Q. B. D. 249. *Consd.* Somerset v. Wade, [1894] 1 Q. B. 574; Smith v. Slade (1900), 64 J. P. 712; *Ex p.* Marshall (1907), 71 J. P. 501; Buxton v. Scott (1909), 100 L. T. 390. *Refd.* Boyle v. Smith, [1906] 1 K. B. 432.

305. ———. *Servant in charge of premises.*—Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who was in charge of the premises, but without any knowledge or connivance on the part of the licensed person:—*Held*: the licensed person had suffered gaming to be carried on on the premises within Licensing Act, 1872 (c. 94), s. 17, & was rightly convicted.—*BOND v. EVANS* (1888), 21 Q. B. D. 249; 57 L. J. M. C. 105; 59 L. T. 411; 52 J. P. 613; 36 W. R. 767; 4 T. L. R. 614; 16 Cox, C. C. 461, D. C.

Annotations:—*Expld.* Massey v. Morris (1894), 63 L. J. M. C. 185. *Consd.* Somerset v. Wade, [1894] 1 Q. B. 574. *Expld.* Coppen v. Moore (No. 2), [1898] 2 Q. B. 306. *Consd.* Buxton v. Scott (1909), 100 L. T. 390. *Refd.* Chisholm v. Doulton (1889), 58 L. J. M. C. 133; Smith v. Slade (1900), 64 J. P. 712; Emary v. Nolloth (1903), 89 L. T. 100; Boyle v. Smith, [1906] 1 K. B. 432; Mousell v. L. & N. W. Ry., [1917] 2 K. B. 836; *Mentd.* Wilson v. Twamley (1903), 19 T. L. R. 504.

306. *Allowing bets to be made on premises.*—Betting on horse races is not "gaming" within Licensing Act, 1872 (c. 94), s. 17 (1), & a licensed person who merely allows bets on horse races to be made in his licensed premises does not "suffer gaming to be carried on on his premises" within the meaning of that sub-sect.—*KEEP v. STEVENS* (1909), 100 L. T. 491; 73 J. P. 112; 22 Cox, C. C. 59, D. C.

307. *Offence may be of trifling character.*—*Summary Jurisdiction Act, 1879 (c. 49), s. 16.*—The offence of unlawfully suffering gaming on licensed premises contrary to Licensing Act, 1872 (c. 94), s. 17, may be of a trifling nature within the meaning of s. 16 of the Summary Jurisdiction Act, 1879 (c. 49), s. 16.—*Ex p.* MARSHALL (1907), 71 J. P. 501, D. C.

SUB-SECT. 4.—PRACTICE AND PROCEDURE.

308. *Indictment by private prosecutor—Stay of proceedings.*—An indictment for a nuisance in

the game so played constituted "gaming" & the licensee had been properly convicted.—*FULLER v. FOUHY* (1905), 24 N. Z. L. R. 753.—N.Z.

n. Playing billiards for drinks.—Applt. was charged in the lower Ct. with permitting gambling on his licensed premises. The facts were that two men, to the knowledge of applt., had played a game of billiards on his premises for drinks:—*Held*: though the game of billiards is one of skill, playing billiards for drinks is gambling, & applt. had therefore been rightly convicted.—*MARSHALL v. CREEN* (1906), 26 N. Z. L. R. 161.—N.Z.

o. Synonymous with gambling.—"Gambling" in Licensing Act, 1908, s. 185, is indistinguishable from gaming.—*OAKES v. EDWARDS*, [1918] N. Z. L. R.

746.—N.Z.

p. Use of premises by bookmaker for purposes of betting.—At the trial of a publican on a charge of knowingly & wilfully permitting his licensed premises to be used as a betting-house, the evidence disclosed that a bookmaker was in the habit of visiting the premises at certain hours each day, when he openly made bets with customers in the public bar, & that these transactions took place in presence of the licensee-holder, who, from his position behind the counter, had a clear view of the public bar:—*Held*: in the absence of explanation of the bookmaker's presence for any legitimate purpose, the Sheriff was, on these facts, entitled to find that the premises were used by the book-

maker for purposes of betting, & that the licensee-holder sanctioned this use.—*DRYDEN v. MACKAY*, [1924] S. C. (J.) 67.—SCOT.

PART II. SECT. 2, SUB-SECT. 4.

q. Search warrant—Arrest—Bail allowed—Whether new information necessary.—A deft. having been arrested on a search warrant, under Games & Wagers Act (14 Vict. No. 9), & allowed bail appeared on the day mentioned in the recognisance:—*Held*: as the information warrant, arrest, charge & conviction were under the same Act, a new information was not necessary.—*Ex p.* AH HING (1887), 8 N. S. W. L. R. 412; 4 N. S. W. W. N. 110.—AUS.

r. Execution.—*Pliffs.* were

Sect. 2.—Gaming houses: Sub-sect. 4. Part III.
Sects. 1 & 2: Sub-sect. 1.]

keeping a common gaming house was preferred by a private prosecutor, who, after removing it by *certiorari* proceeded no further. Another party

then caused a *venire facias* to be issued & other steps for bringing the case to trial though desired by the original prosecutor to forbear. On motion by the latter for a stay of proceedings, he alleging that the offence had been discontinued, the ct.

owners of an assembly room suspected of being used as a common gaming-house. In executing a search order, deft. broke into plff.'s premises after trying to open the doors but without stating the cause of his coming or making request to have doors opened.—*Held*: in all cases of a search warrant or order the police officer executing the same must have it in his possession for inspection at the time of search, but that in the case of a dwelling-house the police officer executing the warrant must signify the cause of his coming & demand admittance before forcing entry—not so where the building is of another class, more circumspection being required in forcing entry to a dwelling-house than in other cases.—*WA KIE v. CUDBY* (1914), 30 W. L. R. 167; 8 Alta. L. R. 111; 20 D. L. R. 351; 23 Can. Crim. Cas. 383.—CAN.

a. — *Form of—Effect of surveillance.*—If a warrant issued under Criminal Code, s. 641, contains the necessary essentials, i.e. "to go to the place & enter," & the statute gives the constable power to do anything contained in the warrant, it is not bad by reason of its containing additional matter which may be looked upon as mere surplusage.—*R. v. KONG YICK* (1919), 25 B. C. R. 269.—CAN.

t. — *Forfeiture of money seized.*—A motion to quash a conviction of deft. for unlawfully keeping a common betting-house was dismissed, where certain things discovered upon deft.'s person & in his house, when searched by the police under warrant, especially betting-slips, money, & bank books showing the deposit by deft. of large sums of money, afforded more than a *scintilla* of evidence that the house was opened, kept, & used for the purpose of betting with persons resorting thereto & for the purpose of receiving deposits on bets as consideration for a promise to pay on the events of races. The forfeiture of the money seized upon deft.'s premises was affirmed, as well as the conviction.—*R. v. JOHNSON* (1915), 9 O. W. N. 313; 35 O. L. R. 215.—CAN.

a. — *—*—Upon the conviction of deft. for keeping a common gaming-house, certain moneys seized under a search warrant were ordered forfeited to the Crown. On appeal, the order of forfeiture was set aside by the county ct. judge & the moneys directed to be returned to deft. The order of the county ct. judge was subsequently quashed.—*Held*: the Crown was entitled to recover the moneys so forfeited.—*R. v. Foo Loy* (1921), 66 D. L. R. 516; 36 Can. Crim. Cas. 159; 30 B. C. R. 162.—CAN.

b. *Information on oath—Essential preliminaries to prosecution.*—On an information on oath of complainant, a constable, that the deft.'s premises were kept, & used as a common gaming-house a special warrant was issued under Act 14 Vict., No. 9. The warrant was otherwise in the form provided by the 1st Schedule to the Act, but was not addressed to anyone. On an order to quash the conviction.—*Held*: the warrant was informal & perhaps invalid but that the only essential preliminaries to the prosecution were the informations on oath & the exercise of the justices' discretion in granting the warrant, & as these had been complied with & there was evidence to support the conviction, the order was

discharged.—*SHEEHAN v. GALLAGHER* (1902), S. R. Q. 319.—AUS.

c. *Form of complaint—1902 Act No. 18, s. 4.*—To authorise the issue of a warrant under Act 1902, No. 18, s. 4, complaint must state that there is reason to suspect that the house is being kept or used as a common gaming-house & that it is commonly reported & believed by the deponent to be so.—*Ex p. MARKS* (1906), 6 S. R. N. S. W. 428.—AUS.

d. — *Police Offences Act, 1890 s. 57.*—The "complaint on oath upon which a warrant may issue under Police Offences Act, 1890, s. 57, must be in writing.—*MONTAGUE v. AH SHEN*, [1907] V. L. R. 458.—AUS.

e. *Jurisdiction of magistrate—Card playing—Recovery of penalty.*—Deft. was convicted for playing a game of cards called "faro".—*Held*: under 27 Geo. III., c. 1, s. 2, the jurisdiction of justices of the peace in such cases was taken away, & in lieu thereof the recovery of such a penalty was to be by civil action. The conviction was therefore quashed.—*R. v. MATHESON* (1884), 4 O. R. 559.—CAN.

f. — *Right of accused to trial by jury.*—A police magistrate has not absolute & summary jurisdiction to try, without their consent, persons accused of keeping a common gaming-house such persons have the right to elect to be tried by a jury.—*R. v. LEE GUEY* (1907), 10 O. W. R. 1060; 15 O. L. R. 235; 13 Can. Crim. Cas. 80.—CAN.

g. — *—*—*R. v. SHING* (1910), 20 Man. L. R. 214.—CAN.

h. *Evidence of offence.*—For a person to be convicted of using a house as a common gaming-house it is not necessary to prove that the house had been used for playing an unlawful game on more than one occasion.—*NATION v. KROGDALH*, [1923] S. A. S. R. 94.—AUS.

k. — *—*—*R. v. DUFFY*, 21 L. T. 477.—CAN.

l. — *Conversations between third persons—Admissibility.*—On trial of a charge of keeping a gaming-house evidence of conversations between requesters of the house in question overheard by the police were admitted.—*Held*: such conversations formed part of the *res gestæ* & had been rightly admitted.—*LENSEN v. R.* (1906), T. S. 154.—S. AF.

m. *Conviction—Penalty beyond statutory authority—Validity.*—A conviction under L. S. C. c. 158, s. 6, provided, in addition to fine & imprisonment, for distress in default of payment of the fine.—*Held*: the punishment being in excess of that warranted by the statute, the conviction must be quashed.—*R. v. LOGAN* (1888), 10 O. R. 335.—CAN.

n. — *—*—*—*—Deft. was summarily tried before a police magistrate & convicted for that he did unlawfully keep a disorderly house, to wit, a common gaming-house, & sentenced to pay a fine of \$200 & "costs of the ct." & in default of payment, to 4 months' imprisonment. The conviction having been removed into the Ct. of Appeal by *certiorari*.—*Held*: the penalty imposed was beyond the statutory authority of the

police magistrate; & Parliament had not conferred on the ct. the power to amend the conviction by lessening the amount of the fine; & the conviction was quashed, but on condition that no action should be brought by or on behalf of the accused in respect of the proceedings.—*L. v. SHING* (1910), 15 W. L. R. 714; 20 Man. L. R. 214.—CAN.

o. — *Form of—In the alternative—Validity.*—The accused were convicted "for that they did unlawfully play, or look on while others were playing, in a common gaming-house".—*Held*: the conviction was bad, upon the ground that the charge was double, & the offence of which each accused was convicted was uncertain, because it was stated in the alternative.—*R. v. TOY MOON* (1911), 19 W. L. R. 480; 1 W. W. L. R. 50; 21 Man. L. R. 257; 17 Can. Crim. Cas. 57.—CAN.

p. — *Statement of offence.*—A person may be convicted on a charge of being "found in a common gaming-house without lawful excuse" under Gaming & Lotteries Act, 1881, s. 4, although no one has been convicted under the first para. of that sect., but it must first be found that the house was a common gaming-house. Where a conviction did not contain the words "without lawful excuse".—*Held*: an essential ingredient of the offence had been omitted, & the conviction must be quashed.—*QUICK v. COX* (1902), 21 N. Z. L. R. 584.—N.Z.

q. *Notice of appeal—Description of offence—Sufficiency of.*—A notice of appeal from a conviction for playing in a common gaming-house, which describes the offence for which applt. was convicted as "looking on while another was playing in a common gaming-house" is insufficient.—*R. v. MAH YIN* (1904), 9 B. C. R. 319.—CAN.

r. *Proceedings against offender—How taken.*—The offence of keeping a common gaming-house, although it was an offence at common law, is also a statutory offence under Gaming & Lotteries Act, 1881, & a person charged with such an offence can be proceeded against under the Act of 1881, that Act not being inconsistent with Criminal Code Act, 1893. What may be a common gaming-house under the Criminal Code may not in all cases be a common gaming-house under the Act of 1881; & the procedure under the Act of 1881 is summary, that under the Code by way of indictment. The two Acts are not inconsistent with, but complementary to, one another.—*R. v. EAGER, R. v. STURGEON, R. v. COUNIHAN, R. v. THOMAS* (1903), 23 N. Z. L. R. 552.—N.Z.

sa. *Sufficiency of allegations & particulars—Appeal by A.G.—Costs of accused.*—Accused was charged with keeping a gambling-house, at premises known as the S. A. Club, in contravention of Law 6 of 1889, ss. 1 & 4, in that (a) between Jan. 9, 1918, & Jan. 31, 1919, he continued to be a member of the committee of the club; (b) on Jan. 29, 1919, he supplied cards to persons playing "faro" in the club; & (c) on July 10, 1918, he agreed with others to guarantee the rent of the premises to the lessor.—*Held*: (1) the allegation that accused kept a gambling-house was a sufficient allegation of a crime & the particulars set out in

refused to interfere, the prosecution being for a public nuisance.—*R. v. WOOD* (1832), 3 B. & Ad. 657; 1 L. J. M. C. 93; 110 E. R. 240.

Certiorari to remove indictment.]—*See CROWN PRACTICE*, Vol. XVI., p. 412, No. 2697.

Removal of right of certiorari.]—*See CROWN PRACTICE*, Vol. XVI., p. 443, No. 3081.

Judgment on validity of conviction—Whether criminal cause or matter.]—*See CRIMINAL LAW*, Vol. XIV., p. 553, No. 6288.

Part III.—Betting and Betting Houses.

SECT. 1.—IN GENERAL.

309. What is betting—Whether subscription to sweepstake.]—*R. v. HOBBS*, No. 401, *post*.

310. Betting or betting business—Not illegal ipso facto.]—*HAWKE v. DUNN*, No. 339, *post*.

SECT. 2.—OFFENCES UNDER VAGRANCY ACTS.

SUB-SECT. 1.—BETTING IN OPEN AND PUBLIC PLACES.

See Vagrancy Act, 1824 (c. 83), s. 4; *Vagrant Act (Amendment) Act*, 1868 (c. 52), s. 3; *Vagrant Act (Amendment) Act*, 1873 (c. 38), s. 3; & *Street Betting Act*, 1906 (c. 43), s. 2.

311. Railway carriage—Actually conveying of passengers.]—Prisoner was convicted of playing in a certain open & public place, to wit, a carriage used on a railway, with an instrument of gaming:—*Held*: the conviction was bad, it not showing that the carriage was being used for the conveyance of passengers on the line.—*Re FREESTONE* (1856), 1 H. & N. 93; 27 L. T. O. S. 109; 20 J. P. 376; 2 Jur. N. S. 525; 4 W. R. 567; 156 E. R. 1131; *sub nom. Ex p. FREESTONE*, 25 L. J. M. C. 121.

Annotation:—*Consd. Langrish v. Archer* (1882), 10 Q. B. D. 44.

312. ———.]—*Vagrant Act (Amendment) Act*, 1873 (c. 38), s. 3, imposes a penalty upon "every person playing or betting by way of wagering or gaming in any street, road, highway, or other open or public place, or in any open place to which the public have or are permitted to have access at or with any coin, card, &c., used as an instrument or means of such wagering or gaming at any game or pretended game of chance":—*Held*: a railway carriage while travelling on its journey is within the definition of "an open & public place to which the public have or are per-

mitted to have access" in the sect.—*LANGRISH v. ARCHER* (1882), 10 Q. B. D. 44; 52 L. J. M. C. 47; 47 L. T. 548; 47 J. P. 295; 31 W. R. 183; 15 Cox, C. C. 194, D. C.

Annotation:—*Reid. Airton v. Scott* (1909), 100 L. T. 393.

313. Highway—River—No conveyance specified.]—A vagrant conviction under Vagrancy Act, 1824 (c. 83), s. 4, alleging that prisoner was convicted, & that he "did play in a certain highway, to wit, the river Thames, with instruments of gaming, to wit, cards, at a game of chance," following the words of the statute, is good.—*Ex p. GRANT* (1857), 28 L. T. O. S. 266; 5 W. R. 289.

314. Enclosed grounds—Payment for admission.]—Depositing a half sovereign as a bet on a dog race is not "betting with a coin as an instrument of gaming at a game of chance," within Vagrant Act (Amendment) Act (c. 52), s. 3. *Qu.*: whether inclosed grounds, to which persons are admitted on payment of a price for admission, is "a place to which the public have or are permitted to have access" within the sect.—*HIRST v. MOLESBURY* (1870), L. R. 6 Q. B. 130; 40 L. J. M. C. 76; 23 L. T. 555; 35 J. P. 229; 19 W. R. 246.

Compare Nos. 331, 334, post.

315. For recreation of workmen—Public not debarred.]—A colliery co. had a large field of 30 acres, which they allowed the workmen & their families to use for recreation, & bowling matches. Strangers were also allowed to come & play there, & were not turned away. One day T. & others played at pitch & toss in the field:—*Held*: they were liable to be convicted under Vagrant Act (Amendment) Act, 1873 (c. 38), s. 3, for playing in a place to which the public were permitted to have access.—*TURNBULL v. APPLETON* (1881), 45 J. P. 469, D. C.

Annotation:—*Reid. R. Wellard* (1884), 14 Q. B. D. 63.

316. Sports ground—Athletic competition including horse race—Temporary adaption of ground for that purpose—*Street Betting Act*, 1906 (c. 43),

(a) & (b) were sufficient to enable an accused to defend himself, but the particulars in (c) were not sufficient; (3) in appeals by the A.G. under Act 32 of 1917, s. 100 (2), accused will not be awarded his costs of appearance unless he is successful & can show that the point is one which materially affects him personally.—*R. v. COHEN* (1919), T. P. D. 213.—S. AF.

PART III. SECT. 1.

t. Meaning of "common betting-house."]—For the purposes of the Criminal Code the term "common betting-house" is to be construed in accordance with the definition enacted by s. 227, as amended 1910, its applica-

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tion relating specially to the offence of keeping a disorderly house under Criminal Code (Amendments of 1909 & 1913), s. 228. Under the latter sect. it is made an indictable offence punishable by one year's imprisonment to keep a disorderly house, & by reference to s. 227 "a common betting-house constitutes a disorderly house.—*R. v. JOHNSON* (1916), 27 D. L. R. 611.—CAN.

a. Engaging in the business of betting.]—The evidence showed that doft. placed bets for M. with G., who was admittedly a bookmaker, engaged in the business of betting. The bets made in the six months before prosecution were about a dozen in all. Doft.

also made "credit bets" with P., about twice a week, during the 6 months:—*Held*: although "engaging in business" does not mean taking part in a single act, but connotes a repetition or series of acts, the evidence was ample to justify a jury in finding that the doft. engaged in betting as a business, & therefore engaged in the business of betting.—*R. v. HYNES* (1919), 45 O. L. R. 51; 15 O. W. N. 341.—CAN.

PART III. SECT. 2, SUB-SECT. 1.

b. Street.]—A person, having no regular place of business, who makes his living by taking bets on the street with individuals on his own behalf, &

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Sect. 2.—Offences under Vagrancy Acts: Sub-sects. 1, 2 & 3. Sect. 3.]

s. 2.]—A field was being used on a particular day for certain mixed sports, consisting partly of foot races & other athletic competitions & partly of horse races. The field was not permanently laid out as a racecourse, but was only temporarily adapted for the purpose of horse racing for the particular occasion:—*Held*: it was not "ground used for the purpose of a racecourse for racing with horses" within the above sect., so as to exclude the application to it of that Act.—*STEAD v. ACKROYD*, [1911] 1 K. B. 57; 80 L. J. K. B. 78; 103 L. T. 727; 74 J. P. 482, D. C.

SUB-SECT. 2.—FREQUENTING FOR PURPOSE OF BETTING.

317. What constitutes.]—*JONES v. SCOTT* (1906), cited, 100 L. T. at p. 394, D. C.

Annotation:—*Reid. Airton v. Scott* (1909), 100 L. T. 393.

318. —.]—By Street Betting Act, 1906 (c. 43), s. 1, "Any person frequenting or loitering in streets or public places, on behalf either of himself or of any other person, for the purpose of . . . betting" shall be guilty of an offence:—*Held*: a person who loiters in a street for the purpose of distributing handbills, stating that a third person therein named is willing to make bets upon the events & at the rates of odds therein specified, & if the recipients of the handbills will send to such third person written offers to bet accompanied by remittances of money the offers will be accepted, is guilty of an offence under the sect.—*DUNNING v. SWETMAN*, [1909] 1 K. B. 774; 78 L. J. K. B. 359; 100 L. T. 604; 73 J. P. 191; 25 T. L. R. 302; 22 Cox, C. C. 93, D. C.

Annotation:—*Consol. R. v. Wyton* (1910), 5 Cr. App. Rep. 287.

Compare Nos. 334, 335, post.

319. Conviction on "second offence"—Prior offence against bye-law—Street Betting Act, 1906 (c. 43), s. 1.]—Applt. was convicted under the above sect., but it was the first offence he had committed under that Act. He had been previously convicted under a county council bye-law which provided: "No person shall frequent & use any street or other public place either on

behalf of himself or of any other person for the purpose of bookmaking or betting or wagering or agreeing to bet or wager with any person":—*Held*: the justices were not entitled to inflict a fine as for a second offence, inasmuch as the second offence ought to be an offence under the same statute as that creating the original offence.—*R. v. STONE, Ex p. SETON* (1908), 99 L. T. 88; 72 J. P. 388; 21 Cox, C. C. 653.

SUB-SECT. 3.—USE OF INSTRUMENTS OF GAMING.

320. Current coin—Not included.]—Persons tossing halfpence in the public highway, & betting & exchanging money upon the result of "heads" or "tails" are not liable to be convicted under Vagrancy Act, 1824 (c. 83), s. 3, since halfpence are not "instruments of gaming" within that sect.—*WATSON v. MARTIN* (1864), 5 New Rep. 120; 34 L. J. M. C. 50; 11 L. T. 372; 28 J. P. 775; 11 Jur. N. S. 321; 13 W. R. 144; 10 Cox, C. C. 56.

Annotations:—*Reid. Monck v. Hilton* (1877), 2 Ex. D. 268; *R. v. O'Connor & Brown* (1881), 45 L. T. 512.

321. —.]—*HIRST v. MOLESBURY*, No. 314, *ante*.

322. Pari-mutuel—Included.]—Applts. were convicted under Vagrant Act (Amendment) Act, 1868 (c. 52), s. 3, on evidence from which it appeared that they were the proprietors of a machine called a "pari-mutuel." The machine had on it numbers, beside each of which were three holes, & behind these holes were figures, which, by a mechanical contrivance, were made to shift on the turning of a key, so that any number from 0 to 999 would be exhibited behind these holes. On the top of the machine was the word "total," & beside it were holes in which could be exhibited, in a similar manner, figures shifting on the turn of the key. Applts. took this machine to a racecourse, & appropriated each of the numbers to designate a particular horse about to run a race. Any person who wished to bet on a particular horse deposited with applts. half-a-crown, & received a ticket with the number appropriated to the horse; & applts., by a turn of the key, altered the figures, increasing the sum indicated alongside of that number by one; & the same turn of the key increased the figures

if he loses, pays the bets himself, is not a loose, idle, or disorderly person or vagrant within Criminal Code, s. 238 (1).—*R. v. ELLIS* (1910), 1 O. W. R. 195; 20 O. L. R. 218.—*CAN.*

PART III. SECT. 2, SUB-SECT. 2.

c. "Frequenting & using"—*Municipal bye-law.*—*Held*: a bye-law made by P. municipal council, which provided that no person shall frequent & use any street or other public place on behalf of himself or any other person for the purpose of bookmaking or betting or wagering or agreeing to bet or wager with any person, or paying or receiving or settling bets was within the power conferred by Municipal Corpn. Act, 1906, s. 179, (10)(a) & (52), & was reasonable & therefore valid.—*MYERS v. CONDON* (1920), 22 W. A. L. R. 30.—*AUS.*

d. —.—.]—*DAVIES v. JEANS* (1904), 6 F. (Ot. of Sess.) 37; 41 So. L. R. 426; 11 S. L. T. 790, J.—*SCOT.*

PART III. SECT. 2, SUB-SECT. 3.

320 i. Current coin—Not included.]—The expression "instrument of gaming" as used in Bombay Act IV. of 1887, s. 12, as amended by Bombay Act 1 of 1890, means an implement devised or intended for that purpose. A coin is not such an instrument.—*R. v. GOVIND* (1891), 1 L. R. 16 Bom. 283.—*IND.*

e. *Totalisator machine.*—An information was laid against resp. B. as secretary of the H. V. Racing Club for unlawfully using a totalisator machine during a race meeting on the club's racecourse. The race club was incorporated under Cos. Act, 1893, & horse-racing was included among the objects for which the co. was formed. There were, however, many other pursuits which the co. was authorised to carry on, & the profits of the co., which were in fact made up from the earnings of the totalisator machine, were distributed in dividends:—*Held*: the main object of the co. not being

the promotion of horse-racing & the co. not being *bond fide* established for that purpose, the use of the totalisator machine was illegal under 47 Vict. No. 26.—*CORNE v. BERRY* (1899), 1 W. A. L. R. 164.—*AUS.*

f. —.—.]—*DAY v. CLOETE* (1887), 5 S. C. 139.—*S. AF.*

g. *Any article used as means of wagering.*—Any article which is in fact used as a means of wagering comes within the definition of "an instrument of gaming," even though it may not have been specially devised or intended for that purpose.—*R. v. KANJI BHIMJI* (1892), 1 L. R. 17 Bom. 184.—*IND.*

h. *Cowries.*—Cowries may be treated as instruments of gaming where they are used as counters or as a means to carry on gaming.—*R. v. MAKUND RAM* (1897), 1 L. R. 25 Calc. 432.—*IND.*

k. —.—.]—*R. v. BHAGGI LAL* (1920), 1 L. R. 42 All. 470.—*IND.*

l. *Books—Kept for recording wagers.]*

Sect. 3.—Offences against bye-laws. Sect. 4: Sub-sect. 1, A.]

agreeing to bet or wager with any person either on behalf of himself or any other person," is not *ultra vires* or invalid, & it is not necessary, in order to obtain a conviction under it, that evidence should be given that there was annoyance to passengers & other persons.—*JONES v. WALTERS* (1898), 78 L.T. 167; 62 J. P. 374; 14 T. L. R. 265; 19 Cox, C. C. 1, D. C.

Annotation:—*Appld.* *White v. Morley*, [1899] 2 Q. B. 34.

330. Metropolitan Streets Act, 1867 (c. 134), s. 23.—A bye-law made by the London County Council provided that no person should frequent & use any street or other public place for the purpose of betting, under a penalty. By the above sect., any three or more persons assembled together in any part of a street for the purpose of betting shall be deemed to be obstructing the street, & each of them shall be liable to a penalty:—*Held*: the bye-law was not repugnant to the above sect., & was valid.—*WHITE v. MORLEY*, [1899] 2 Q. B. 34; 68 L. J. Q. B. 702; 80 L. T. 761; 63 J. P. 550; 47 W. R. 583, 15 T. L. R. 360; 43 Sol. Jo. 511; 19 Cox, C. C. 345, D. C.

Annotations:—*Apprvd.* *Thomas v. Sutters*, [1900] 1 Ch. 10. *Refd.* *Scott v. Pilliner* (1904), 68 J. P. 518; *Sutton Harbour Improvement Co. v. Foster* (1920), 123 L. T. 549.

331. Private Act.—A local Act empowers the corpn. of M. to make "such bye-laws as they may think fit for the prevention of betting . . . in the public streets . . . & other places of public resort within the borough."

The corpn. made a bye-law that "any person who shall frequent & use any street . . . or other place of public resort within the borough . . . for the purpose of bookmaking or betting . . . shall be liable to a penalty."

Appld. used for the purpose of bookmaking an uninclosed piece of private ground within the borough, bounded by streets. Bookmakers & other persons habitually used the ground for betting, but without permission from the owner. *Appld.* & the other bookmakers conducted their business in an orderly manner, & caused no nuisance, annoyance, or obstruction. *Appld.* was convicted under the bye-law:—*Held* (1) the bye-law was within the power given by the Act, & was valid; (2) as the ground was in fact habitually used by the public, it was a "place of public resort," within the meaning of the bye-law; & *appld.* was rightly convicted.—*KITSON v. ASHE*, [1899] 1 Q. B. 425; 68 L. J. Q. B. 286; 80 L. T. 323; 63 J. P. 325; 15 T. L. R. 172; 19 Cox, C. C. 257, D. C.

332. ———.—*GODWIN v. WALKER* (1896), 12 T. L. R. 367; 40 Sol. Jo. 481; 60 J. P. Jo. 308, D. C.

333. Bye-law against distribution of betting literature—in public place—Whether valid.—A bye-law made by a county council imposed a penalty on any person frequenting & using any

street or public place "for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions":—*Held*: the bye-law was unreasonable & could not be supported.

—*SCOTT v. PILLINER*, [1904] 2 K. B. 855; 73 L. J. K. B. 998; 91 L. T. 658; 68 J. P. 518; 53 W. R. 284; 20 T. L. R. 662; 2 L. G. R. 1018; 20 Cox, C. C. 731, D. C.

Annotation:—*Mentd.* *A.-G. v. Hodgson*, [1922] 2 Ch. 429.

334. "Frequenting" — How constituted.—A bye-law prohibited the frequenting of a public place for the purpose of betting. By the definition sect. of the bye-law a public place included (*inter alia*) any open space to which the public had access for the time being. *Appld.* attended at an athletic ground to which the public had access on payment of an entrance fee, & made bets there:—*Held*: the word "frequenting" meant being sufficiently long in the place to effect the object aimed at, namely, to bet, & the athletic ground was a "public place" notwithstanding that a payment had to be made to gain admission.—*AERTON v. SCOTT* (1909), 100 L. T. 393; 73 J. P. 148; 25 T. L. R. 250; 22 Cox, C. C. 16, D. C.

335. Evidence to prove — Whether previous conduct admissible.—*WHICKHAM v. ASHE* (1897), 41 Sol. Jo. 211.

336. Whether annoyance to passers-by necessary.—*JONES v. WALTERS*, No. 329, *ante*.
See, also, Sect. 2, sub-sect. 2, *ante*.

SECT. 4.—OFFENCES UNDER BETTING ACTS.

SUB-SECT. 1.—WHAT IS A BETTING HOUSE OR PLACE.

A. In General.

See Betting Act, 1853 (c. 119), ss. 1, 3; Betting Act, 1874 (c. 15).

Premises from which coupon competitions conducted.—*See* Part VI., Sect. 1, *post*.

337. General rule.—(1) In order to support a conviction under Betting Act, 1853 (c. 119), s. 3, for unlawfully using a house, room or place for the purpose of betting with persons resorting thereto, it is unnecessary that there should be evidence of such house, room or place having been opened & kept or used previously to the occasion in question for the purpose of such illegal betting as is forbidden by sect. 1; in other words, the illegal user forbidden by sect. 3, is not necessarily of a house, room or place which is already a common nuisance & a common gaming house under sects. 1 & 2. It is also immaterial that the principal user of the house, room, or place is for a legitimate object if in fact it is also used for the prohibited purpose.

(2) The term "place" in sect. 3, does not necessarily mean one particular spot, but may

private land was in fact frequented by the public, who were present in large numbers when the betting took place:—*Held*: a public place.—*Ex p. BRIAN* (1902), 2 S. R. N. S. W. 125; 19 N. S. W. W. N. 123.—*AUS.*

t. Bye-law restricting operations of bookmakers on racecourse—Made by

committee of racing club—Validity.—*COLMAN v. MILLER*, [1906] V. L. R. 622.—*AUS.*

a. Bye-law as to bookmaking—In street—Validity.—*Appld.* was charged with having frequented & used a street in the city of W. for the pur-

pose of bookmaking, contrary to a bye-law of the city:—*Held*: the bye-law was good.—*CONRICK v. JOHNSON* (1902), 22 N. Z. L. R. 704.—*N.Z.*

b. ———.—*DAVIES v. JEANS* (1904), 6 F. (Ct. of Sess.) 37; 41 Sc. L. R. 426; 11 S. L. T. 790, J.—*SCOT.*

include a place extending over a considerable area of ground. Such place need not be bounded by a definite line, but it cannot be of unlimited extent, & is to be confined to the area occupied by the persons congregated together & resorting to it; & such place is further to be limited to a space upon which, if anyone carried on business there as a betting man, he might fairly & reasonably be said to be carrying on such business in the immediate presence of the persons resorting to such space. The bar-room of a public-house is a "place" within sect. 3 &, *semble*, user of a bar-room is user of a "house" for the purpose of the sect.

(3) For the purposes of illegal user within sect. 3, it is not necessary that the delinquent should remain stationary in the place so used; he may use the place by moving about within its area.—*R. v. PREEDY* (1888), 17 Cox, C. C. 433.

Annotations:—As to (2) *Appld.* *Hawke v. Dunn*, [1897] 1 Q. B. 579; *R. v. Humphrey*, [1898] 1 Q. B. 875. *Consd.* *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143.

338. —.]—*THWAITES v. COULTHWAIT*, No. 167, *ante*.

339. —.]—(1) Any area of inclosed ground, covered or uncovered, which is known by a name or capable of reasonably accurate description, to which persons from time to time or upon any particular occasions or occasion resort, & who may properly be described as resorting thereto, used by a professional betting man for the purpose of exercising his calling & betting with such persons or for the purpose of carrying on a ready money betting business, may be a "place" within sect. 3 of Betting Act, 1853 (c. 119).

(2) Metes & bounds are not essential, & it is immaterial whether the bookmaker remains upon one particular spot within the area or moves about within that area from one spot to another. Each case must depend & be decided upon its own particular circumstances.

(3) The law does not forbid betting itself, nor is the business or avocation of a bookmaker necessarily illegal. That which the Legislature has forbidden, & which it has pronounced to be illegal, is the use by those who make a trade & business in betting of any place for the purpose of betting with persons resorting thereto or for the purpose of receiving, either themselves or by any other person, any money or valuable thing as the consideration for a bet or bets on the event of any horse race, etc.

(4) Upon the occasion of a race meeting about one thousand persons, including resp., a bookmaker & professional betting man, were admitted to a £1 stand known as Tattersall's ring. Tattersall's ring was inclosed by an iron fence breast high, & about forty yards long by thirty yards broad, & was owned by a limited co. Resp.

invited all persons about him to bet with him, & certain persons did so, each being required to pay in advance resp. a deposit of the money for which they had respectively backed the horse. Resp. did not confine himself to any one fixed spot or locality, he had no stool, box, umbrella, nor anything of a similar character to denote the precise spots at which from time to time he was carrying on his betting operations, but moved about the ring at his will, shouting out the odds & making his bets in various parts of it. After each race, resp. paid to each backer the bets they had respectively won:—*Held*: the ring was a "place" within sect. 3 of the Act.—*HAWKE v. DUNN*, [1897] 1 Q. B. 579; 60 L. J. Q. B. 364; 76 L. T. 355; 61 J. P. 292; 45 W. R. 359; 13 T. L. R. 281; 41 Sol. Jo. 351; 18 Cox, C. C. 543, D. C.

Annotations:—As to (1) *Reid*. *McInaney v. Hildreth*, [1897] 1 Q. B. 600. As to (3) *Consd.* *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143. As to (4) *Appld.* *R. v. Humphrey*, [1898] 1 Q. B. 875. *Overd.* *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143. *Reid*. *Belton v. Busby* (1899), 68 L. J. Q. B. 859; *Brown v. Patch* (1899), 63 J. P. 421; *Buxton v. Scott* (1909), 100 L. T. 390.

340. —.]—*POWELL v. KEMPTON PARK RACECOURSE CO.*, No. 358, *post*.

341. — Question for jury.]—Localisation, for the purposes of Betting Act, 1853 (c. 119), is a question of fact for the jury.—*R. v. FISHER & GROUT* (1913), 9 Cr. App. Rep. 164, C. C. A.

342. Definite area in park—Habitually used.—The habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, is not the using of a "place" for such purpose, within Betting Act, 1853 (c. 119), s. 1.—*DOGGETT v. CATTERNS* (1865), 19 C. B. N. S. 765; 5 New Rep. 376; 34 L. J. C. P. 159; 12 L. T. 355; 29 J. P. 149; 11 Jur. N. S. 243; 13 W. R. 390; 144 E. R. 987, Ex. Ch.

Annotations:—*Distd.* *Shaw v. Morley* (1868), L. R. 3 Exch. 137; *Eastwood v. Miller* (1874), L. R. 9 Q. B. 440; *Haigh v. Sheffield Corp'n* (1874), L. R. 10 Q. B. 102. *Consd.* *Gallaway v. Marles* (1881), 8 Q. B. D. 275. *Distd.* *R. v. Preedy* (1888), 17 Cox, C. C. 433. *Consd.* *Liddell v. Loffthouse*, [1896] 1 Q. B. 295; *Hawke v. Dunn*, [1897] 1 Q. B. 579; *McInaney v. Hildreth*, [1897] 1 Q. B. 600. *Reid.* *Bows v. Fenwick* (1874), L. R. 9 C. P. 339; *Thwaites v. Coulthwaite*, [1896] 1 Ch. 496; *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143.

343. Inclosed sports ground—Public admitted on payment.—(1) Applt. was the occupier of a certain inclosed grounds in which a pigeon shooting match between two persons for £10 a side, & afterwards a foot race, took place, & into which the public were admitted on payment of money. The persons who were admitted into the grounds made bets with each other both on the pigeon shooting match & on the foot race:—*Held*: the grounds were a "place," & they were kept & used by applt. for the purpose of betting within Betting Act, 1853 (c. 119) s. 3.

PART III. SECT. 4, SUB-SECT. 1.—A.

343 i. Inclosed sports ground—Public admitted on payment.—*CLARK v. DYKES* (1906), 8 F. (Ct. of Sess.) 43; 43 Sc. L. R. 389; 13 S. L. T. 842, J.—SCOT.

c. —.]—*Held*: a space of ground enclosed by walls, but not roofed in, which was entered by a door with a lock & which was fitted up as a quelling-ground, but was used primarily as a place for conducting betting transactions, was a "place" used as a betting-house within Burgh

Police (Scot.) Act, 1892, s. 407.—*FLANNAGAN v. HILL* (1904), 7 F. (Ct. of Sess.) 26; 42 Sc. L. R. 224; 12 S. L. T. 588, J.—SCOT.

d. *Street.*—A street or part of a street in conjunction with a house abutting on it is not a "place" within Police Offences Act, 1890, ss. 49 & 51.—*GLEESON v. ADAMS* (1894), 20 V. L. R. 229.—AUS.

e. — *What included in term—Sports ground.*—Betting took place on enclosed ground on which foot-races were being run & for admission to which

a charge was made. The ground was registered as a sports ground under Police Offences Act, 1915, & Local Government Act, 1915:—*Held*: the ground came within the definition of "street" in Police Offences Act, 1915, s. 106.—*MCCANN v. BUTCHER*, [1917] V. L. R. 548.—AUS.

f. — —.]—*Held*: recreation grounds, enclosed by a high paling with two gates, to which the public were admitted at a charge of 6d. for each person on days when races were being run were not a "street" within

Sec. 4.—Offences under Betting Acts: Sub-sect. 1, A.]

(2) To show that such a "place" was "used or permitted to be used" for the purpose of betting, it is not necessary that the betting should be the only or the primary object of the persons permitted to use it. It is sufficient if it be used or permitted to be used for betting as well as any other purpose.—*EASTWOOD v. MILLER* (1874), L. R. 9 Q. B. 440; 43 L. J. M. C. 139; 30 L. T. 716; 38 J. P. 647; 22 W. R. 790.

Annotations:—As to (1) *Consd. Hawke v. Dunn*, [1897] 1 Q. B. 579. *Field. Haigh v. Sheffield Corp.* (1874), L. R. 10 Q. B. 102; *Oldham v. Ramsden* (1875), 32 L. T. 825; *Gallaway v. Marles* (1881), 8 Q. B. D. 275; *R. v. Cook* (1884), 13 Q. B. D. 377; *Snov v. Hill* (1885), 14 Q. B. D. 588; *R. v. Freedy* (1888), 17 Cox. C. C. 433; *Thwaites v. Coulthwaite*, [1896] 1 Ch. 496; *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143; *Saffery v. Mayer* (1900), 70 L. J. Q. B. 145.

344. *—[Haigh v. SHEFFIELD TOWN COUNCIL, No. 369, post.*

345. *Garden common to houses.]—Deft. was convicted of unlawfully using a yard & garden ground at the back of 187, Q. Street, W., & of the adjoining messuages, for the purpose of betting with persons resorting thereto. It was proved that the premises, 187, Q. Street, were at the time in question occupied by deft.'s father, who carried on a fruiterer's business there. The premises were in the middle of a row of eight other similar small houses, each of them having a front door opening into Q. Street. This row of houses backed on to a piece of inclosed land which formed a common yard & garden ground for the whole row, & the same piece of land was*

*crossed by a footpath which ran immediately behind the row of houses & upon which path the back doors of the premises opened. Upon the garden ground behind No. 187 was some shedding, which was also occupied by deft.'s father. The grounds at the back of this row were approached from Q. Street by an entry at the side of No. 187. Evidence was given that on July 12, thirty-nine persons were seen to go up this entry between 1 & 1.45 p.m., & about 3 p.m. a bet was made with deft., who was sitting against the wall in the garden behind the house. On July 13, seventy-two persons were seen to go up this entry between 1 & 2.15 p.m., & deft. was seen to come down the entry & a bet was made with deft. on that day in the yard at the rear of the house. On July 14, between 1 & 1.50 p.m., fifty persons were seen to go up the entry, & a bet was made with deft. & he paid the winnings of a bet made the day before. On each of these days some person was seen to be keeping a look out:—*Held*: there was evidence of "resorting" & "user" within Betting Act, 1853 (c. 119), & there was evidence that deft. used a "place" within the Act.—*R. v. RUSSELL* (1905), 69 J. P. 247, C. C. R.*

346. *Uninclosed ground—Free access by public.]—Resp. was in the habit of going to a certain piece of ground, which was bounded on one side by a boarding & on two other sides by stays supporting the hoarding, for the purpose of betting with persons resorting thereto:—*Held*: the piece of ground was a "place" within Betting Act, 1853 (c. 119), s. 3, & resp. ought to have been convicted under that sect.—*LIDDELL v.**

Glasgow Police (Further Powers) Act, 1892, s. 3.—*YOUNG v. NEILSON* (1893), 20 H. (Ct. of Sess.) 62; 30 Sc. L. R. 640; 1 S. L. T. 32, J.—*SCOT*.

f. *—Passage within building.]—A passage, within a building, formed the entry to two dwelling-houses constituting the lower story of the building. The passage was completely closed at the back, & at the entrance from the street had a door which was open during the day but was generally closed at night:—*Held*: the passage was a "street" within Street Betting Act, 1906, ss. 1 & 3.—*VALLANCE v. CAMPBELL*, [1909] S. C. (J.) 9; 46 Sc. L. R. 239; 16 S. L. T. 635.—*SCOT*.*

h. *—Strip of ground.]—Under Street Betting Act, 1906, it is an offence to loiter in "streets" for betting purposes, "street" being defined as including a "public passage." A small strip of ground which belonged to a railway co., forming a recess in the road which led to a station, & giving direct access to the platform, open at the road end, but closed at the platform end by a sliding door which only opened in times of extra traffic:—*Held*: not to be a public passage.—*LANG v. WALKER*, [1910] S. C. (J.) 41; 47 Sc. L. R. 162; 2 S. L. T. 462; 6 Adam, 180.—*SCOT*.*

k. *—Betting from private ground—Over fence.]—A bookmaker, standing on private ground, separated by a fence from a street, engaged in betting with a person in the street by extending his arm over the fence & receiving a betting slip & money:—*Held*: the betting transaction took place in the street, & the bookmaker had been rightly convicted under Burgh Police (Scotland) Act, 1903.—*QUEEN v. WILSON*, [1910] S. C. (J.) 62.—*SCOT*.*

l. *—"Assembling together" for purposes of betting—What constitutes.]—*BONNAR v. WALKER* (1896), 23 R.*

(Ct. of Sess.) 39; 33 Sc. L. R. 722; 3 S. L. T. 244, J.—SCOT.

m. *—Lottery for purpose of betting.]—A bookmaker's clerk used a motor car for the purpose of collecting betting slips from sub-agents. While being driven in the car, which had slowed down in rounding a street corner within a burgh, he was handed from the pavement a packet of betting slips:—*Held*: he was not "loitering" in a street for the purpose of betting.—*WILLIAMSON v. WRIGHT*, [1924] S. C. (J.) 57.—*SCOT*.*

n. *Steps leading from street to house.]—The word "place" in Police Offences Act, 1890 (No. 1126), s. 49, includes the steps leading into a house from the street.—*R. v. DUNCAN* (1896), 21 V. L. R. 438.—*AUS*.*

o. *Saddling paddock—Access by public on payment.]—W. a bookmaker made bets under a tree in the saddling paddock at R. The paddock was a large enclosure to which the public have access on payment:—*Held*: he was rightly convicted under the Betting Houses Suppression Act, s. 3, of using a place, etc.—*POTTER v. MOSE, Ex p. WESTBROOK* (1897), 18 N. S. W. L. R. 169; 13 N. S. W. W. N. 207.—*AUS*.*

p. *Lane or private right of way.]—The appt. used for the purpose of betting with persons who resorted thereto a lane or private right of way opening from a street from which there was access to certain bookmakers' shops which fronted an adjoining street:—*Held*: the lane was a "place" within Betting Houses Suppression Act, s. 3.—*POTTER v. THOMAS* (1898), 19 N. S. W. L. R. 170; 14 N. S. W. W. N. 170.—*AUS*.*

q. *—[A bookmaker carried on his business standing in a lane or right of way which led from a street to the back entrance of some houses*

*facing the street. The lane was open to the public at all times & the part in which the bookmaker stood was a cul-de-sac branching off from the main passage:—*Held*: neither the lane nor any part of it was a place used by the bookmaker for the purposes of betting within Games, Wagers, & Betting Houses Act, 1902, ss. 17 & 19. The "place" used if it is not a house, office or room must be some specific area of land which is in actual occupation of deft., or some person by whose permission he makes use of it. Deft.'s occupation must be differentiated by some object of such a nature that its use involves exclusive occupation of some portion of the area or by some structural or natural boundaries.—*PRIOR v. SHERWOOD* (1906), 3 C. L. R. 1054.—*AUS*.*

r. *—[BOOKLESS v. BUCK, [1922] St. R. Qd. 88.—AUS.*

s. *Movable chattel.]—A movable chattel may constitute a "place" within Police Offences Act, 1890, s. 49, by reason of the fact that it may temporarily appropriate a piece of ground for the purpose of betting & whether there has or has not been such an appropriation is for the justices to determine.—*O'DONNELL v. O'BRIEN* (1899), 24 V. L. R. 673.—*AUS*.*

t. *Stairs & passage.]—Evidence was given by two constables that they made bets with deft. & had seen him taking bets on the stairs leading to a club:—*Held*: the passage was a place used "for the purpose of bets being made therein between persons resorting to the place" & was therefore a common betting-house.—*R. v. GUTMAN* (1904), 7 W. A. L. R. 35.—*AUS*.*

u. *—[Held: the words "any house, building, room, or place" in Edinburgh Municipal & Police Act, 1879, s. 284, did not cover a common passage leading to a common stair.—*

LOFTHOUSE, [1896] 1 Q. B. 295; 65 L. J. M. C. 64; 74 L. T. 139; 60 J. P. 264; 44 W. R. 349; 12 T. L. R. 200; 40 Sol. Jo. 278; 18 Cox, C. C. 249, D. C.

Annotations:—*Folld. R. v. Humphrey*, [1898] 1 Q. B. 875. *Consd. Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143. *Reid. Thwaites v. Coulthwaite*, [1896] 1 Ch. 496; *Hawke v. Dunn*, [1897] 1 Q. B. 579; *McInaney v. Hildreth*, [1897] 1 Q. B. 600; *Brown v. Patch*, [1899] 1 Q. B. 892; *Saffery v. Mayer* (1900), 70 L. J. Q. B. 145.

347. —[*Resp.*, a professional book-maker, was charged with using a certain place called "The Pit Heap" for the purpose of betting with persons resorting thereto upon contingencies concerning horse races. The Pit Heap was a piece of ground, comprising about one-eighth of an acre, bounded by various buildings & boardings & a row of posts & a road. It was occasionally occupied by shows, for which rent was paid to the owner; otherwise the public had free access. On the day in question no one was in personal charge of it. On that day the Lincolnshire Handicap was run. In the morning a crowd began to assemble on the Pit Heap, & soon afterwards applt. came on to the ground, & stationed himself at a point on it, with his back against a hoarding, where he remained about three hours. During that time men in the crowd came to him,

gave him money, & made bets with him on the Lincolnshire Handicap, of which he made entries in his betting book. The justices found that the spot where applt. stood was a "place," & was used by him "for the purpose of betting with persons resorting thereto," within Betting Act, 1853 (c. 119).—*Held*: the decision of the justices was right, & applt. was rightly convicted under sect. 3 of the Act.—*McINANEY v. HILDRETH*, [1897] 1 Q. B. 600; 66 L. J. Q. B. 376; 76 L. T. 463; 61 J. P. 325; 13 T. L. R. 284; 18 Cox, C. C. 604, D. C.

348. Bar-room of public house.]—*R. v. PREEDY*, No. 337, *ante*.

349. Private thoroughfare.—From street to dwelling-house.]—Prisoner was in the habit of going to an archway which was a private thoroughfare leading from a public street into a yard containing dwelling-houses, stables, & workshops, for the purpose of betting with persons resorting to him there:—*Held*: the archway was a "place" within Betting Act, 1853 (c. 119), & prisoner was rightly convicted under that Act.—*R. v. HUMPHREY*, [1898] 1 Q. B. 875; 67 L. J. Q. B. 534; 78 L. T. 360; 62 J. P. 409; 46 W. R. 543; 14 T. L. R. 340; 42 Sol. Jo. 415, C. C. R.

Annotation:—*Reid. R. v. Cranny* (1899), 63 J. P. Jo. 826.

WRIGHT v. SMITH (1903), 6 F. (Ct. of Sess.) 13, J.—SCOT.

b. —[*HASSON v. NEILSON* (1908), S. C. (J.) 57; 45 Sc. L. R. 649; 16 S. L. T. 24.—SCOT.

c. Private letter-box.—*At General Post Office*.]—A private letter-box at the General Post Office, used by a book-maker for the purpose of betting, is not a "place" within Police Offences Act, 1912, ss. 87 & 97.—*DAVEY v. GREEN*, [1914] V. L. R. 594.—AUS.

d. Telegraph office.]—A bank, a telegraph office, & another office were simultaneously opened in a town. Moneys were deposited in the bank by various persons, who were given receipts therefor in the name of a person in the U.S., which receipts were taken to the telegraph office, where information as to horse-races being run in the U.S. was furnished to the holders of the receipts, who telegraphed instructions to the person there for whom the receipts were given, to place & who placed bets equivalent to the amounts deposited, on horse running in the races, & on their winning, the amounts won were paid to the holders of the receipts at the third office by telegraphic instructions from the person making the bets in the U.S.:—*Held*: deft., who kept the telegraph office, was properly convicted of keeping a common betting-house.—*R. v. OSBORNE* (1895), 27 O. R. 185.—CAN.

e. Tent.—In village frequented by public.]—*R. v. GILES* (1895), 26 O. R. 586.—CAN.

f. Perambulatory booth.—Used on racecourse.]—A perambulatory booth used on the racecourse of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto, as defined in Criminal Code, 1892, s. 197.—*SAUNDERS v. R.* (1907), 27 C. L. T. 228; 38 S. C. R. 382.—CAN.

g. Public place.—Boat.—Anchored in harbour.—Mile away from land.]—Accused chartered a *machhua* (boat), & having got it anchored in the harbour a mile away from the land, carried on gambling there:—*Held*: accused were not guilty of an offence under Bombay Prevention of Gambling Act, 1887,

s. 12, since they cannot be said to be gambling in a public place.—*R. v. JUSUB ALI* (1905), 1 L. R. 29 Bom. 386.—IND.

h. —Railway carriage.—In through special train.]—A railway carriage forming part of a through special train is not a public place under the Bombay Prevention of Gambling Act (Bombay Act IV. of 1887), s. 12.—*R. v. HUSEIN* (1905), 1 L. R. 30 Bom. 348.—IND.

k. —Place to which public have unrestricted access.—Independently of right.]—A place to which the public have access, without their access being refused or interfered with, is a public place within Act No. III. of 1867, whether the public have a right to go there or not.—*R. v. SUKHNANDAN SINGH* (1921), 1 L. R. 44 All. 265.—IND.

l. —[*Harbour Board* reserve had been leased to private individuals for a term of years. The land was bounded on three sides by public roads, & the fence along one of these roads was frequently down, this being caused by people climbing over it in order to get into or pass through the reserve. The reserve adjoined a racecourse, & a turnstile had been erected between the reserve & the course. By permission of the lessees a golf club had its links on the ground, & the members of this club were in the habit of assembling there daily. Other persons, however, frequently assembled on the reserve, without the consent of the lessees, or passed through it. There were beaten tracks across the ground, showing that many persons used it as a thoroughfare:—*Held*: the reserve was a "public place" within Gaming & Lotteries Act, 1881, s. 8.—*WALTERS v. LOWRY* (1906), 25 N. Z. L. R. 637.—N.Z.

m. —Private road leading to docks.]—Betting was carried on on ground belonging to the C. N. Trustees & forming a road or access to their docks; the Trustees were owners of lines of rails within the boundaries of their property used for the conveyance of railway wagon traffic by railway cos. who paid tonnage rates for such use to the Trustees; the actual locus of the betting was near to certain of these

rails, but was not on or within any of them:—*Held*: the locus of the offence was a "street" within the meaning of the Govan Corporation Order, 1904, s. 4 (3).—*SMITH v. DYKES*, [1907] S. C. (J.) 17; 44 Sc. L. R. 106; 14 S. L. T. 438.—SCOT.

n. —Field.]—A field at one time fenced off by a wire fence from two streets between which it lay had been unrestrictedly used by the public as a recreation ground & short out to a station, the fences having fallen into a state of disrepair. The field was private property, & was subleased by the tenant for purposes of betting to two persons who made no attempt to exclude the public:—*Held*: the field was a "public place" within Street Betting Act, 1906, s. 1 (4).—*BRESLIN v. THOMSON*, [1910] S. C. (J.) 5.—SCOT.

o. —Shed on quay.]—On a quay belonging to a harbour trust there was a shed, in the sides of which there were large openings without gates or doors. The public had free access to both quay & shed:—*Held*: the shed was "unenclosed ground" & was a "public place" within Street Betting Act, 1906, s. 1.—*CAMPBELL v. KERR*, [1912] S. C. (J.) 10; 49 Sc. L. R. 197; 2 S. L. T. 500; 6 Adam, 550.—SCOT.

p. —Interpretation of term.]—*WOODS v. LINDSAY*, [1910] S. C. (J.) 88; 47 Sc. L. R. 774; 2 S. L. T. 68; 6 Adam, 294.—SCOT.

q. —[*An open space within the burgh of M., known as "Wellington Street Showground," to which the public resort for purposes of amusement, is a "place" within Gaming Machines Act, 1917, s. 1 (1).*—*DAWSON v. WRIGHT*, [1924] S. C. 121.—SCOT.

r. —[*The meaning of "public place" or of the word "public" depends upon the particular offence that it is used in connection with, or the particular statute in question, & the evil which the Legislature intended to prevent.*—*R. v. COHEN* (1915), C. P. D. 236.—S. AF.

s. —Place to which public have restricted right of access.—"Enclosed place."]—*WALKER v. REID*, [1911]

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350. Timber yard—Habitually used.]—R. v. CRANNY (1899), 63 J. P. Jo. 826.

351. Common passage in private house.]—R. v. FISHER & GROUT (1913), 9 Cr. App. Rep. 164, C. C. A.

B. Racecourses.

352. Defined area within—Temporary wooden structure.]—On land adjoining a race course, & just outside an inclosure reserved for ticket holders, was a long strip of ground of six feet wide, bounded on one side by an iron railing which surrounded the inclosure, on the other side by a permanent wooden paling, facing the open ground. Within this strip were placed temporary wooden structures, in which during the races the business of betting was carried on. They had desks fronting both ways, & at each desk was a clerk with a book, & a person standing in front of each desk conducted the business on behalf of the person who rented the strip of land, & the bets were recorded by the clerk. At one of these structures applt. conducted this business. On appeal from a conviction under Betting Act, 1853 (c. 119), s. 3:—**Held:** this structure was an "office" & a "place" within the statute, & applt. was rightly convicted.—**SHAW v. MORLEY (1868), L. R. 3 Exch. 137; 37 L. J. M. C. 105; 19 L. T. 15; 32 J. P. 391; 16 W. R. 763; 11 Cox, C. C. 128.**

Annotations:—Folld. Bows v. Fenwick (1874), L. R. 9 C. P. 339. **Consd.** Galloway v. Maries (1881), 8 Q. B. D. 275; Hawke v. Dunn, (1897) 1 Q. B. 579; Brown v. Patch, [1899] 1 Q. B. 892. **Refd.** Snow v. Hill (1885), 14 Q. B. D. 588; R. v. Preedy (1888), 17 Cox, C. C. 433; R. v. Coulthwaite, [1896] 1 Ch. 496; Powell v. Kempton Park Racecourse Co., [1899] A. C. 143; R. v. Deaville, R. v. Simpson (1903), 51 W. R. 604. **Mentd.** Saffery v. Mayer (1900), 70 L. J. Q. B. 145.

353. —.]—**Resp.**, a bookmaker, & his clerk entered inclosed grounds in which horse races were being carried on, & put up a cane structure about five feet high with four legs or supports, & having on the top a board on which were painted the words "Bob Patch," resp.'s name, "London. All in run or not, pay first past the post." Before each race the odds offered by resp. against the various horses running were written on the board. He stood on a box placed close to the structure, & invited people to bet with him; & assisted by his clerk who stood near, made bets on each race with backers of the horses running:—**Held** resp. had used a "place" for the purpose of betting with persons resorting thereto, within Betting Act, 1853 (c. 119), s. 1.—**BROWN v. PATCH, [1899] 1 Q. B. 892; 68 L. J. Q. B. 588; 80 L. T. 716; 63 J. P. 421;**

47 W. R. 623; 15 T. L. R. 312; 43 Sol. Jo. 418; 19 Cox, C. C. 330, D. C.

Annotations:—Refd. R. v. Deaville, R. v. Deaville R. v. Simpson, [1903] 1 K. B. 468; R. v. Fisher, Fisher & Grout (1913), 9 Cr. App. Rep. 164.

354. — Umbrella fixed in ground.]—Appl't. was on a race course, standing on a stool, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, & fastened in the ground with a spike. The umbrella when open was seven or eight feet high. It was a showery day; but the umbrella was kept up rain or dry. On the umbrella was painted in large letters, "G. B., Victoria Club, Leeds." There was also a card exhibited, on which were the words, "We pay all bets first past the post." Applt. was calling out offering to make bets; & he was seen to make several bets, the money being deposited with him, & for which he gave a ticket:—**Held:** applt. was using a fixed and ascertained "place" for the purpose of betting with persons resorting thereto, & was properly convicted thereof under Betting Act, 1853 (c. 119), s. 3.—**BOWS v. FENWICK (1874), L. R. 9 C. P. 339; 43 L. J. M. C. 107; 30 L. T. 524; 38 J. P. 440; sub nom. R. v. CHESHIRE JJ., BOWS v. FENWICK, 22 W. R. 804.**

Annotations:—Apld. Galloway v. Maries (1881), 8 Q. B. D. 275. **Consd.** Hawke v. Dunn, [1897] 1 Q. B. 579; Brown v. Patch, [1899] 1 Q. B. 892. **Refd.** Haigh v. Sheffield Corp'n (1874), L. R. 10 Q. B. 102; Snow v. Hill (1885), 14 Q. B. D. 588; R. v. Preedy (1888), 17 Cox, C. C. 433; Bond v. Plumb, [1894] 1 Q. B. 169; Thwaites v. Coulthwaite, [1896] 1 Ch. 496; Powell v. Kempton Park Racecourse Co., [1899] A. C. 143. **Mentd.** Saffery v. Mayer (1900), 70 L. J. Q. B. 145.

355. — Wooden box not fixed in ground.]—**Resp.** & a companion, having paid for admission, were in a railed inclosure of the grand stand at a race meeting. The companion stood on a small wooden box not attached to the ground, & he & resp. called out offering to make & making bets with other persons. The companion received the money for bets made, & resp. booked the same. They stood together in one place within the inclosure during the races:—**Held:** the fixed & ascertained spot defined in the inclosure by the box at which resp. orally advertised his willingness to bet was a "place" used by him for the purpose of betting with persons resorting thereto, & he was liable to a penalty under Betting Act, 1853 (c. 119), s. 3.—**GALLOWAY v. MARIES (1881), 8 Q. B. D. 275; 51 L. J. M. C. 53; 45 L. T. 763; 46 J. P. 326; 30 W. R. 151, D. C.**

Annotations:—Consd. R. v. Preedy (1888), 17 Cox, C. C. 433; Hawke v. Dunn, [1897] 1 Q. B. 579. **Refd.** Snow v. Hill (1885), 14 Q. B. D. 588; Brown v. Patch (1899), 63 J. P. 421; Powell v. Kempton Park Racecourse Co., [1899] A. C. 143.

S. C. (J.) 41; 48 So. L. R. 99; 2 S. L. T. 384; 6 Adam, 358.—SCOT.

t. — — — — —.]—ROSS v. CAMERON, [1921] S. C. (J.) 41.—SCOT.

a. Open spaces—Under control of Municipality.]—A Municipality empowered to make bye-laws framed a bye-law preventing the use of "any street, park or open space, or any vacant ground adjacent to any street," for the purpose of betting:—**Held:** the words "open space" must be taken to be such open spaces as were under the control of the Municipality & to which the public had a right of access, & to no others.—**LEWIS v. R., [1907] T. S. 1017.—S. AF.**

b. Desk or table—In premises established for betting—Purporting to be a club.]—In premises hired by a co. which purported to be a club, but which had in reality been established for the purpose of betting, each of the business members who were bookmakers was allotted the use of a particular desk or table at which he carried on the business of betting with ordinary members:—**Held:** every such desk or table was a "place" within Proclamation 33 of 1901, s. 2.—**GOLDMAN v. R., [1908] T. S. 895.—S. AF.**

c. Betting stand.]—The words "betting stand" occurring in Law 26 of 1878 refer to a place at which a person stations himself in the open air

for the purpose of betting, & not to a club or other building used for betting purposes.—**RHODES v. CHIEF CONSTABLE OF DURBAN (1921), 42 N. L. R. 238.—S. AF.**

PART III. SECT. 4, SUB-SECT. 1.—B.

d. Defined area within—Book-making without permission of club.]—Carrying on the business or vocation of bookmaker on portion of a racecourse set aside for betting without a permit from the Committee of the racing club controlling the racecourse is not an offence against Police Offences Act, 1912, s. 153.—**WRIGHT v. LEWIS, [1914] V. L. R. 165.—AUS.**

356. Undefined movement within.]—Dog races were held in an inclosed field hired for the purpose by a committee, the public being admitted to a reserved portion of the field on payment of a small sum. Applt. attended the races, & moved about the reserved portion, making bets with various persons there :—*Held* : applt. did not use a place for the purpose of betting with persons resorting thereto, within Betting Act, 1853 (c. 119), ss. 1 & 3, & was not liable to be convicted for an offence under those sects.—*SNOW v. HILL* (1885), 14 Q. B. D. 588; 54 L. J. M. C. 95; 52 L. T. 859; 49 J. P. 440; 33 W. R. 475; 15 Cox, C. C. 737, D. C.

Annotations :—*Consd.* *R. v. Preedy* (1888), 17 Cox, C. C. 433. *Fold. Whitehurst v. Fincher* (1880), 62 L. T. 433. *Dist.* *Hornaby v. Raggett*, [1892] 1 Q. B. 20. *Consd.* *Liddell v. Lethbridge*, [1896] 1 Q. B. 295. *Dist.* *Hawke v. Dunn*, [1897] 1 Q. B. 579. *Consd.* *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143.

Compare No. 337, *ante*.

357. —.]—*HAWKE v. DUNN*, No. 339, *ante*.

358. Owners having no interest in transactions.]

—(1) Adjacent to a racecourse there was an uncovered inclosure of about a quarter of an acre fenced in by iron rails, to which when race-meetings were held the public were admitted by the owners of the racecourse on payment of an entrance fee. Among the five hundred to two thousand persons so admitted were always one or two hundred professional bookmakers, & most of the persons admitted, other than the bookmakers, went for the purpose of backing horses with the bookmakers, but some did not bet at all. The bookmakers, who were accompanied by their clerks, did not use any apparatus such as a desk, stool, umbrella, or tent, but any particular bookmaker was usually to be found in or near the same part of the inclosure, calling out the odds to attract backers. In some cases the backers were required by the bookmakers to deposit their stakes; in others credit was allowed. This use of the inclosure was known to & permitted by the owners thereof :—*Held* : the inclosure so used was not “a place opened, kept or used” for the purposes prohibited by Betting Act, 1853 (c. 119).

(2) But for the words “person using the same,” no question would ever have arisen, & it is material to see what these words import. It will be observed that these words occur as an alternative to the owner of the place. I supply the words “of the place” by necessary construction—the occupier of the place, the keeper of the place, or

any person using the place : these are all put in one category. Then comes another enumeration of persons employed, & again language is exhausted to fix responsibility upon caretakers, managers, or other persons in any manner conducting the business thereof. I think it is clear that what the statute is dealing with here is the case of persons who are in control & occupation of the place which is assumed to be the betting establishment. The conducting of the business, whether as master or servant, is the thing made unlawful, & the business is that of a betting house or place to which people can resort for the purpose of betting, not with each other, but with the betting establishment. It is the employment of the words “using the same” which to my mind has led to the difference of opinion. Those words, unless explained by the context, are necessarily ambiguous. In one sense every person who enters the inclosure uses it; but he does not use it in the character of owner, keeper, manager, or conductor of the business thereof. The betting man in his use of the place differs in this respect in no way from any other member of the public who enters it, & who neither does nor intends to bet. It is the personality of the betting man & not his being in any particular place which affords the opportunity of betting, & a man who walked along a public road shouting the odds in the way here described would be doing exactly the same thing (*LORD HALSBURY, C.*).

(3) I am not certain that I appreciate the distinction which I observe is sought to be drawn between what are called professional betting men & other men who bet. In respect of games which people play for amusement or pay, the distinction is intelligible enough; but all people who bet for money mean to win money, & whether it is for the sake of a living or for the sake of adding to money which the bettor already possesses seems to me an altogether illusory distinction (*LORD HALSBURY, C.*).

(4) It seems to me clear that the thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, & there must be an owner, occupier, manager, keeper, or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to & is of the same genus as the owner, keeper, or occupier, who bets or is willing to bet with the persons who resort to his house, room,

356 i. Undefined movement within.]—In order to constitute a “place” there must be a measure of fixity, localisation, & exclusive right of user. Defts. were two of a number of bookmakers, who, on payment of the usual entrance fee, were admitted, along with the general public, to a fenced enclosure owned & controlled by the Q. Jockey Club, an incorporated racing assocn. These bookmakers laid bets from day to day, through their assistants, with members of the general public attending the races. They did not use any desk, stool, umbrella, tent, or booth or erection of any kind, to mark any place where bets were made, & no part of the general enclosure was especially allocated to them, nor did they occupy a fixed position, but during each race stood as much as possible about the same spot within a radius of from 5 to 10 feet :—*Held* : defts. did not occupy a “house, office, room, or other place.”—*R. v. Moxlett* (1907), 10 O. W. R. 803; 15 O. L. R. 348; 13 Can. Crim. Cas. 279.—*CAN.*

6. — Booth for paying off bets.]—Plt., a director & shareholder in deft. co., brought an action for an injunction restraining defts. from carrying out an arrangement entered into with a bookmaker named J., by which J. should be allowed to carry on his business as a bookmaker at a race meeting to be held on deft.'s race-track at V., provided that he carried on his betting operations at no fixed spot on the race-track, but kept moving about. He was, however, to be allowed to pay off his bets at a booth on the track :—*Held* : the booth from which it was proposed to pay off the bets was not a common betting-house.—*FRASER v. VICTORIA COUNTRY CLUB, LTD.* (1909), 14 B. C. R. 365.—*CAN.*

1. Strip of land outside enclosure —Part of racecourse.]—Outside the enclosure of a racecourse where racing was in progress, & connected with a public road, there was a strip of land to which the public had access without payment, for purpose of getting tickets

to enter the enclosure. The races were not visible from this strip of land, but it was part of the racecourse, & was a necessary adjunct to the running of races :—*Held* : this strip of land was not a place or portion of a place where horse-racing was being carried on.—*MORRIS v. ADAMSON*, [1921] S. A. S. R. 242.—*AUS.*

5. Statutory exemptions.]—A racecourse acquired & operated by an incorporated racing assocn. in a locality other than that designated in the original charter of the corporation, comes within the exemption of Criminal Code, s. 235 (2) (as enacted by 2 Geo. 5, c. 19), where the power to acquire & operate the racecourse was granted by supplementary letters patent issued after Mar. 20, 1912. The supplementary letters patent, which purported to cancel the powers expressly conferred by the charter & substitute others therefor, did not take the corpn. out of the class of corpns. whose racecourses are exempted by the Code; the corpn.

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or other place. In this view it is not an offence under this Act of Parliament to allow persons to assemble for the purpose of betting with each other; there is, upon this hypothesis, no business being conducted at all. The different betting people, or each individual bettor, is conducting his own business, & doing it in a house used indeed, but only used, just as he might do it on the racecourse or on the high road. There is no betting establishment at all, & there is no keeper of one (LORD HALSBURY, C.).

(5) I am unable to accept the reasoning in that case [*Hawke v. Dunn*, No. 359, *ante*], nor do I think it is consistent with the previous authorities or with itself. . . . I find that reliance is placed upon the fact that the bookmakers who bet are professional bookmakers. I know of no canon of construction which can introduce such words into an Act of Parliament, & certainly there are no such words here. I cannot doubt that if the prohibited thing is done, whatever that prohibited thing is, by a person who does it for the first time in his life, he is just as amenable to the law as though he had been for many years in the practice of it. . . . At the end of the judgment I find these words: "The law does not forbid betting itself, nor is the business or avocation of a bookmaker necessarily illegal, but what the Legislature has forbidden, & what it has pronounced to be illegal, is the use, by those who make a trade & business of betting, of any place for the purpose of betting with persons resorting thereto." My Lords, I will not again refer to the fallacious employment of the word "use"; what I at present insist upon is the selecting of such persons indicated by the words as if the Act of Parliament had made any difference between different classes of persons, & as if professional bettors were in any different position from any other members of the public (LORD HALSBURY, C.).—*POWELL v. KEMPTON PARK RACECOURSE CO.*, [1899] A. C. 143; 68 L. J. Q. B. 392; 80 L. T. 538; 63 J. P. 260; 47 W. R. 585; 15 T. L. R. 266; 43 Sol. Jo. 329; 19 Cox, C. C. 265, H. L.; *affg.*, [1897] 2 Q. B. 242, C. A.

Annotations:—*As to (1) Consd. R. v. Humphrey*, [1898] 1 Q. B. 875; *Brown v. Patch*, [1899] 1 Q. B. 892; *Stoddart v. Hawke*, [1902] 1 K. B. 353; *Tromans v. Hodgkinson*, [1903] 1 K. B. 30. *Reid. Peddie v. Bennett* (1897), 61 J. P. 680; *Lennox v. Stoddart, Davis v. Stoddart*, [1902] 2 K. B. 21; *Lee v. Taylor & Gill* (1912), 107 L. T. 682. *As to (2) Consd. R. v. Deaville, R. v. Deaville, R. v. Simpson*, [1903] 1 K. B. 468; *Jackson v. Roth*, [1919] 1 K. B. 102. *Reid. Mackenzie v. Hawke*, [1902] 2 K. B. 216. *As to (3) Reid. Martin v. Benjamin*, [1907] 1 K. B. 64. *As to (5) Reid. Belton v. Busby*, [1899] 2 Q. B. 380. *Generally, Mendenhall v. Johnston v. Maconochie* (1820), 124 L. T. 323.

C. Clubs.

See CLUBS, Vol. VIII., pp. 525, 526, Nos. 129–134.

never ceased to exist as an entity:—*Held*: the corp. was exempt from the operation of s. 228.—*R. v. WESTERN RACING ASSOCN., LTD.*, (1923) 69 D. L. R. 584; 38 Can. Crim. Cas. 255; 51 O. L. R. 533.—*CAN.*

h. Inclosed area.—*Held*: an inclosed racecourse, some twenty acres in extent, was not a "house, office, room or other place."—*HENKERTY v. HART* (1885), 13 R. (Cl. of Sess.) 9; 23 Sc. L. R. 269, J.—*SCOT.*

SUB-SECT. 2.—LIABILITY FOR USER.

A. In General.

See Betting Act, 1853 (c. 119), ss. 1, 3; Betting Act, 1874 (c. 15).

359. What constitutes user—User not restricted to betting.—*EASTWOOD v. MILLER*, No. 343, *ante*.

360. Office for clerical work.—It is a sufficient user of an office within Betting Act, 1853 (c. 119), ss. 1 & 3, if the clerical work, the accounts & the records of ready money betting transactions, is done there.—*R. v. THOMPSON & THOMPSON* (1924), 18 Cr. App. Rep. 31, C. C. A.

361. What persons liable to penalties—Persons "keeping"—Not persons "resorting to" premises.—In order to constitute an offence within Betting Act, 1853 (c. 119), facts must be found to show that deft. was keeping a place for the purpose of betting with persons resorting thereto, & persons who only resort to it for the purpose of betting are not within the Act.—*SNOW v. HARRIS* (1885), 1 T. L. R. 325.

362. —————A person who is found in a betting house, & is arrested on a warrant, under Betting Act, 1853 (c. 119), s. 11, can be bound over, under 33 Hen. 8, c. 9, no more to play, haunt, or exercise, from thenceforth at any gaming house, notwithstanding that there is no evidence against him, beyond the fact of his having been found in such betting house.—*MURPHY v. ARROW*, [1897] 2 Q. B. 527; 66 L. J. Q. B. 865; 77 L. T. 435; 62 J. P. 38; 46 W. R. 94; 14 T. L. R. 13; 42 Sol. Jo. 15; 18 Cox, C. C. 662, D. C.

363. — Person managing premises.—Appl't. was manager of bicycle grounds. Bicycle races, at which 20,000 spectators were present, took place there. Placards, with the words "No betting allowed" were posted in the grounds, & twelve police constables were employed there by the manager, but some betting took place about twenty yards from the winning post where he stood, acting as judge of the races. He was aware that betting would & did take place, but could not have wholly prevented it under the circumstances, although he might have repressed it to a certain extent with the aid of the constables:—*Held*: as the business of the grounds was not that of illegal betting within Betting Act, 1853 (c. 119), s. 1, he was not liable to conviction under sect. 3, as a "person having the care or management of or in any manner assisting in conducting the business of any . . . place opened, kept, or used for the purposes aforesaid."—*R. v. COOK* (1884), 13 Q. B. D. 377; 51 L. T. 21; 48 J. P. 604; 32 W. R. 796, D. C.

Annotations:—*Consd. Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143. *Reid. R. v. Preedy* (1888), 17 Cox, C. C. 433; *Bond v. Plumb* (1893), 42 W. R. 222; *Hawke v. Dunn*, [1897] 1 Q. B. 579.

PART III. SECT. 4, SUB-SECT. 2.—A.

k. What constitutes user—Primary use of room.—The words "assurance, undertaking, promise, or agreement . . . to pay," in Gaming & Lotteries Act, 1881, s. 11, mean an assurance, undertaking, etc., to pay by any person, whether the owner, occupier, or keeper of the house or other place, or some other person; & it is sufficient, on a prosecution for an offence under s. 13 of that Act, to prove money to have

been received in consideration of a promise by some person to pay. It is not necessary, to constitute an offence under s. 13, that the room or other place should be used primarily for betting purposes, if it is substantially & really used for such purposes.—*MARTIN v. CAMPBELL* (1892), 13 N. Z. L. R. 42.—*N.Z.*

1. — Standing on box on public racecourse—To take bets.—Standing on a small box on a public racecourse

364. Persons acting as conduit—Between bookmaker & customers.]—A person who acts as a mere conduit pipe for making bets between a bookmaker & his customers, though he has no pecuniary interest in the transactions, may be guilty of using the premises where he is employed for the purpose of betting "with persons resorting thereto."—*R. v. WYTON* (1910), 5 Cr. App. Rep. 287, C. C. A.

Owner, occupier or keeper.]—See Nos. 367, 368, *post*.

"Persons using the place."]—See No. 358, *ante*, Nos. 382, 384–394, *post*.

365. Evidence to prove user—Receipt by agent of betting slips—Similar to those found on defendant—Admissible.]—Deft. was indicted for offences against Betting Act, 1853 (c. 119), committed on Nov. 13. He had been arrested in a public-house, the licensee of which pleaded guilty to using the said house for the purpose of betting, & upon him were found (1) lists of the names of persons & the amounts due to them upon bets, (2) betting slips containing the names of horses, the amounts for which they were to be backed, & the names of the persons backing them. In the parlour of the public-house were found a large number of betting slips of the same character as those found on deft. Evidence was admitted to show that betting slips similar to those found on deft. & to those found on the premises on Nov. 13 had previously to that date been frequently received from customers at the public-house by the licensee, & had been forwarded on by him to deft., & also to show that the lists found on deft. were an epitome of slips received by him from the licensee on occasions prior to Nov. 13:—*Held*: such evidence was admissible.—*R. v. MEAN* (1904), 69 J. P. 27; 21 T. L. R. 172, C. C. R.

Annotation.—*Mentd. R. v. Rodley*, [1913] 3 K. B. 468.

366. Conviction of third person for user—Not admissible against licensee of premises.]—W. was convicted for unlawfully using licensed premises for the purpose of betting, & the holder of the licence was then summoned under Licensing (Consolidation) Act, 1910 (c. 24), s. 79, for suffering his premises to be used in contravention of Betting Act, 1853 (c. 119). On the hearing of this information the licensee desired to call evidence to show that no betting had taken place on his premises on the occasion, but the justices refused to admit this evidence & admitted the conviction against W. as being conclusive against the licence holder that betting had taken place

& they convicted:—*Held*: the conviction against W. that he had used the premises for the purpose of betting was not admissible in evidence against the licensee, & the conviction of the licensee was therefore wrong & must be quashed.—*TAYLOR v. WILSON* (1911), 106 L. T. 44; 76 J. P. 69; 28 T. L. R. 97; 22 Cox, C. C. 647, D. C.

User of premises for coupon competitions.]—See Part VI., Sect. 1, *post*.

B. Owner, Occupier or Keeper.

(a) User by Occupier.

See Betting Act, 1853 (c. 119), ss. 1, 3.

367. User for betting business—Deposits not paid.]—B., a commission agent, was charged under Betting Act, 1853 (c. 119), ss. 1, 3, with keeping an office for the purpose of betting. The justices found that B. kept a room for betting, but B. contended that, as there was no evidence that he received deposits beforehand, he had not committed any offence. The justices convicted B.:—*Held*: under sect. 1, it was not necessary to prove that deposits were paid to B. beforehand, & the conviction was right.—*BOND v. PLUMB*, [1894] 1 Q. B. 169; 70 L. T. 405; 58 J. P. 168; 42 W. R. 222; 10 T. L. R. 137; 38 Sol. Jo. 99; 17 Cox, C. C. 749; 10 R. 44, D. C.

Annotations.—*Consd. Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242. *Expld. Peers v. Caldwell, Taylor v. Caldwell*, [1916] 1 K. B. 371. *Reid. R. v. Worton*, [1895] 1 Q. B. 227; *Hawke v. Dunn*, [1897] 1 Q. B. 579.

Abroad.]—Where an office in England is used substantially for the purpose of assisting in the management of a betting business carried on abroad, an offence is committed against the Betting Act, 1853 (c. 119). It is immaterial that the office in this country is not advertised or in any way made known to the public.—*R. v. ANDREWS, SCHOTZ & LUGGAR* (1910), 74 J. P. 255.

(b) Knowingly Permitting User.

See Betting Act, 1853 (c. 119), ss. 1, 3.

369. What constitutes—No steps taken to prevent user.]—Applt. was charged on a summons under Betting Act, 1853 (c. 119), ss. 1, 3, with knowingly & wilfully permitting a place of which he was the occupier to be used by certain persons for the purpose of betting with persons resorting thereto. It was proved that applt. occupied as tenant a house with a piece of inclosed ground adjoining, used for cricket, foot racing, & other

taking bets from the public for a considerable time, long enough for the betting public to know where persons offering or willing to take bets might be found, is an unlawfully using the said place for the purpose of betting with persons resorting thereto upon certain events & contingencies of & relating to horse-racing.—*HYDE v. O'CONNOR* (1893), 11 N. Z. L. R. 723.—N. Z.

m. Transacting betting in street.]—*DAVIES v. JEANS* (1904), 6 F. (Ct. of Sess.) 37; 41 So. L. R. 426; 11 S. L. T. 790, J.—*SCOT*.

n. Whether use of penny in the slot machine.]—*MACKINTOSH v. GRANATA* (1916), 53 So. L. R. 766.—*SCOT*.

o. Keeping desk in club room—For making bets.]—Where C. a bookmaker did habitually enter into bets & did keep a desk for such purpose in rooms leased by the T. Club

of which he was a member:—*Held*: C. was rightly convicted of using the rooms for the purpose of betting.—*R. v. CARN* (1905), 22 S. C. 507.—S. AF.

PART III. SECT. 4, SUB-SECT. 2.— **B. (a).**

p. User for betting business—Whether isolated instance of betting sufficient.]—A police constable went into applt.'s shop, & there made a bet with him on a horse-race. The constable deposited money with applt., & gave him a piece of paper on which was written the amount of the bet & the name of the horse:—*Held*: not sufficient evidence to justify a conviction under Betting Houses Act, 1853, s. 3.—*M'CONNELL v. BRENNAN*, [1905] 2 I. R. 411.—IR.

q. Indicia of betting establishment.]—M., with the assistance of her brother, P., kept a shop nominally for the sale of chandlery, tobacco, &

stationery. The police found M. behind the counter, & three men in the shop, one of whom was writing out a betting docket on the counter. Two other betting dockets were found on the floor beside another of the men, & M. was observed to crush up & throw behind the counter two slips of paper which were found to be betting dockets. Betting newspapers were found on the counter, & betting literature behind the counter & in the back parlour:—*Held*: the shop presented all the indicia of a "betting establishment," & the magistrate was justified in convicting M. M. & P.—*MAGUIRES v. QUINN*, [1911] 2 I. R. 216; 45 I. L. T. 77.—IR.

PART III. SECT. 4, SUB-SECT. 2.— **B. (b).**

r. What constitutes—Liability of president of company owning racecourse.]—The president of an incorporated co., owners of a racecourse,

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games & sports. On the day named in the summons foot racing took place in the grounds, to which persons were admitted on payment of 6d. Within the grounds, but outside the place reserved for the runners, & amongst the spectators, some fifteen or twenty professional bettors stood on chairs & stools in different spots, with books in their hands, calling out the odds on the various runners, & betting with different persons, a man behind each of the professional bettors recording the bets in a book, the persons betting paying 1s. each, & receiving a ticket. The evidence satisfied the magistrate that applt. knew of what was going on & took no steps to prevent it, & that he might have prevented it if he had been so minded; & he accordingly convicted applt. of the offence charged:—*Held*: the conviction was right.—**HAIGH v. SHEFFIELD TOWN COUNCIL** (1874), L. R. 10 Q. B. 102; 44 L. J. M. C. 17; 31 L. T. 536; 39 J. P. 230; 23 W. R. 547, D. C.

Annotations.—*Consd.* R. v. Preedy (1888), 17 Cox, C. C. 433; *Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242. *Reid*, Gallaway v. Maries (1881), 8 Q. B. D. 275; R. v. Cook (1884), 13 Q. B. D. 377; Bond v. Plumb, [1894] 1 Q. B. 169; Hawke v. Dunn, [1897] 1 Q. B. 579; *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143; R. v. Deaville, R. v. Deaville, R. v. Simpson (1903), 72 L. J. K. B. 272. *Mentd.* Strachan v. Universal Stock Exchange (No. 2), [1895] 2 Q. B. 697; Henshall v. Porter, [1923] 2 K. B. 193.

370. Deposits of stakes in house.—Deft., the keeper of a licensed house, allowed a person who made bets near it to deposit in the house the stakes received by him. Such stakes had been received by him outside the house:—*Held*: as the money was proved to have been received by the depositor outside & not inside the house, deft. was not liable to be convicted for suffering the house to be used by the depositor for the purpose of money being received by him by way of betting contrary to Betting Act, 1853 (c. 119), ss. 1, 3.—**DAVIS v. STEPHENSON** (1890), 24 Q. B. D. 529; 59 L. J. M. C. 73; 62 L. T. 436; 54 J. P. 565; 38 W. R. 492; 6 T. L. R. 242; 17 Cox, C. C. 73, D. C.

Annotation.—*Distd.* Stoddart v. Hawke, [1902] 1 K. B. 353.

371. Occasional use of public-house.—Resp. was the occupier of a beerhouse, & it was shown that he knowingly permitted a bookmaker to come into the taproom & use the room for the purpose of betting with persons who frequented the beerhouse:—*Held*: although the bookmaker did not occupy any fixed part of the room, resp. was guilty of an offence under Betting Act, 1853 (c. 119), ss. 1, 3.—**HORNSBY v. RAGGETT**, [1892] 1 Q. B. 20; 61 L. J. M. C. 24; 66 L. T. 21; 56 J. P. 135; 40 W. R. 111; 8 T. L. R. 12; 36 Sol. Jo. 43; 17 Cox, C. C. 428, D. C.

Annotations.—*Apld.* M'William v. Dawson (1891), 56 J. P. 182; Liddell v. Lofthouse, [1896] 1 Q. B. 295. *Consd.* Hawke v. Dunn, [1897] 1 Q. B. 579; *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143.

372.—*]*—K. was shown to have been at a public-house on three days & to have there made three or four bets on each of those days. On the last of the three days he was arrested on a charge of street betting, & on him a betting book was found. Applt., the licensee of the public-house, was present on the two first days, & could

have seen what was taking place in the house. On the third day he was not present. Applt. was convicted for suffering his house to be used on the second & third days for the purpose of betting with persons resorting thereto:—*Held*: the convictions ought to be affirmed.—**PEDDIE v. BENNETT** (1897), 61 J. P. 680.

373.—*]* **Bookmakers allowed on racecourse.**—**POWELL v. KEMPTON PARK RACECOURSE CO.**, No. 358, *ante*.

374.—*]* **Use of rooms in private house.**—**R. v. FISHER & GROUT** (1913), 9 Cr. App. Rep. 164, C. C. A.

375. Evidence of knowledge.—(1) Applt., a police inspector, preferred an information against T. for that he, T., on certain specified dates used a certain public-house for the purpose of betting with persons resorting thereto, & also a further information against G., the licensee of the said public-house, for that he G., suffered the house to be used for the purpose of betting with persons resorting thereto, contrary to Betting Act, 1853 (c. 119), & Licensing Consolidation Act, 1910 (c. 24). The metropolitan magistrate by whom the case was heard found as a fact that T. had used the public bar of the public-house for the purpose of betting with persons resorting thereto on each of the dates alleged, & that G. & his servants had ample opportunity of seeing & ought to have seen the passing of the betting slips & other things being done which should have made them aware that betting was taking place, but that the prosecution had failed to give any evidence that anybody about the house had, as a fact, seen that betting was actually taking place:—*Held*: the case must go back to the magistrate with a direction to consider whether resp. G. had connived at betting being carried on.

(2) Where the facts constitute a *prima facie* case not amounting to positive proof of knowledge there is evidence upon which a magistrate can find knowledge.—**LEE v. TAYLOR & GILL** (1912), 107 L. T. 682; 77 J. P. 66; 29 T. L. R. 52; 23 Cox, C. C. 220, D. C.

376. Licensing Act, 1872 (c. 94)—Effect of—Whether penalties cumulative.—A licensed victualler is still liable to summary conviction & a penalty of £100, under Betting Act, 1853 (c. 119), s. 3, for “opening, keeping, or using his licensed house for the purpose of betting with persons resorting thereto,” notwithstanding that by Licensing Act, 1872 (c. 94), s. 17, “any licensed person opening, keeping, or using” his house for the same purpose is liable to a penalty for the first offence of £10, & for any subsequent offence of £20 together with the liability of having the conviction indorsed upon his licence, there being no implied repeal of sect. 3 of the Act of 1853 by sect. 17 of the Act of 1872, but, on the contrary, that sect. & its penalties, being kept in full force & operation by sect. 59 of the last-mentioned Act.—**SIMS v. PAY** (1889), 58 L. J. M. C. 39; 60 L. T. 602; 53 J. P. 420; 5 T. L. R. 195; 16 Cox, C. C. 609, D. C.

377.—*]*—**BELTON v. BUSBY**, No. 390, *post*.

378.—*]* **Single act of user—Not sufficient to constitute offence.**—In order to constitute the

who lease for valuable consideration the privilege of taking & receiving bets in part of the premises, is not, merely

by virtue of his office, & without anything more than acquiescence on his part, liable to conviction as a party to

the offence of keeping a common betting-house.—**R. v. HENDRIE** (1905), 11 O. L. R. 202; 6 O. W. R. 1015.—**CAN.**

offence under sect. 17 of above Act of using licensed premises in contravention of Betting Act, 1853 (c. 119), there must be evidence of more than one act of user.—*JAYES v. HARRIS* (1908), 99 L. T. 56; 72 J. P. 364; 21 Cox, C. C. 639, D. C.

379. Licensing Consolidation Act, 1910 (c. 24).]—*LEE v. TAYLOR & GILL*, No. 375, *ante*.

C. By Other Persons.

See Betting Act, 1853 (c. 119), ss. 1, 3.

380. "Persons using the same"—Who is included.]—*POWELL v. KEMPTON PARK RACE-COURSE CO.*, No. 358, *ante*.

381. Distinction between bookmakers & others.]—*POWELL v. KEMPTON PARK RACE-COURSE CO.*, No. 358, *ante*.

382. What constitutes user—User on casual occasions.]—H. was shown to have been at a public-house on three days, for about an hour each day, & to have received slips of paper containing money on each of those days. It was not denied that these were betting transactions:—*Held*: the question for the jury was whether these were mere casual bets, or whether a betting business was carried on by H. at the public-house with persons resorting thereto.—*R. v. HERBERT* (1897), 61 J. P. 679.

383. ———.]—*POWELL v. KEMPTON PARK RACE-COURSE CO.*, No. 358, *ante*.

384. ———.]—A house was kept by T. & his two sons, for the purpose of betting on horse races. One day T. & one son sat at one table in a room receiving bets, & in another room S. & another son of T. sat at another table receiving bets, while persons offering bets stood around:—*Held*: there was evidence that S. was using the room, & was rightly convicted for so doing under Betting Act, 1853 (c. 119), s. 3.—*SLATTER v. BAILEY* (1872), 37 J. P. 262, D. C.

Annotation:—*Refd.* *Whitehurst v. Fincher* (1890), 54 J. P. 565.

385. Payment in one place of bets made elsewhere—Not sufficient.]—*Resp.*, a bookmaker, was charged with using the bar of a beerhouse for the purpose of betting with persons resorting thereto. He went to the beerhouse on several days, at the same hour in the evening of each day, & persons who had made bets with him elsewhere, & had won, came to the beerhouse, & he paid the bets to them in the bar. On a case stated by a police magistrate:—*Held*: paying bets, previously made elsewhere, was not using the bar for the purpose of betting with persons resorting thereto, within the meaning of the Betting Act, 1853 (c. 119), s. 1, & *resp.* could not be convicted.—*BRADFORD v. DAWSON*, [1897] 1 Q. B. 307; 66 L. J. Q. B. 191; 76 L. T. 54; 61 J. P. 134; 45 W. R. 347; 41 Sol. Jo. 160; 18 Cox, C. C. 473, D. C.

386. Of bar of public-house—Whether management or control necessary.]—A person on three successive days went to the bar room of a public-house for the purpose of betting, & did there bet upon certain horse races with persons

resorting thereto, but he had no interest in the keeping, management, or tenancy of the room or of any part of the public-house:—*Held*: as the room had not been opened, kept, or used for the purpose of betting, he had not committed an offence under Betting Act, 1853 (c. 119), s. 3, which imposes a penalty upon any person who being the owner or occupier of any house, office, room, or other place, or a person using same, shall open, keep, or use the same for the purpose of betting with persons resorting thereto.—*WHITE-HURST v. FINCHER* (1890), 62 L. T. 433; 54 J. P. 565; 17 Cox, C. C. 70, D. C.

Annotations:—*Expld.* *Hornsby v. Raggett*, [1892] 1 Q. B. 20. *Consd.* *Liddell v. Lothouse*, [1896] 1 Q. B. 295. *Apprvd.* *Hawke v. Dunn*, [1897] 1 Q. B. 579. *Consd.* *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143.

387. ———.]—D., a bookmaker, went nine days within a fortnight into the bar of a public-house & betted there with all comers, receiving bets on horse races, & being seated at a table with sporting papers & slips & cards before him for two hours at a time. D. had no interest in or exclusive occupation of the bar:—*Held*: D. was liable to be convicted under Betting Act, (c. 119), s. 3, of using the place for the purpose of betting.—*M'WILLIAM v. DAWSON* (1891), 56 J. P. 182, D. C.

Annotations:—*Consd.* *Hawke v. Dunn*, [1897] 1 Q. B. 579. *Refd.* *Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242.

388. ———.]—*BENNETT v. WOODWARD* (1923), 87 J. P. Jo. 347, D. C.

389. Money handed over outside.]—A person who habitually resorts to the bar of a public-house with a view to meet persons coming there in the character of customers to bet with him upon the contingency of horse racing, may be convicted, under Betting Act, 1853 (c. 119), s. 1, of using such place for the purpose of betting with persons resorting thereto, whether the money staked upon the results of such races is handed to him inside or outside the house.—*R. v. WOERTON*, [1895] 1 Q. B. 227; 64 L. J. M. C. 74; 72 L. T. 29; 11 T. L. R. 107; 39 Sol. Jo. 114; 18 Cox, C. C. 70; 15 R. 102, C. C. R.

Annotation:—*Consd.* *Hawke v. Dunn*, [1897] 1 Q. B. 579.

See, further, CLUBS, Vol. VIII., pp. 525, 526, Nos. 129, 134.

390. Effect of permission by landlord.]—A bookmaker was in the habit of attending at the bar of a licensed beerhouse daily at certain hours for the purpose of betting with persons resorting thereto, & he carried on there a business of ready-money betting with the knowledge & permission of the licensed occupier of the beerhouse. His hours of attendance at the beerhouse were known to his customers, who came there for the purpose of transacting betting business with him. The beerhouse keeper had no interest in the bets made, & the bookmaker had no interest in or control over the business of the beerhouse or the house itself:—*Held*: (1) the bookmaker "used" the bar of the beerhouse for the purposes prohibited by Betting Act, 1853 (c. 119); (2) the proprietor & licensee of the beerhouse was guilty of the offence under Licensing Act, 1872 (c. 94),

PART III. SECT. 4, SUB-SECT. 2.—C.

a. *What constitutes—Control over place by persons betting.*—In order to establish the offence of "being the

owner or occupier of any house or place who knowingly & wilfully permits the same to be . . . used by any other person for the purposes" of gaming, it is necessary to prove that

the persons betting had themselves some dominion or control over the place.—*MCCANN v. BLAKE*, [1920] V. L. R. 89.—*AUS.*

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s. 17 (2), of suffering his house to be used in contravention of Betting Act, 1853 (c. 119).

(3) There is this great distinction between the racecourse cases, such as *Powell v. Kempton Park Racecourse Co.*, No. 358, *ante*, & the present, that in the former, the bookmakers & the members of the public who bet with them go into the racecourse inclosures on exactly the same footing; the place is open to them both on the same terms, the one has no greater right to be there than the other. But that was not the case here. The bookmaker had something in the nature of a right or licence to use the bar of the beerhouse for the purposes of his betting business, over & above the right of an ordinary member of the public to resort there. The case finds that he was allowed to remain there regularly for certain hours every day, although he was not there as a customer (*GRANTHAM, J.*).—*BELTON v. BUSBY*, [1899] 2 Q. B. 380; 68 L. J. Q. B. 859; 81 L. T. 196; 63 J. P. 709; 47 W. R. 636; 15 T. L. R. 458; 43 Sol. Jo. 656; 19 Cox, C. C. 392, D. C.

Annotations:—*As to (1) Apprvd. & Foll'd. R. v. Deaville, R. v. Deaville, R. v. Simpson*, [1903] 1 K. B. 468; *Tromans v. Hodgkinson*, [1903] 1 K. B. 30; *Refd. Buxton v. Scott* (1909), 100 L. T. 390. *As to (3) Refd. R. v. Deaville, R. v. Deaville, R. v. Simpson*, [1903] 1 K. B. 468.

391. ————.]—Applt., who was a bookmaker, was in the habit of frequenting the bar of an inn at certain hours for the purpose of carrying on a business of ready-money betting with persons resorting thereto, & the fact of his carrying on that business in the bar was known to those persons. He carried on the business there by the permission of the landlord, but he did not for the purposes of it occupy any specific portion of the bar:—*Held*: the above facts amounted to a "use" of the bar by applt. for the purposes of betting in contravention of Betting Act, 1853 (c. 119), s. 3.

It was contended that because applt. had no interest in the inn, or control over the premises, he did not "use" the bar in the sense in which that term is employed in the sect. With that contention I cannot agree. Apart from the decision in *Belton v. Busby*, No. 390, *ante*, I think that where you find a man habitually frequenting the same room or place for the purpose of carrying on there a regular business of betting with persons resorting thereto, he commits an offence against the Act. There is, to my mind, nothing in *LORD HALSBURY'S* judgment in *Powell v. Kempton Park Racecourse Co.*, No. 358, *ante*, to support the contrary (*LORD ALVERSTONE, C.J.*).—*TROMANS v. HODKINSON*, [1903] 1 K. B. 30; 72 L. J. K. B. 21; 87 L. T. 549; 67 J. P. 30; 51 W. R. 286; 19 T. L. R. 19; 47 Sol. Jo. 32; 20 Cox, C. C. 360, D. C.

Annotation:—*Apprvd. & Foll'd. R. v. Deaville, R. v. Deaville, R. v. Simpson*, [1903] 1 K. B. 468.

392. ————.]—Where a bookmaker is in the habit of frequenting the bar of a public-house for the purpose of carrying on a business of ready-money betting with persons resorting thereto but for the purposes of that business does not occupy any specific portion of the bar, the question whether he "uses" the bar for the purpose of betting in contravention Betting Act, 1853 (c. 119), s. 3, depends upon whether he so carries on his betting business there with the knowledge & permission of the occupier of the house.

Assuming you find a betting business carried

on in a place which is not either in law or in fact in possession of the person charged, but is a common place to which persons have access for other purposes, you require to give evidence from which the jury may infer that the person who owns the place, authorised or permitted the prohibited business to be carried on (*LORD ALVERSTONE, C.J.*).—*R. v. DEAVILLE, R. v. DEAVILLE, R. v. SIMPSON*, [1903] 1 K. B. 468; 72 L. J. K. B. 272; 88 L. T. 32; 67 J. P. 82; 51 W. R. 604; 19 T. L. R. 223; 47 Sol. Jo. 280; 20 Cox, C. C. 389, C. C. R.

Annotations:—*Consd. Buxton v. Scott* (1909), 100 L. T. 390. *Apld. Lee v. Taylor & Gill* (1912), 77 J. P. 66. *Refd. R. v. Fisher, Fisher & Grout* (1913), 9 Cr. App. Rep. 164.

393. ———— Or agent.]—A. used a public-house for the purpose of betting with persons resorting thereto. He did this with the knowledge & connivance of B., the licensee's son, who assisted the licensee in conducting the business of the public-house. The licensee was present in & managing the public-house, but the justices were not satisfied upon the evidence that she knew that betting was going on. The justices convicted A. of using the public-house for the purpose of betting with persons resorting thereto, & convicted B. of aiding & abetting A. to commit the offence:—*Held*: as B. was in fact assisting in conducting the business of the public-house, he was a person clothed with the licensee's authority who could give permission to A. to use the premises for the purpose of betting with persons resorting thereto, & the conviction of A. & B. was therefore right.—*BUXTON v. SCOTT* (1909), 100 L. T. 390; 73 J. P. 133; 25 T. L. R. 239; 21 Cox, C. C. 799, D. C.

394. ————.]—In this case a conviction under Betting Act, 1853 (c. 119), s. 3, for using a room for the purpose of betting with persons resorting thereto, was quashed on the ground that the deputy recorder who tried the case had misdirected the jury, so that they might have thought that the mere physical use of the room for the purpose of betting, without the sanction of either the landlord or of his servants, was sufficient to support a conviction. The ct. refused to decide the question of whether the permission of the landlord's servant in charge of the room in question was sufficient to support a conviction, as unnecessary for the determination of the case.—*R. v. MOSS* (1910), 74 J. P. 214; 26 T. L. R. 323; 4 Cr. App. Rep. 112, C. C. A.

SUB-SECT. 3.—THE RESORTING.

395. Physical resorting—Whether necessary.]—Upon the trial of an indictment under Betting Act, 1853 (c. 119), s. 1, for keeping a house for the purpose of betting with persons resorting thereto, it is unnecessary to show that such persons have physically resorted to the premises, the purpose for which the house is kept being that which is condemned by the sect. & the offence may be proved by showing that the house was opened & advertised as a betting house, although no person ever physically resorted thereto. But where no other evidence than that of resorting is offered in support of such an indictment, there must be evidence of a physical resorting & it is not sufficient to show that letters & telegrams were sent to the accused directing him to make bets with the senders; persons sending such letters & telegrams

do not resort to the house within the meaning of the sect.—*R. v. BROWN*, [1895] 1 Q. B. 119; 64 L. J. M. C. 1; 72 L. T. 22; 59 J. P. 485; 43 W. R. 222; 11 T. L. R. 54; 39 Sol. Jo. 64; 18 Cox, C. C. 81; 15 R. 59, C. C. R.

Annotations.—*Consd. Stoddart v. Argus Printing Co.*, [1901] 2 K. B. 476. *Distd. Taylor v. Monk* (1914), 83 L. J. K. B. 1125. *Refd. R. v. Worton* (1894), 72 L. T. 29; *Hawke v. Dunn*, [1897] 1 Q. B. 579; *Ashley & Smith v. Hawke* (1903), 89 L. T. 538. *Mentd. R. v. Bradbury, R. v. Edlin*, [1921] 1 K. B. 562.

396. —.]—*STODDART v. ARGUS PRINTING CO.*, No. 409, *post*.

397. —.]—*BLAIR BROTHERS v. LOUGHBOROUGH JJ.* (1906), 70 J. P. Jo. 568, D. C.

398. What amounts to—Congregation in defined space.]—*R. v. RUSSELL*, No. 345, *ante*.

399. Person receiving betting slips at defined place in highway—On behalf of bookmaker.]—Applt. employed a man to stand on the footway outside the door of a house to receive betting slips & money from persons passing along the highway, & another man to stand inside the doorway of the house & receive the bets from the first man & send them on to applt. elsewhere. He also gave the occupier of the house various sums of money for the privilege of his employees using the house in this manner. The justices convicted applt. of "using the house for the purpose of betting with persons resorting thereto":—*Held*: there was evidence of a "user of the house" & of "persons resorting thereto" within Betting Act, 1853 (c. 119), s. 1, although the persons making the bets did not enter the house, & the justices were entitled on the evidence to convict applt. of the offence charged.—*TAYLOR v. MONK*, [1914] 2 K. B. 817; 83 L. J. K. B. 1125; 110 L. T. 980; 78 J. P. 194; 30 T. L. R. 367; 24 Cox, C. C. 150, D. C.

SUB-SECT. 4.—KEEPING A PLACE, ETC., FOR RECEIVING MONEY.

In respect of "coupon competitions."—See Part VI., Sect. 1, *post*.

400. Sale of tickets—In lottery.]—*R. v. CRAWSHAW*, No. 457, *post*.

401. — Receipt by organiser of sweepstake.]—To subscribe to a sweepstake is not to bet; the organiser of a sweepstake, therefore, does not commit an offence against Betting Act, 1853 (c. 119), even though the sweepstake may have reference to a horse race.

A publican received subscriptions for a sweepstake on a horse race. Before the date fixed for the drawing of the sweepstake the police seized the documents relating to the subscriptions, & consequently no drawing took place. The publican

was indicted & convicted under the above Act, for using his house for the purpose of money being received by him, as & for the consideration for promises & agreements to pay thereafter money on certain events relating to a horse race:—*Held*: the conviction was wrong. *Semble*: a sweepstake is a lottery & therefore illegal.—*R. v. HOBBS*, [1898] 2 Q. B. 647; 67 L. J. Q. B. 928; 79 L. T. 160; 62 J. P. 551; 47 W. R. 79; 14 T. L. R. 573; 42 Sol. Jo. 717; 19 Cox, C. C. 154, C. C. R.

Annotations.—*Expld. R. v. Stoddart*, [1901] 1 K. B. 177. *Refd. Hardwick v. Lane* (1903), 73 L. J. K. B. 96; *Hawke v. Hulton* (1905), 22 T. L. R. 169; *Peers v. Caldwell, Taylor v. Caldwell* (1915), 85 L. J. K. B. 754.

402. Receipt in capacity as agent—To make bet—Whether offence constituted.]—W. kept a house or office for the purpose of executing commissions on receiving instructions by letter to bet on horse races, but professed not to bet himself, only acting as an agent in the matter, & investing the money sent to him & laying it out to the best advantage for his client, in reference to the particular races. W. received money by letter from C. to back a particular horse, & acknowledged receipt, & on the horse winning sent the money to C. There were no principals named by W. as advancing the money to pay the bets:—*Held*: W. was guilty of the offence of keeping open an office for receiving money on an undertaking to pay money on the event of horse races within Betting Act, 1853 (c. 119), s. 1.—*WRIGHT v. CLARKE, MORRIS v. CLARKE, SMITH v. CLARKE* (1870), 34 J. P. 661.

Annotation.—*Refd. R. v. Wyton* (1910), 5 Cr. App. Rep. 287.

403. Receipt at place itself—Whether necessary to constitute offence—Receipt abroad.]—To constitute an offence under Betting Act, 1853 (c. 119), s. 1, it is not necessary that the money should be intended to be received at the house itself, nor need the intended place of receipt be within the United Kingdom.—*STODDART v. HAWKE*, [1902] 1 K. B. 353; 71 L. J. K. B. 133; 85 L. T. 687; 66 J. P. 67; 50 W. R. 93; 18 T. L. R. 23; 46 Sol. Jo. 31; 20 Cox, C. C. 111, D. C.

Annotations.—*Apprvd. Lennox v. Stoddart, Davis v. Stoddart*, [1902] 2 K. B. 21. *Consd. Mackenzie v. Hawke*, [1902] 2 K. B. 216. *Refd. Hawke v. Mackenzie* (No. 1), *Hawke v. Mackenzie* (No. 2) (1902), 71 L. J. K. B. 565; *Hawke v. Hulton* (1905), 22 T. L. R. 169; *R. v. Thompson & Thompson* (1924), 18 Cr. App. Rep. 31.

404. —.]—*R. v. ANDREWS, SCHOTZ & LUGGAR*, No. 368, *ante*.

405. — Betting Act, 1853 (c. 119), s. 5—Not repealed by Gaming Act, 1892 (c. 9), s. 1.]—*LENNOX v. STODDART, DAVIS v. STODDART*, No. 108, *ante*.

406. Receipt outside house.]—Resp was the tenant of a house on the ground floor of which was a shop with a room at the back. Outside the house there was an entry from which a side door opened into the house. Resp's father

PART III. SECT. 4, SUB-SECT. 4.

402 i. Receipt in capacity as agent—To make bet—Whether offence constituted.]—It is no breach of Gaming & Lotteries Act, 1831, s. 11, to keep an office for the purpose of receiving money from others for investment on the totalisator, agreeing to pay them the sums (if any) which the keeper of the office may receive or be able to recover as the holder of totalisator tickets on their behalf, less an agreed commission.—*PATERSON v. CAMPBELL* (1894), 13 N. Z. L. R. 529.—N.Z.

t. Receipt of money in one room—Settlement of accounts in another.]—Held: a conviction under Betting Act, 1853, ss. 1 & 3, was good, although all the money was received & all the correspondence relating to bets was conducted in one room, while the other was used exclusively for settling accounts.—*HODGSON v. MACPHERSON*, [1913] S. C. (J.) 68; 50 So. L. R. 752; 2 S. L. T. 8.—SCOT.

u. Receipt of money by post—Winnings paid after money received.]—

A bookmaker occupied premises in E. where he carried on his business by receiving communications from his clients by telephone, the client subsequently sending by post a note of the bet along with a postal order for the sum staked. No instance was proved of money being received by the bookmaker before the race on which it was staked to run, but clients did not receive their winnings until after their money had been received by the bookmaker.—*Held*: the bookmaker had committed a contravention of Betting

Sect. 4.—Offences under Betting Acts: Sub-sects. 4 & 5. Sects. 5 & 6.]

occupied the house. Betting was carried on by resp. in this way: A person wishing to bet wrote on a paper the name of the horse & the amount of the bet; he wrapped up in the paper the coin representing the bet & handed the same to resp. in the entry or street. Several packets were so received by resp., but none were received in the house. Papers & coins which had been so handed to resp. outside were found in the back room of the house, & the rooms of the house were used merely for paying out the money won on bets previously made outside.

Upon an information under Betting Act, 1853 (c. 49), s. 4, against resp. as the occupier of the house, for receiving moneys as a "deposit" upon bets, the justices dismissed the information on the ground that the betting having been completed outside the house, the mere taking of the papers & money to the back room without the knowledge of the persons making the bets was not a "receiving" of the moneys within the statute:—*Held*: (1) the justices were wrong in holding that the mere taking of the papers & money to the back room without the knowledge or connivance of the persons making the bets did not constitute a "receiving" within the statute, but that sufficient facts had not been found to bring the case within sect. 4, & upon that ground the case ought not to be remitted to them; (2) "deposit" in sect. 4 includes the payment or handing over of the whole sum staked as well as of a part only of that sum.—*BOULTON v. HUNT* (1913), 109 L. T. 245; 77 J. P. 337, 23 Cox, C. C. 520, D. C.

437. Money deposited in bank—For purpose of executing bets—On occasions agreed upon.]—*VOGT v. MORTIMER*, No. 109, *ante*.

408. Receipt of postal orders—On deposit account—Pursuant to previous agreement.]—*Appl.*, a bookmaker, was convicted on an indictment charging him under Betting Act, 1853 (c. 119), s. 3, with having used his premises for the purpose of money being received by him "as & for the consideration for certain assurances, undertakings, promises, & agreements to pay thereafter" money on bets on horse races.

Evidence was given on behalf of the prosecution that, at the time alleged in the indictment, postal orders for £5 were sent to & retained by applt. in pursuance of a letter previously received in which the writer stated that he desired to open a deposit account with applt., & that his commissions would not exceed £5 without a further remittance;

that bets to an amount not exceeding £5 were subsequently made by applt. with the sender of the postal orders, & an account showing him the sums won or lost was sent to him, & that a few days later applt.'s premises were searched by the police, & betting slips & ledgers containing entries relating to the bets were found there:—*Held*: there was evidence on which the jury were entitled to convict applt.—*R. v. MORTIMER*, [1911] 1 K. B. 70; 80 L. J. K. B. 76; 103 L. T. 910; 75 J. P. 37; 27 T. L. R. 17; 22 Cox, C. C. 359; 5 Cr. App. Rep. 199, C. C. A.

SUB-SECT. 5.—ADVERTISEMENTS, ETC., OF BETTING HOUSES.

See Betting Act, 1853 (c. 119), ss. 1, 3 & 7; Betting Act, 1874 (c. 15), s. 3.

409. Whether advertisement illegal—House not physically resorted to—Coupon competition.]—The publication in a newspaper of an advertisement relating to a "coupon competition," that is to say, of a promise by the proprietor of an office to pay a certain specified sum of money to such persons as shall correctly guess the result of a horse race shortly to be run, & shall write their guesses upon certain forms called coupons issued with each number of the newspaper, & return the coupon so filled up to the office together with the sum of one penny in respect of each guess made, does not constitute an offence under Betting Act, 1853 (c. 119), s. 7, or Betting Act, 1874 (c. 15), s. 3, inasmuch as the advertisement does not relate to a house to which persons physically resort for the purpose of betting.—*STODDART v. ARGUS PRINTING CO.*, [1901] 2 K. B. 470; 70 L. J. K. B. 711; 85 L. T. 110; 65 J. P. 694; 49 W. R. 666; 17 T. L. R. 549; 45 Sol. Jo. 556, D. C.
Annotation:—*Overd. Hawke v. Mackenzie* (Nos. 1 & 2), [1902] 2 K. B. 225.

410. —.]—(1) By Betting Act, 1853 (c. 119), s. 7, a penalty is imposed on any person publishing any advertisement whereby it is made to appear that any house, office, etc., is opened, kept, or used for the purpose of "making bets or wagers in manner aforesaid." The proprietor of a newspaper in England published an advertisement of an illegal football coupon competition conducted by a person resident abroad, the coupons for which were printed as part of the advertisement & were to be obtained at the office of the newspaper:—*Held*: the making of bets in "manner aforesaid" included all the modes of betting specified in Betting Act, 1853

Act, 1853, s. 1.—*TRAYNOR v. MACPHERSON*, [1914] S. C. (J.) 174.—*SCOT*.

a. —.]—A bookmaker occupied premises at which he carried on his business. No money was paid or deposit made by clients before or at the time of making a bet or before the event on which the bet was made had been decided; but accounts were rendered weekly or daily, & the balance remitted to or by the bookmaker:—*Held*: the bookmaker had not committed a contravention of Betting Act, 1853, s. 1.—*AULD v. LOGAN* (1920), 57 Sc. L. R. 474.—*SCOT*.

b. —.]—*WILLIAMSON v. MACPHERSON*, [1923] S. C. (J.) 3.—*SCOT*.

c. — *Conveyed to another address.* —Premises in P. were used for the

transaction of betting business by means of correspondence, but no correspondence was received through the medium of the post at that address, all letters, including those containing money, being addressed to accused's father at an office occupied by him in G., whence they were daily conveyed, by a motor car belonging to accused, to P. On arrival in P. they were opened by the accused or his staff, & the contents dealt with:—*Held*: the money had been "received" in P.—*M'LAUGHLAN v. CAMERON*, [1916] S. C. (J.) 14.—*SCOT*.

PART III. SECT. 4, SUB-SECT. 5.

d. *Information or advice—Advertisement of—What constitutes offence.]—**Held*: in order to constitute the offence of publishing an advertisement whereby

it was made to appear that some person would give advice with respect to an event or contingency relating to a horse race it was not necessary to show that the advice had reference to bets to be made in a betting house.—*POTTER v. RIDSDALE* (1892), 13 N. S. W. L. R. 248; 9 N. S. W. W. N. 84.—*AUS*.

notification that there was a betting market & that the layers of odds were offering certain prices on an intended horse-race was the giving of information or advice "as to the betting" on such race.—*O'DONNELL v. SMART*, [1907] V. L. R. 439.—*AUS*.

f. —.]—*VOCKLER v. KING* (1919), 26 C. L. R. 366.—*AUS*.

g. —.]—The essence of the offence is the dissemination of

(c. 119), s. 1, & was not limited to the class of betting described in the first branch of that sect., that is, betting with persons "resorting to the house, office, etc., & the proprietor of the newspaper was liable to be convicted upon a summons under sect. 7.

(2) By Betting Act, 1874 (c. 15), s. 3 (1), a penalty is imposed upon the publication of an advertisement whereby it is made to appear that any person will on application give information or advice with respect to any bet or wager or any event or contingency mentioned in Betting Act, 1853 (c. 119). The proprietor of the same newspaper published in it advertisements by persons offering to give information as to the probable winners of the football matches dealt with in the coupon competition.—*Held*: the proprietor of the newspaper was liable to be convicted of an offence under Betting Act, 1874 (c. 15), s. 3 (1).—*HAWKE v. MACKENZIE* (Nos. 1 & 2), [1902] 2 K. B. 225; 71 L. J. K. B. 565; 87 L. T. 127; 66 J. P. 709; 51 W. R. 236; 18 T. L. R. 550; 46 Sol. Jo. 501; 20 Cox, C. C. 314, D. C.

Compare Nos. 496, 497, *post*.

411. — Nor money received therein.]—The publishers of a daily paper were charged with unlawfully causing certain advertisements to be published in the city of London whereby it was made to appear that an office & place was opened, kept & used by T. & S. for the purpose of making bets or wagers in manner prohibited by the Betting Act, 1853 (c. 119). At the hearing it was proved that the following advertisement was published on May 27, 1902: "T. & S., Flushing, Holland. The Derby, Ascot Stakes, Royal Hunt Cup, Northumberland Plate, etc. The Continental Sportsman, also Year Book & Ready Reckoner. Free on receipt of address. Telegraphic instructions can be sent to London. All letters to be addressed 'T. & S., Flushing, Holland.' Postage 2½d.; Postcards, 1d." Evidence was given as to bets & proceedings relating to bets taken pursuant & subsequent to the publication of the advertisement. The publishers were convicted:—*Held*: for an advertisement to come within the terms of sect. 7 of the Act, it must appear by reasonable inference from the advertisement itself, that it referred to one of the two classes of betting transactions prohibited or rendered illegal by sect. 1 of the Act. This was not so apparent on the face of the advertisement in question, as it did not appear that there was or would be "physical resorting" to any office or place in England or Ireland, or that betting was or would be carried on at any such office or place by means of prepayment. The evidence

given as to bets & proceedings relating to bets, taken pursuant & subsequent to the publication of the advertisement was irrelevant. The conviction, therefore, could not stand.—*ASHLEY & SMITH, LTD. v. HAWKE* (1903), 89 L. T. 538; 67 J. P. 361; 19 T. L. R. 581; 47 Sol. Jo. 640; 20 Cox, C. C. 558, D. C.

412. Information or advice.—Advertisement of.—How far illegal.]—Betting Act, 1874 (c. 15), is confined to such bets as are mentioned in the Betting Act, 1853 (c. 119), that is, to bets made in any house, office or place kept for betting, & the Act does not apply to advertisements offering information for the purpose of bets not to be made in any house, office or place kept for that purpose.—*COX v. ANDREWS* (1883), 12 Q. B. D. 126; 53 L. J. M. C. 34; 48 J. P. 247; *sub nom.* *ANDREWS v. COX*, 32 W. R. 289, D. C.

Annotations:—*Consol. Stoddart v. Hawke*, [1902] 1 K. B. 353. *Reid. Hawke v. Mackenzie* (Nos. 1 & 2), [1902] 2 K. B. 225.

413. —.]—*HAWKE v. MACKENZIE* (Nos. 1 & 2), No. 410, *ante*.

SECT. 5.—OFFENCES UNDER BETTING AND LOANS (INFANTS) ACT, 1892.

See Betting & Loans (Infants) Act, 1892 (c. 4).

414. Circular to person at university.—When an offence.]—A circular sent to a person at an address in a university town is not sent to a person "at a university" within Betting & Loans (Infants) Act, 1892 (c. 4), s. 3, unless the sender knows that the address is that of a house at which undergraduates are permitted by the university authorities to reside.—*MILTON v. STUDD*, [1910] 2 K. B. 118; 79 L. J. K. B. 638; 102 L. T. 573; 74 J. P. 217; 26 T. L. R. 392.

SECT. 6.—OFFENCES UNDER FOOTBALL BETTING ACT, 1920.

415. "Printing or knowingly circulating coupons"—Construction of Football Betting Act, 1920 (c. 52), ss. 1, 2.]—Where a printer undertook in the ordinary course of business the printing of betting coupons marked "To be used for credit business only," & where these coupons were subsequently used for the purpose of ready-money betting, but no evidence was adduced to show

information intended to assist in or for use in connection with bookmaking, etc.—*R. v. HEWITT* (1922), 69 D. L. R. 576; 38 Can. Crim. Cas. 265; 51 O. L. R. 522.—*CAN.*

h. Invitation to bet.—Exhibiting & publishing handbills.]—*AGNEW v. MORLEY*, [1909] S. C. (J.) 41; 46 Sc. L. R. 640; 1 S. L. T. 394.—*SCOT.*

k. — Sent by post.—Accused triable where letter received.]—*Held*: the sheriff-substitute at Dundee had jurisdiction to try a Glasgow bookmaker charged with a contravention of the Betting Acts by sending by post to persons in Dundee cards inviting them to bet.—*LIPSEY v. MACKINTOSH*, [1913] S. C. (J.) 104.—*SCOT.*

l. — Public placard.]—Def. exhibited an illustrated printed placard

in a barber's shop in S. intimating that he was a registered bookmaking member of the M. T. Club & was to be seen at his office:—*Held*: the placard being in a place open & accessible to the public was a public placard under Ord. No. 17 of 1914, s. 2 (1) (Southern Rhodesia).—*R. v. COHEN* (1915), C. P. D. 236.—*S. AF.*

PART III. SECT. 5.

m. Selling totalisator tickets to infant.—Evidence as to infant's age.—*Mens rea*.]—Appl. was charged with having sold totalisator tickets to S., a person under the age of twenty-one years. The evidence as to S.'s age before the magistrate was an admission made to resp. by S. that he was only seventeen years of age, & evidence by resp. that S. did not have the appear-

ance of being more than seventeen years of age:—*Held*: (1) the magistrate would not have been justified in finding that S. was under the age of twenty-one years on S.'s admission, but resp.'s evidence that S. did not appear to be more than seventeen years of age was legal evidence to justify the magistrate's finding; (2) it was the intention of the legislature to make *mens rea* necessary to constitute an offence under Gaming Act, s. 67 (1) (c), subject to this qualification: that if the person to whom the ticket is sold appears to be an infant, then the person selling the ticket is deemed to have known that the purchaser was an infant unless he proves that he had reasonable grounds for believing & that he did believe the purchaser to be of full age.—*MILLER v. HOOD*, [1921] N. Z. L. R. 998.—*N. Z.*

Sect. 6.—Offences under Football Betting Act, 1920.
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that the printer had knowledge of the intention to use the coupons for a prohibited purpose, in a charge under above sects.:—*Held*: the printer was rightly acquitted by justices.—*WHITE v. ROBERTSON* (1925), 41 T. L. R. 484; 69 Sol. Jo. 677; 89 J. P. Jo. 313, D. C.

SECT. 7.—PRACTICE AND PROCEDURE.

Recovery of money—Paid as deposit.]—See Part I., Sect. 3, sub-sect. 2, B., ante.

416. Information under Betting Act, 1853 (c. 119)—Form of information.]—Appl't. was convicted summarily by justices upon an information preferred against him under sect. 3 of above Act, which charged him "with having on Oct. 5 in the year aforesaid, & on divers other days & times between Oct. 5 & the laying of the information" (Nov. 16 following), "being then & there the occupier of a certain house in M., knowingly & wilfully opened, kept & used the same for the purpose of O. betting with persons resorting thereto." The justices convicted him of the offence committed on Nov. 8, & in a case stated for the opinion of this ct., they stated that it was established to their satisfaction that he did so keep & use the house on Nov. 8, but not on Oct. 5, or on any other day:—*Held*: the information was good, & did not allege more than one offence, & upon such information the justices were warranted in convicting of the offence as committed on Nov. 8.—*ONLEY v. GEE* (1861), 30 L. J. M. C. 222; 4 L. T. 338; 25 J. P. 342; 7 Jur. N. S. 570; 9 W. R. 662.

Annotations:—*Reid. Ex p. Burnby*, [1901] 2 K. B. 458; *Parker v. Sutherland* (1917), 116 L. T. 820.

PART III. SECT. 7.

n. Form of information.]—Appl't. was convicted under Police Offences Statute Amendment Act, 1872 (No. 424), s. 6, of using a shop for the purpose of betting with persons resorting thereto, the information & conviction not charging that the betting was upon any of the contingencies mentioned in s. 4:—*Held*: the conviction was sufficient.—*JACOBS v. JENNINGS* (1875), 1 V. L. R. 172.—**AUS.**

o. —.]—On an information, for, on a certain day, using a certain shop for the purpose of betting with persons & resorting thereto evidence was given of betting upon a certain other day & also the identification of certain entries in betting books found in the shop, with certain betting tickets found elsewhere:—*Held*: as no amendment had been made the conviction must be quashed.—*ZUCKER v. JENNINGS* (1875), 1 V. L. R. 168.—**AUS.**

p. —Being found in betting-house.]—Where persons have been found in a betting-house & brought before justices, it is not necessary that they should be proceeded against by information & summons.—*PORTER v. BLACK* (1902), 2 S. R. N. S. W. 325; 19 N. S. W. W. N. 181.—**AUS.**

q. —"Unlawful gaming"—Proof of time & place.]—It is not necessary that the words "unlawful gaming" should appear in an information in order that the information may be one for unlawful gaming. The

information alleged that the offence was committed at the time a certain race was run, & that the place where the offence was committed was the place where that race was run. There was no proof of either of these allegations:—*Held*: Lottery & Gaming Act, 1917, s. 71, supplied artificial proof of the place, & it was unnecessary to prove the time in order to justify the conviction.—*THOMPSON v. ALLCHURCH*, [1922] S. A. S. R. 217.—**AUS.**

r. Evidence—Information under Street Betting Suppression Act, 1896—Jurisdiction of courts of petty sessions.]—*GLESON v. JONES* (1896), 22 V. L. R. 321.—**AUS.**

s. —.]—In order to support a conviction under Street Betting Suppression Act, 1896, s. 2, it is not sufficient to show merely that deft. made a bet in a street.—*BIGGS v. ZILLES* (1898), 23 V. L. R. 567.—**AUS.**

t. —Suppression of Public Betting & Gaming Act, 1915—Onus of proof.]—Defts. were charged under Suppression of Public Betting & Gaming Act, 1915, s. 4 (2), with being unlawfully on the N. P. racecourse for the purpose of betting. There was no clear evidence of a bet having been made by accused but there was evidence sufficient to raise a suspicion in the mind of the magistrate, who took the view that it was for defts. to prove the innocence of their conduct, & on their failing to do so convicted them: *Held*: Suppression of Public Betting & Gaming Act, 1915, s. 5, relates only to cases falling within s. 4 (1) & does

417. —May be laid before one justice.]—An information for using a place for betting contrary to sect. 3 of above Act does not require to be laid before two justices; one will suffice.—*LEE v. GOLD* (1880), 44 J. P. 395.

418. Search warrants—Jurisdiction of justices—"Persons found."]—Complaint having been made under Betting Act, 1853 (c. 119), s. 11, a search warrant was issued thereunder, & certain licensed premises searched by the police:—*Held*: the justices had jurisdiction to issue the warrant in respect of licensed premises; & the powers of the police under such warrant were not restricted by words of the sect., "all such persons found therein," to all such persons as were actually engaged in contravening the Act, or in aiding & abetting the contravention thereof.—*ANDERSON v. HUME & SOUTH SHIELDS CORPN.* (1882), 46 J. P. 825, D. C.

419. To bind by recognisances.]—*MURPHY v. ARROW*, No. 362, ante.

420. —What may be seized—Whether money found on premises—Proceeds of street betting.]—Pltf. deposited in a house, which was occupied by a person employed by him, money which was the proceeds of street betting operations carried on by him. In pursuance of a warrant issued under Betting Act, 1853 (c. 119), s. 11, the police entered the house, & seized therein a number of betting slips & the aforesaid money. Pltf. & his above-mentioned employee were subsequently prosecuted for using the house as a gaming house. Pltf.'s employee was convicted, but pltf. was acquitted of the charge. The Chief Comr. of the Metropolitan Police having refused to give up the aforesaid money, pltf. brought an action against him to recover the same. At the trial, the defence having been set up by deft. that the money belonged, not to pltf., but to his above-mentioned employee, pltf. who was

not affect the onus of proof in cases falling under s. 4 (2).—*MCKAY v. OAKES* (1920), 16 Tas. L. R. 4.—**AUS.**

a. —Living by means of gaming—Sufficiency.]—H. was convicted before a magistrate under R. S. C., 1886, c. 157, s. 8, upon a charge of having no peaceable profession or calling to maintain himself by, but who, for the most part supported himself by gaming, & of being a loose, idle or disorderly person & a vagrant:—*Held*: it is an insufficient compliance with the statute for the prosecution to show merely that accused has no apparent occupation or calling, other than gaming, & that he gambles frequently & habitually.—*R. v. HERMAN* (1892), 8 Man. L. R. 330.—**CAN.**

b. —.]—*Held*: to support a conviction under R. S. C., c. 157, s. 8, there must be evidence: (1) that accused had no peaceable profession or calling to support himself by; (2) that he practised gaming; (3) that, from this practice, he derived some substantial profits; (4) that these profits constituted the larger portion of his means of support.—*R. v. DAVIDSON* (1892), 8 Man. L. R. 325.—**CAN.**

c. Search warrants—What may be seized—"Documents."]—Betting Act, 1853, s. 11, empowers any justice of the peace in certain circumstances to authorise any constable by special warrant to enter any house or premises suspected of being used as a betting-house & to seize all lists, cards or other documents relating to racing or

called as a witness, in rebutting that defence disclosed the fact that he had obtained the money by street betting. The judge at the trial found that the detention of the money was originally lawful as being requisite for the purposes of the prosecution; & he held that the maxim *ex turpi causa non oritur actio* applied, & that *pltf.* could not therefore recover:—*Held*: *pltf.*'s cause of action not being shown to arise out of any illegal transaction, he was entitled to recover.—GORDON v. METROPOLITAN POLICE CHIEF COMR., [1910] 2 K. B. 1080; 79 L. J. K. B. 957; 103 L. T. 338; 74 J. P. 437; 26 T. L. R. 645; 54 Sol. Jo. 719, C. A.

421. Power of arrest—Persons found—Persons entering after police.—A person may be "found" on premises within Betting Act, 1853 (c. 119), s. 11, although he only comes thereon after the police have entered the premises, but the power of arrest given to the police by that sect. is limited to the arrest of persons found on the premises for the purpose of betting.—DAVIS v. SLX (1910), 26 T. L. R. 460.

422. Summary jurisdiction—Right to trial by jury—Effect of omission to inform prisoner.—R. was charged with an offence under Betting Act, 1853 (c. 119), s. 3. He was not aware of his right to be tried by a jury, & was never so informed by the ct. of summary jurisdiction. He was convicted & fined £50:—*Held*: (1) the conviction must be quashed as the caution was not given; (2) the conviction need not state the fact of the caution being given.—R. v. COCKSHOTT, [1898] 1 Q. B. 582; *sub nom.* R. v. COCKSHOTT, *Ex p.* RICKERBY, 67 L. J. Q. B. 467; 78 L. T. 168;

betting found in such house or premises":—*Held*: "documents" does not cover unopened letters found on the premises.—McLAUCHLAN v. RENTON, [1911] S. C. (J.) 12; 48 Sc. L. R. 96; 2 S. L. T. 331; 6 Adam, 378.—SCOT.

d. Summary jurisdiction—Right to trial by jury—Evidence.—Case stated at request of *defts.*, who were convicted of keeping a common betting-house, on the questions whether the magistrate was right (1) in refusing to allow accused to elect; (2) in authorising a police inspector to act in the absence of the Chief Constable & Deputy Chief; (3) in admitting exhibits seized by police officers in the course of a *trepass*, as evidence:—*Held*: the effect of 8 & 9 Edw. VII., c. 8, ss. 773 & 774 (Can.), was to make jurisdiction of magistrate in the case of a charge of keeping a common betting-house, absolute. First & third questions answered in affirmative. Unnecessary to answer second question for disposal of case.—R. v. HUNAN (1912), 22 O. W. R. 527; 3 O. W. N. 1412; 26 O. L. R. 484; 19 Can. Crim. Cas. 57; 6 D. L. R. 276.—CAN.

e. ———.—A person charged with a contravention of Criminal Code, s. 235 (as re-enacted by 9 & 10 Edw. VII., c. 10, s. 3), dealing with betting, wagering, pool-selling, etc., has the right to elect to be tried by a jury, & cannot, without his consent, be tried summarily by the police magistrate.—R. v. HELLIWELL (1914), 30 O. L. R. 594; 13 D. L. R. 550; 5 O. W. N. 936; 23 Can. Crim. Cas. 146.—CAN.

f. ———.—*Deft.* was summarily tried by a magistrate upon an information for keeping a disorderly house or common betting-house. *Deft.* was not asked to consent. He pleaded "guilty":—*Held*: as the magistrate

had jurisdiction under Criminal Code, ss. 773 (f.), 774 & 781, to try *deft.* without his consent, it must be assumed that the information was intended to be laid & tried under those sections.—R. v. BOOTH (1914), 31 O. L. R. 539; 23 Can. Crim. Cas. 224; 6 O. W. N. 549, 675.—CAN.

g. ——— Power of superior court to examine evidence—On certiorari.—M. was convicted of an offence under Betting House Act, 1853, ss. 1 & 3, on evidence which, if examinable, was insufficient to support the conviction. The prosecution was under Dublin Summary Procedure Acts, 1 Vict. c. 25, & 5 Vict. c. 24, which prescribe a general form of conviction not stating or incorporating the evidence:—*Held*: (1) the conviction being regular & following the statutory form, could not be quashed on such ground, as the evidence could not be examined; (2) the same principles applied to prosecutions under Petty Sessions (Ireland) Act, 1851, & neither the column in the statutory order book directing witnesses' names to be stated, nor s. 20 (4) of that statute, which requires, on request, a note of the material part of the evidence given to be taken & signed by the justice, incorporated the evidence, or enabled the ct. to examine it on *certiorari*; (3) the mere absence of evidence to warrant a conviction did not oust jurisdiction, but amounted merely to error as distinguished from want of jurisdiction.—R. (MARTIN) v. MAHONY, [1910] 2 I. R. 695.—IR.

h. ——— Service of complaint on accused.—It is not essential to the validity of summary prosecutions that the complaint shall in every case be served upon accused.—KELLY v. RAE, [1917] S. C. (J.) 12; 2 S. L. T. 216.—SCOT.

62 J. P. 325; 14 T. L. R. 204; 42 Sol. Jo. 346; 19 Cox, C. C. 3, D. C.

Annotations:—As to (1) *Reid*, *It. v. Goldberg* (1904), 73 L. J. K. B. 970; *It. v. Beesby*, [1909] 1 K. B. 849.

423. ——— Under Licensing Consolidation Act, 1910 (c. 24), s. 79.—Appl. was the licensee of G. Inn at M. On Apr. 30, 1919, six informations were laid against him. Five of them charged that he, being the licensee of G. Inn, had on Apr. 21, 1919, & other dates respectively, suffered the premises to be used by certain persons for the purpose of betting with persons resorting thereto in contravention of Betting Act, 1853 (c. 119), contrary to the form of the statute in such case made & provided. The sixth information charged that applt. on Apr. 21, 1919, he then being the occupier of G. Inn, unlawfully did use the same for the purpose of betting with persons resorting thereto. The six informations were heard together by justices sitting as a ct. of summary jurisdiction. Applt. claimed to be tried by a jury, & he was committed for trial on all the informations. At quarter sessions he was indicted & tried for the offence under Betting Act, 1853 (c. 119), alleged to have been committed at G. Inn on Apr. 21, & was acquitted. The justices subsequently heard the first five informations, & convicted applt. on each of them. Applt. appealed to quarter sessions. The appeal as to the offence alleged on Apr. 21 was allowed, & the other appeals were dismissed:—*Held*: (1) the offence under Betting Act, 1853 (c. 119), is not the same offence as that created by Licensing Consolidation Act, 1910 (c. 24), s. 79, & applt. had not been twice placed in jeopardy for the same offence; (2) as a person charged with an offence under Licensing Con-

k. *Games, Wagers & Betting Houses Act, 1902—Special warrant—To whom addressed.*—A special warrant under Games, Wagers & Betting Houses Act, 1902, s. 4, may be addressed to constables generally in New South Wales & need not mention any constable by name.—McDONALD v. BEARE (1904), 1 C. L. R. 513.—AUS.

l. ——— Plea of autrefois convict—Test to be applied.—Appets. were convicted under Games, Wagers & Betting Houses Act, 1902, s. 19 (2), of having been found in a common gaming-house without lawful excuse. They were then charged at the same ct. under s. 19 (1) with having assisted the keeper of the house in the betting business that was there carried on:—*Held*: the test to be applied where the plea of *autrefois convict* is raised is to consider whether the evidence that was necessary to support the second charge would have been sufficient to procure a legal conviction on the first charge.—SHERWOOD v. SPENCER, *Ex p.* SPENCER (1905), 2 C. L. R. 250.—AUS.

m. Case remitted to magistrates—Further hearing.—Where on appeal by case stated the ct. remits the case to the magistrates to enter continuances, & to find further facts in answer to questions submitted by the ct., the magistrates should give the parties an opportunity of being re-heard, & of giving evidence in relation to the facts required to be found. Where the magistrates, without any re-hearing or fresh evidence, find in answer to such questions, at a date long after the original hearing, merely from recollection, the ct. may decline to act on such findings, & will certainly so decline, where, in so making such findings, the magistrates state that none of the matters on which the further findings were required was

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solidation Act, 1910 (c. 24), s. 79, has no right to claim to be tried by a jury, the act of the justices in purporting to commit applt. for trial on the five informations which alleged offences under that sect. was a mere nullity & did not deprive the justices of jurisdiction to hear those informations summarily at a subsequent date.—**BANNISTER v. CLARKE**, [1920] 3 K. B. 598; 90 L. J. K. B. 250; 124 L. T. 28; 85 J. P. 12; 36 T. L. R. 778; 26 Cox, C. C. 641.

424. — Same act constituting different offences—Under Betting Act, 1853 (c. 119), & Licensing Consolidation Act, 1910 (c. 24).—**BANNISTER v. CLARKE**, No. 423, *ante*.

425. Application of penalty — Discretion of magistrate—To deprive common informer of share.]—Under Metropolitan Police Courts Act, 1839

(c. 71), s. 34, a metropolitan police magistrate has a discretion to deprive an informer of any share in a penalty inflicted under Betting Act, 1853 (c. 119), although sect. 9 of the latter Act expressly directs that one-half of the penalty is to be paid to the informer.—**HAWKE v. MACKENZIE** (No. 3), [1902] 2 K. B. 234; 71 L. J. K. B. 570; 87 L. T. 131; 66 J. P. 709; 51 W. R. 239; 20 Cox, C. C. 324, D. C.

426. Sentence reduced—Original heavy sentence—Imposed on unfounded allegations—Fines paid by third person.]—**R. v. PERKINS** (1911), 6 Cr. App. Rep. 248, C. C. A.

427. Evidence of previous offences — Admissibility.]—**R. v. MEAN**, No. 365, *ante*.

428. — Conviction for “suffering betting” — Whether admissible on charge of “betting with persons resorting.”—**TAYLOR v. WILSON**, No. 366, *ante*.

Part IV.—Lotteries.

SECT. 1.—IN GENERAL.

429. What amounts to a lottery—Sale by lot—Gaming Act, 1738 (c. 28), s. 4.]—To a declaration in covenant deft. pleaded that before the making of the covenant, it was unlawfully agreed between pltf. & deft. that deft. should sell & pltf. purchase certain lands for a certain sum of money, to the intent & in order & for the purpose, as pltf. at the time of making the agreement well knew, that the lands should be sold by lottery contrary to above Act; that afterwards, in pursuance of

the illegal agreement, the lands were conveyed to deft., & a part of the purchase-money for same being unpaid, deft. to secure the payment thereof made the covenant declared on. A verdict being found for deft. on the issue on this plea, pltf. obtained judgment *non obstante veredicto*:—**Held**: in error, reversing the judgment below, the plea was good, after verdict it ought to be taken to mean that the covenant was given in pursuance of the illegal agreement, & even, if not so understood, the covenant could not be enforced, since

raised before them at the original hearings.—**FORTE v. M'ALISTER**, [1917] 2 I. R. 387.—**IR.**

n. Form of conviction.]—G. was charged under Suppression of Public Betting & Gaming Act, 1915, with betting in a sports ground with one R. After one bet had been proved the magistrate admitted evidence of two other bets with R.:—**Held**: evidence of the later bets was properly admitted & the form of conviction was sufficient.—**GADD v. OAKES** (1921), 17 Tas. L. R. 73.—**AUS.**

o. —.]—A conviction for “keeping & using a certain place, to wit, a shop—for the purpose of betting with persons resorting thereto,” not being in the disjunctive, is not bad.—**TAYLOR v. BRETHAM** (1898), 17 N. Z. L. R. 405.—**N.Z.**

p. — Alternative charges.]—A husband & wife were charged with keeping a dwelling-house as a gaming or betting-house, or having the care or management thereof, or acting in conducting gaming or betting therein, contrary to Burgh Police (Scotland) Act, 1892, s. 407. They were found “guilty as libelled”:—**Held**: the convictions were not open to the objection of being general convictions upon alternative charges in respect that the charges were not mutually exclusive & consequently were not truly alternative.—**M'CULLOCH v. RAE**, [1915] S. C. (J.) 43; 7 Adam, 602; 52 Sc. L. R. 469; 1 S. L. T. 312.—**SCOT.**

q. Prejudice of accused—Sheriff using notes prepared before hearing counsel.]—A person convicted of an offence, appealed on the ground of oppression, & prejudice in his defence on the merits, in respect that the sheriff before whom he was tried had, in delivering judgment, used notes of opinion admittedly prepared before he had heard counsel for accused:—**Held**: the procedure had not prejudiced the accused.—**LENG & CO., LTD. v. MACKINTOSH** (1914), 51 Sc. L. R. 266.—**SCOT.**

r. Separate offences involving separate penalties—Burgh Police (Scotland) Act, 1892, s. 407.]—Accused, charged under Burgh Police (Scotland) Act, 1892, s. 407, with keeping his dwelling-house as a gaming or betting-house, & conducting gaming or betting therein, was convicted under both branches of the complaint, & a separate fine was imposed for each offence:—**Held**: each of these acts constituted a separate & distinct offence, in respect of which a separate penalty for each offence could be imposed.—**HEALY v. WRIGHT**, [1923] S. C. (J.) 9.—**SCOT.**

s. Power of police to seize & detain envelope—Dropped by accused—Street Betting Act, 1906.]—Police constables, in apprehending a person suspected of street betting under Street Betting Act, 1906, s. 1, are entitled to seize & detain an addressed envelope, dropped by accused, although the envelope is sealed, & the magistrate who tried the case is entitled to open the same.—**M'GOWAN v. MACKENZIE**, [1924] S. C. (J.) 106.—**SCOT.**

t. Joint offence—Penalty several against each offender.]—Act 36 of 1902, s. 16, enacts that whosoever keeps any house or place for the purpose of betting, shall be liable to a penalty of £200. I. & M. having been jointly concerned in the keeping of such a house, were each sentenced to pay a fine of £150:—**Held**: although the offence was joint, the penalty was intended to be several against each offender.—**I. v. DAVIS** (1903), 20 S. C. 177.—**S. AF.**

u. Gambling Law 25 of 1878—Who should prosecute.]—The proper person to prosecute in any offence under Gambling Law 25 of 1878, committed within the limits of any borough, is the Superintendent of Police.—**JACQUES v. DURBAN CORPN., DURBAN TURF CLUB & NATAL TATTERSALLS intervening** (1918), N. P. D. 35.—**S. AF.**

PART IV. SECT. 1.

b. What amounts to a lottery—Sale by lot.]—**Ex p. GREEN** (1881), 2 N. S. W. L. R. 93.—**AUS.**

c. —.]—A co. was formed in Queensland for the purpose of disposing by lottery of land in Melbourne belonging to a building society, which was duly incorporated & registered in Queensland. The lottery was to be drawn in Brisbane. Defts. were appointed as agents of the co. in Victoria, & received application for shares in such lottery scheme:—**Held**: though the lottery was to be drawn in Queensland, it was an endeavour to dispose of lands in

it was given as a security for the payment of money due under an illegal contract.—*BRIDGES v. FISHER* (1854), 3 E. & B. 642; 2 C. L. R. 928; 23 L. J. Q. B. 276; 23 L. T. O. S. 223; 18 J. P. 599; 1 Jur. N. S. 157; 2 W. R. 706; 118 E. R. 1283. Ex. Ch.

Annotations:—*Reid*, A.-G. v. Hollingworth (1857), 2 H. & N. 416; *Geere* v. *Mare* (1863), 2 H. & C. 339; *Taylor* v. *Chester* (1869), 10 B. & S. 237; *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 19 Ch. D. 478; *Hyams* v. *Stuart King*, [1908] 2 K. B. 696; *Re Campbell, Ex p. Seal*, [1911] 2 K. B. 992.

430. Distribution of profits by lot.—A “Govt. securities trust,” or combination of more than twenty persons, formed on the principle of investing the subscriptions of the members & dividing the capital fund & profits among themselves by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest, with a bonus, is an “assocn. for the acquisition of gain,” within Cos. Act, 1862 (c. 69), s. 4, & is, therefore, unless registered under that sect., an illegal assocn. *See*: the mode of distribution was a lottery, & therefore illegal under Lottery Acts.—*SYKES v. BEADON* (1879), 11 Ch. D. 170; 48 L. J. Ch. 522; 40 L. T. 243; 27 W. R. 464.

Annotations:—**Dbd.** *Smith v. Anderson* (1880), 15 Ch. D. 247. **Consd.** *Wigfield v. Potter* (1881), 45 L. T. 612. **Refd.** *Howard v. Refuge Friendly Soc.* (1886), 54 L. T. 644; *Macnee v. Persian Investment Corp.* (1890), 38 W. R. 596; *Jeffrey v. Bamford*. [1921] 2 K. B. 351.

Melbourne by a lottery within Police
Offences Act, 1894, No. 1126, s. 37.—
CAWSEY v. ANDREWS (1894), 20 V. L. R.
332.—AUS.

d. . .]—Pltf. sold a tract of land to H., giving an agreement to convey on payment of the purchase money at certain periods. H. sold it in lots by a lottery, which pltf. was aware of, but had nothing to do with. After the drawing, it was arranged that pltf. instead of H., should enter into agreements with the persons purchasing by the tirage to convey to them the lots which they had drawn on the terms there agreed upon, & that the sums payable by them should be received by pltf. on account of the purchase money due to him by H. In an action by pltf. on the covenant to pay, contained in one of such agreements:—*Held*: the sale by lottery was illegal & the agreement declared upon, being an adoption of such sale, could not be enforced. —*CHORNY v. WINDNER* (1858), 16 U. C. R. 356.—**CAN.**

e. ————j.—Accused published by advertising in newspapers & distributing handbills particulars of a proposal setting out that a coupon envelope would be given to every customer making a purchase of \$1 or over—each coupon to bear a number. The customer whose coupon bore the Number given to a certain person in a sealed envelope to be opened upon a certain day should become the owner of an automobile as a prize. Defendants were convicted both of advertising & conducting a scheme for disposing of property by a mode of chance. There had been no increase in price in the articles sold :—**Held :** the conviction must be sustained.

Semble: the scheme was also a lottery.—**R. v. HUDSON'S BAY CO.** (1915), 32 W. L. R. 900; 9 W. W. R. 522; 25 D. L. R. 398.—**CAN.**

2. ———. 1—Applt. was an advertising contractor, & he acquired from the W. City Corpn. the sole right to dispose of the space for advertisements on the Corpn. tram-tickets. By way of increasing the circulation of

the advertisements he advertised that he would each month distribute £6 on the production to him of tram-tickets bearing certain numbers which he would at the end of each month call for:—*Held*: this was a promise to dispose of property by chance, & illegal under Gaming & Lotteries Act, 1881, s. 16.—*TAIT* v. *WILLIAMS* (1906), 26 N. Z. L. R. 289.—*N.Z.*

g. ———,]—Defts. published an advertisement setting forth a scheme for a "free day" at their establishment, during a period of twenty-one days. Everything sold for cash on that day was to carry a refund in goods to the same amount. The day was chosen by ascertaining the average cash takings for the twenty-one days, & the day on which the takings most nearly approached this average was to be the free day. Purchasers on producing cash dockets for goods purchased on that day were to receive goods to an equal amount *gratis*:—**Held**: the scheme was a "contrivance or device" within Gaming Act, 1908, s. 39.—**GRANT v. COLLINSON**, [1922] N. Z. L. R. 998.—**N.Z.**

h. ———.]—M. advertised that any person who purchased five shillings' worth of goods at his place of business for cash would be entitled to a coupon & in respect of these coupons a prize would be given, the allocation whereof would be determined by lot:—**Held:** such scheme constituted a lottery within Law 7 of 1890, s. 6.—**R. v. MORRISON** (1914), T. P. D. 329.—**S. AF.**

430 I. — Distribution of profits by lot.—In order to ascertain whether a scheme is a lottery the substantial object of the whole scheme will be looked at. Where the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lot will not vitiate it.—*R. v. CRANSTON, LIDDELL* (1913), T. P. D. 514.—**S. AF.**

432 l. — *Distribution of stakes by lot.*—A transaction is not necessarily a lottery within Act V. of 1844, simply

431. -] — A society constituted, avowedly, for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the Lottery Acts.—**WALLINGFORD v. MUTUAL SOCIETY** (1880), 5 App. Cas. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81, H. L.

Annotations:—**Mentel**, Edmunds v. Wallingford (1885), 14 L. R. 811; Spens v. Daggers (1885), Cab. & El. 503; Parkiss v. Low (1886), 3 T. R. 63; Gungor v. Arain; Gupta v. Tiluckram Chowdhry (1888), L. R. 15nd. App. 119; Steadman v. Hakim (1888), 58 L. J. Q. B. 57; Mangor v. Cash (1889), 5 T. L. R. 271; Lawrence v. Norreys (1890), 15 App. Cas. 210; Arnold & Butler v. Bottomley, [1908] 2 K. B. 151.

432. Distribution of stakes by lot.]—
TAYLOR v. SMETTEN, No. 443, *post*.

433. Premium bonds.]—A co. was formed for the purpose of dealing in lottery bonds. In some cases the bonds bore a small rate of interest in others no interest was paid, but it was added to the principal. All the bonds must be drawn sooner or later, but the drawings extended over a period of eighty years. A petition was presented for an order for the compulsory winding-up of the co., on the ground that dealing in premium bonds was contrary to the Lottery Act, & was, moreover, carried on in a fraudulent manner. Investors were promised that on paying the first instalment they would have the benefit of the drawing of bonds, but the same bond was given to two or

because a matter of whatever kind is agreed to be decided by lot. Where twenty persons agreed that each should subscribe R.200 by monthly instalments of R.10, & that each in his turn as determined by lot should take the whole of the subscriptions for one month:—*Held*:—the agreement was not illegal.—**KAMAKSHI ACHARI v. APPAVU PILLAI (1863), 1 Mad. 448.—IND.**

432 ii. -.] VASUDEVAN
NAMBUDRI v. MAMMOD (1898), I. L. R.
22 Mad. 212.—IND.

433 i. — *Premium bonds.*—A sale of one of an issue of City of Paris bonds containing certain lottery features was held to be the sale of a share in a foreign lottery under Criminal Code, s. 236.—*R. v. HENLEY*, [1924] 2 D. L. R. 106; 42 Can. Crim. Cas. 11.—**CAN.**

433 ii. -.]—A scheme for raising money by means of "premium bonds" by which the purchaser of a bond obtains a good security at a low rate of interest coupled with a chance of obtaining a valuable prize, which chance is decided by lot, is a lottery.—INTERNATIONAL INVESTMENT CO., LTD. v. ANDREWS (1912), 31 N. Z. L. R. 606.—N. Z.

k. *Prizes drawn for abroad.*—The purchase of foreign bearer bonds, bearing little or no interest, entitled the holder to participate in a certain scheme of drawing for prizes to take place abroad:—*Held*: such an arrangement constituted a lottery within Law 7 of 1890, ss. 5 & 6.—*AFFHAUSER v. MCLEOD* (1909), T. S. 827.—**S. AF.**

1. — *Ballot loans.*—A limited co., with power to raise a small capital conducted drawings for what were called "ballot loans." The funds so applied towards the loans were raised by subscription from the general public and each subscriber obtained a "share warrant," which conferred no interest in the co., but entitled the holder to participate in the ballots. The ballots were drawn in the ordinary way, & the drawers of winning numbers

Sect. 1.—In general. Sect. 2: Sub-sect. 1.]

even three different people :—*Held* : the premium bonds were within the Lottery Acts, & the dealing in them as carried on by the co. was an illegal business.—*Re INTERNATIONAL SECURITIES CORPN., LTD.* (1908), 99 L. T. 581; 24 T. L. R. 837.

Statutory exemptions from Lottery Acts, see Sect. 3, *post*.

SECT. 2.—NATURE OF LOTTERIES.

SUB-SECT. 1.—THE ELEMENT OF WAGER.

434. Whether lottery where no wager.]—The proprietors of a weekly newspaper caused medals to be distributed gratuitously among members of the public; each medal bore a distinctive number & the words, "Keep this, it may be worth £100. See the *Weekly Telegraph* to-day"; the winning numbers, which were arbitrarily selected by the newspaper proprietors & were unknown to the distributors, were published weekly in the newspaper. There were no coupons, & it was not necessary that the holder of a medal should purchase a copy of the paper as a condition of receiving a prize; information as to the winning numbers could be obtained without charge at the office of the newspaper. The object of the scheme was to induce persons to inspect or buy the paper, & the circulation in fact increased considerably during the progress of the scheme :—*Held* : although it was possible for an individual holder of a medal to obtain a prize without paying any-

thing for his chance, the medal-holders as a body collectively contributed sums of money to the fund out of which the money came for the prizes, & the scheme was a lottery within Gaming Act, 1802 (c. 119).

I wish it to be clearly understood that I am not prepared to hold that an absolutely free & gratuitous distribution of chances, none of which have been paid for, would be a lottery. In the present instance all chances are paid for in the mass by the general body of purchasers of the paper, although an individual purchaser may not pay for his chance (*DARLING, J.*).—*WILLIS v. YOUNG & STEMBRIDGE*, [1907] 1 K. B. 448; 76 L. J. K. B. 390; 96 L. T. 155; 71 J. P. 6; 23 T. L. R. 23; 51 Sol. Jo. 28; 21 Oox, C. C. 362. D. C.

Annotation :—*Reid. Minty v. Sylvester* (1915), 84 L. J. K. B. 1982.

435. Equal contribution between subscribers—Sweepstake.]—To debt for money had & received, debt. pleaded, that a certain race was about to be run, & that an illegal game called a lottery, not authorised by law or act of parliament, was set up by debt. for certain subscribers of £1 each, in the whole amounting to 155, to be paid to debt. under regulations in substance as follows—that the subscriber, whose name should be drawn out of a box next after the name of the horse, drawn from another box, which horse should be placed first in the race, should be entitled to receive from debt. £100. The plea then alleged, that the subscriptions were paid by pltf. & others to debt. & that pltf., under the regulations, became entitled to the £100 :—*Held* : the plea disclosed a transaction within the prohibition of Gaming Act, 1802.—*ALLPORT v. NUTT* (1845), 1 C. B. 974;

won the right to loans of sums varying from £5 to £1,000, without interest for 50 years, subject to a deduction of 10 per cent. for expenses, & if no security was given for the repayment of the loan, to a further deduction of 20 per cent. This latter sum was allowed to accumulate in the hands of the co., or invested to provide a fund for the repayment of the subscription during the 50 years to subscribers who presented their share warrants :—*Held* : this was a distribution of prizes by lot or chance, & therefore a lottery.—*MUTUAL LOAN AGENCY, LTD. v. A.-G.* (1909), 9 C. L. R. 73.—*AUS.*

m. ———.]—*O'SULLIVAN v. COLLIS* (1913), 15 C. L. R. 692.—*AUS.*

n. ———.]—*A.-G. v. MERCANTILE INVESTMENTS, LTD.* (1921), 22 S. R. N. S. W. 39.—*AUS.*

o. ———.]—*Manipulation of machine.*—Accused exposed on the counter of his shop a machine called the Automatic Tivoli Cigar Machine intended to be & actually used by his customers. The machine was put in operation by putting a penny in a slot, & by pressing a spring. The amount of the pressure applied to the spring determined the course taken by the penny inside the machine, & this in turn determined whether the person who had put in the penny got it back, lost it to the accused, or won from him a cigar valued at twopence. A certain amount of skill might be acquired in giving the requisite pressure to the spring, but it was not proved that the customers had any opportunity, or ever attempted, to acquire such skill :—*Held* : the machine as worked & used was a lottery within Glasgow Police (Further Powers) Act, 1892, s. 22.—

SANTONGELI v. NEILSON (1900), 3 F. (Ct. of Sess.) 10; 38 Sc. L. R. 162; 8 S. L. T. 340, J.—*SCOT.*

p. ———.]—*Prize gained by mode of chance—"House."*—The president of a workmen's club was prosecuted for having kept open & used the hall of the club for the purpose of unlawful gaming being carried on therein. The game played was called "House." In a large room off the hall of the club were 100 men, seated on forms at tables. Rectangular leather cards, each containing three horizontal rows with five figures in each row, were distributed amongst the men at the rate of one penny per card. From a box or urn, "the president" drew a card & called out its number, whereupon any player upon whose card the number was, crossed that number out with a piece of chalk. The game finished by a player shouting "House," walking up to "the president," & showing him his card, for which he (the player) claimed "House," so claiming from the fact that all the five numbers on one horizontal row were chalked out :—*Held* : the game of "House" was a lottery.—*BARRETT v. FLYNN*, [1916] 2 I. R. 1.—*IR.*

q. ———.]—*Pa-ka-poo.*—The declaration in Gaming & Lotteries Act, 1881, s. 9, that *pa-ka-poo* is a game of chance does not prevent it from being as well a lottery or a scheme under s. 18 if it really comes within the language of s. 18.—*LEE SUN v. CONOLLY* (1905), 24 N. Z. L. R. 553.—*N.Z.*

r. ———.]—The game of *pa-ka-poo*, although declared to be a game of chance by Gaming & Lotteries Act, 1881, s. 9, is also a lottery, & is within s. 18 of that Act. The word "lottery" is applicable to a

scheme in which prizes are gained independently of & without reference to the contributions of those taking part in it, & not merely to a scheme where the prizes are contributed entirely by the subscribers.—*JOE GEE v. WILLIAMS* (1907), 26 N. Z. L. R. 1016.—*N.Z.*

s. ———.]—*"Bicycle club."*—Accused had conducted a so-called "bicycle club," the system of which was as follows: 100 persons sign & undertake to pay the sum of 10s. a week each for a period of fifteen weeks; two bicycles are to be drawn each week by lot, the drawers are then to cease to be members & to make further payments; at the expiration of the period the 70 remaining members having each paid £7 10s. are to have the right to acquire an ordinary £15 15s. bicycle for £8 5s. :—*Held* : this scheme constituted a lottery within Law 7 of 1890, s. 6.—*R. v. CLAPP* (1902), T. S. 106.—*S. AF.*

t. ———.]—*Chinese animal game.*—*R. v. GUSH* (1916), E. D. L. 299.—*S. AF.*

a. ———.]—*R. v. AH SHON* (1917), E. D. L. 18.—*S. AF.*

b. ———.]—*Staking money against bank.*—Accused kept a bank which sold tickets, each of which had eighty numbers marked on it. Each ticket-holder marked twenty of the numbers on his ticket. The same eighty numbers were then distributed in four jars. The numbers in one of these jars, selected by lot, were then drawn out, & every ticket-holder who had five or more of the numbers so drawn marked on his ticket received a prize :—*Held* : this scheme was not a lottery within Law 7 of 1890.—*MING SOO v. R.* (1908), T. S. 2.—*S. AF.*

3 Dow. & L. 233; 14 L. J. C. P. 272; 5 L. T. O. S. 308; 9 Jur. 900; 135 E. R. 826.

Annotations :—*Fold. Gatty v. Field* (1846), 9 Q. B. 431; *Hardwick v. Lane* (1903), 73 L. J. K. B. 96. *Reid. Willis v. Young* (1906), 96 L. T. 165.

436. —.]—MEARING *v.* HELLINGS, No. 96, *ante*.

437. —.]—GATTY *v.* FIELD, No. 100, *ante*.

438. —.]—A person who had the charge of attending to & drawing the tickets in a racing sweep, abstracted the ticket for the winning horse, which was drawn for another person, & subsequently sent a friend with the ticket so abstracted, to receive the money due upon it. The money was paid :—*Held* : though the lottery was illegal, the persons who thus obtained the money were liable for obtaining it by false pretences, or for a conspiracy.

Seemle : a racing sweep is an illegal lottery.—*R. v. LIPSHAM & WORSTER* (1848), 12 J. P. 839.

439. —.]—*R. v. HOBBS*, No. 401, *ante*.

440. —.]—Resp., the keeper of a beer-house, arranged for a sweepstakes on a horse-race to be held on his premises. Sixty-one persons entered, each of whom paid 6d. to resp.; & prizes amounting in the aggregate to 30s. were paid by resp. to the persons who respectively drew the first three horses in the race, less the price of a certain quantity of beer which by the conditions of the sweepstakes had to be bought from resp. by the prize-winners :—*Held* : the sweepstakes was a lottery within Gaming Act, 1802, s. 2.—*HARDWICK v. LANE*, [1904] 1 K. B. 204; 73 L. J. K. B. 96; 89 L. T. 630; 68 J. P. 94; 52 W. R. 591; 20 T. L. R. 87; 48 Sol. Jo. 133; 20 Cox. C. C. 576, D. C.

441. Value given to every subscriber—Prizes given from profits of increased sale.—The distribution of presents, after a musical entertainment, to persons occupying numbered seats, having paid a sum of money for admission generally to the room :—*Held* : to be within Gaming Act, 1802 (c. 119), s. 2.—*MORRIS v. BLACKMAN* (1864), 2 H. & C. 912; 28 J. P. 199; 10 Jur. N. S. 520; 159 E. R. 378.

Annotations :—*Reid. Taylor v. Smetten* (1883), 11 Q. B. D. 207; *Hall v. Cox* (1898), 47 W. L. 161; *Minty v. Sylvester* (1915), 84 L. J. K. B. 1982.

442. —.]—A lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what was professed to be a shilling's worth of goods, & also to the chance of certain bonuses of goods of greater value than the shilling, is an illegal lottery.—*R. v. HARRIS* (1866), 10 Cox, C. C. 352.

Annotation :—*Reid. Taylor v. Smetten* (1883), 11 Q. B. D. 207.

443. —.]—Applt. in a tent erected for the purpose, sold, for half-a-crown each, packets containing a pound of tea & a coupon for something of uncertain value. The tea was admitted to be worth the money paid :—*Held* : the transaction constituted a lottery.

In *Webster's Dictionary* a lottery is defined to be "a distribution of prizes by lot or chance"; such definition is in our opinion correct & in such sense we think the word is used in Gaming Act, 1802 (c. 119) (*per CUR.*).—*TAYLOR v. SMETTEN*

(1883), 11 Q. B. D. 207; 52 L. J. M. C. 101; 48 J. P. 36, D. C.

Annotations :—*Consol. Barclay v. Pearson*, [1893] 2 Ch. 154. *Fold. Willis v. Young* (1906), 76 L. J. K. B. 390. *Consol. Re International Securities Corp.* (1908), 99 L. T. 581. *Reid. Hall v. Cox* (1898), 47 W. R. 161.

444. —.]—H. kept a sweetstuff shop, & sold penny packets of caramels. Several packets contained a halfpenny in addition to a fair pennyworth of sweets. There had been no advertisement as to these enclosures :—*Held* : H. was rightly convicted under Gaming Act, 1802 (c. 119), s. 2, of keeping a lottery.—*HUNT v. WILLIAMS* (1888), 52 J. P. 821, D. C.

445. —.]—An announcement was made in the *Sun*, an evening newspaper, sold at a halfpenny, the property of a limited co., that for a certain period in certain issues of the newspaper spots of varying size & shape would be printed in various parts of the issues. It was also stated that on a certain day an announcement would appear in the paper showing the exact configuration of certain spots which were to be declared to be winning spots, & that the person who had cut out from the various issues of the paper & sent to the office of the paper a portion of the newspaper containing the facsimile of what had been declared to be the winning spot would receive a prize. It was also announced that the prizes differed for different spots. The winning spots were arbitrarily selected by the proprietors of the newspaper, & the winning of the prizes depended only upon chance. Applt. the printer & publisher of the newspaper, was summoned under Lottery Act, 1823 (c. 60), for unlawfully publishing a proposal & scheme for the sale of chances as a lottery, namely, the proposal & scheme called "spots," & was convicted under sect. 41 as a rogue & vagabond :—*Held* : applt. was properly convicted.—*HALL v. McWILLIAM* (1901), 85 L. T. 239; 65 J. P. 742; 45 Sol. Jo. 579; 20 Cox, C. C. 33; *sub nom. HALL v. McWILLIAM*, *McWILLIAM v. BOTTOMLEY*, 17 T. L. R. 561, D. C.

446. —.]—*WILLIS v. YOUNG & STEM-BRIDGE*, No. 434, *ante*.

447. —.]—Tickets each bearing a different number were sold for 6d. each upon the terms that the purchaser of the ticket bearing a number to be subsequently drawn by an independent person should be entitled to a bicycle as a prize. The bicycle was presented as a gift by a firm of cycle manufacturers for the purposes of advertisement, no part of the money paid by the purchasers of the tickets being used for acquiring the bicycle :—*Held* : as each purchaser of a ticket bought a chance, & the holder of the ticket bearing the winning number was determined by chance, the scheme constituted a lottery within the meaning of Lotteries Act, 1823 (c. 60), s. 41, & it was immaterial that no part of the money paid by the purchasers of the tickets was used for the purchase of the prize.—*BARTLETT v. PARKER*, [1912] 2 K. B. 497; 81 L. J. K. B. 857; 106 L. T. 869; 76 J. P. 280; 23 Cox, C. C. 16, D. C.

Annotation :—*Reid. Minty v. Sylvester* (1915), 84 L. J. K. B. 1982.

448. —.]—Resp., proprietor of a music hall entertainment, who was giving a performance in a provincial theatre, announced to the audience that "being possessed of a certain amount of wealth," he would distribute some of it, & his assistants would be supplied with postal

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Sects. 3, 4 & 5: Sub-sect. 1.]**

orders, to be given away as he thought fit. Under his directions the assistants went along the seats, & they handed postal orders of small amounts to persons nearest them. Other postal orders for larger sums were handed to members of the audience who answered questions put by him to them from the stage as to their circumstances, & in other instances to persons who stated their circumstances & requested the gift of an order:—*Held*: the distribution of the postal orders was made & determined by chance & without the exercise of any real judgment on the part of resp.; & resp. had, therefore, “exercised a lottery.”—*MINTY v. SYLVESTER* (1915), 84 L. J. K. B. 1982; 114 L. T. 164; 79 J. P. 543; 31 T. L. R. 589; 13 L. G. R. 1085; 25 Cox, C. C. 247, D. C.

449. —.]—The manager of a newspaper devised a scheme whereby purchasers of goods from certain shops received numbered tickets. Certain numbers were drawn by chance & the holders of tickets bearing these numbers were paid various sums by the newspaper subject to their undertaking to exhibit in their windows for a specified period a card bearing the name of the newspaper:—*Held*: (1) though the price of the goods was not increased there was one price paid for the goods plus a chance in the newspaper scheme, & this constituted a sale of tickets; (2) that the requirement that the winners should render some service to the promoters did not prevent the scheme from being a lottery, since those who were to have the opportunity of rendering the service & earning the reward were selected entirely by chance.—*KERSLAKE v. KNIGHT* (1925), 41 T. L. R. 555; 69 Sol. Jo. 607; 89 J. P. Jo. 328, D. C.

450. Service to be rendered by winner.]—KERS-
v. KNIGHT, No. 449, *ante*.

SUB-SECT. 2.—THE ELEMENT OF SKILL.
See Part VI., Sect. 2, post.

**SECT. 3.—STATUTORY EXEMPTIONS FROM
LOTTERY ACTS.**

451. Division of property by lot between joint tenants, etc.—Gaming Act, 1738 (c. 28), s. 11.]—A co., consisting of a large number of persons subscribing small sums, was formed for the purpose of buying land, erecting dwellings thereon, & allotting the same to the subscribers. The

allotment depended upon the result of a ballot. In connection with this co. there was established a bank for receiving the deposits of small capitalists & working men, upon the security of the property of the co.; & as part of the same concern, a bank in which the subscribers of the co. might place their savings for purchasing their land from the co.:—*Held*: the scheme was illegal, as being contrary to Bank Act.

Qu.: whether it was illegal as being contrary to the Lottery Acts, or whether it fell within Gaming Act, 1739 (c. 28), s. 11.—*O'CONNOR v. BRADSHAW* (1850), 5 Exch. 882; 20 L. J. Ex. 26; 16 L. T. O. S. 237; 155 E. R. 386.

Art unions.]—See Art Unions Act, 1846 (c. 48), s. 1.

SECT. 4.—RECOVERY OF PRIZES.

452. Whether prize recoverable—By successful competitor.]—BLYTH v. HULTON & Co., LTD., No. 503, *post*.

453. —.]—Pltf. alleged that she bought from deft. one-eighth of a ticket in the Hamburg State Lottery; that the ticket had won a prize in the lottery; that the prize money had been paid to deft.; but that deft. refused to pay over to pltf. the share to which she was entitled:—*Held*: the action being in respect of a sum of money alleged to be due as the proceeds of a lottery was not maintainable.—*GORENSTEIN v. FELDLMANN* (1911), 27 T. L. R. 457.

454. — *By purchaser of ticket.]—*Deft. was the treasurer of a Derby lottery, & received the subscriptions. Tickets marked with the names of horses entered to run for the Derby stakes were issued to the subscribers; & it was understood that the holder of a ticket bearing the name of a winning horse would receive a prize in money. Deft. received 5s. for each ticket, & was to pay the prizes. The holder of a ticket purchased of deft. sold it to pltf. There was no written contract between any of the parties; & the party who bought of deft. subscribed as for himself. The horse named on pltf.'s ticket won:—*Held*: pltf. could not recover the amount of the prize from deft., there being no privity between them.—*JONES v. CARTER* (1845), 8 Q. B. 134; 15 L. J. Q. B. 96; 6 L. T. O. S. 170; 10 Jur. 33; 115 E. R. 825.

Whether stake recoverable.]—See Part I., Sect. 3, sub-sect. 2, B., *ante*.

455. Whether costs of advertisement recoverable.]—SMITH'S ADVERTISING AGENCY v. LEEDS LABORATORY CO., No. 504, *post*.

PART IV. SECT. 4.

452 i. Whether prize recoverable—By successful competitor.]—The ct. will not entertain an action to enforce delivery of a subject won in a lottery.—*CHRISTISON v. M'BRIDE* (1881), 9 R. (Ct. of Sess.) 34; 19 Sc. L. R. 19.—*SCOT.*

454 i. — *By purchaser of ticket.]—*F. bought a ticket in a sweepstake got up by defts., who also acted as stakeholders. One of the conditions was that prizes should be paid to the

owner of the ticket bearing the successful number or to the person to whom the ticket had been indorsed, only on the production of the ticket. F. sold & indorsed his ticket to R., who notified defts. of the cession. At the drawing of the lottery that ticket was found to bear the successful number, & on F.'s representation that he had lost the ticket, defts. paid the prize money to him. Thereafter R. presented the ticket & demanded payment:—*Held*: defts. were liable to R. for the amount of the prize money.—*RUTGER v.*

PHILLIPS, LTD. (1897), 4 O. R. 208.—*S. AF.*

*a. Whether portion of prize recoverable—By joint-purchaser of ticket.]—**Held*: a joint adventurer in a lottery ticket was not entitled to sue one of his co-adventurers for any portion of the proceeds which the latter received in respect of the same because his claim is founded upon a venture in taking or having a share in a lottery ticket which was an offence under Law 7 of 1890, s. 1 (c).—*MEYER v. LEGGE* (1909), T. S. 226.—*S. AF.*

SECT. 5.—OFFENCES IN CONNECTION WITH LOTTERIES.

SUB-SECT. 1.—IN GENERAL.

456. Setting up lottery.—Indictable as common nuisance.—Gaming Act, 1898 (c. 23), s. 2; Gaming Act, 1802 (c. 119), s. 2.]—YODAN *v.* CROOKES (1858), 22 J. P. Jo. 287.

457. ———.]—(1) By Gaming Act, 1898 (c. 23), s. 1, lotteries are declared to be common & public nuisances. Sect. 2, which came into operation on a subsequent day, rendered persons keeping lotteries liable to a penalty, to be sued for by information or action. Gaming Act, 1802 (c. 119), contains similar enactments with regard to lotteries called "Little-goes." On motion in arrest of judgment, on an indictment for keeping a lottery, containing counts framed upon the above Acts:—*Held*: the counts were good & the offence indictable.

Deft. kept an eating-house, & sold tickets for what was called The Great Eastern Money Club, in respect of which prizes were drawn, & the holders of the tickets, whose numbers were drawn for prizes, received the same; & deft. delivered out the prizes to such ticket holders:—*Held*: (2) this evidence was sufficient to support a conviction against deft. for keeping a lottery, but (3) not sufficient to support a conviction for keeping a room for betting upon horse racing under Gaming Act, 1802 (c. 119).—*R. v. CRAWSHAW* (1860), Bell, C. C. 303; 30 L. J. M. C. 58; 3 L. T. 510; 25 J. P. 37; 9 W. R. 38; 8 Cox, C. C. 375, C. C. R.

Annotation.—As to (1) *Refd.* Martin *v.* Benjamin, [1907] 1 K. B. 64.

458. Under grant from foreign government.—Lotteries Act, 1722 (c. 19), s. 4.]—A co., formed to acquire & work a concession conferring the exclusive privilege of conducting all operations in connection with lottery loans in Persia, issued a prospectus which referred to the profits made on the Continent by lotteries, & stated that the operations of the co. would be conducted upon the lines adopted by European states where govt.

lotteries were in vogue, & that "at least five issues have to be made annually in Persia with minimum drawings of £10,000, & it is estimated that these operations should return continuously increasing dividends." The co. had agreed to purchase this concession. A shareholder commenced an action to restrain the co. from acquiring & from publishing any prospectus or scheme relating to the acquisition of this concession, & from publishing any advertisement or notice in any manner relating to such lottery loans, & from applying the funds of the co. in the purchase of the said concession, contending that the enterprise of the co. was illegal & in contravention of the Lottery Acts:—*Held*: the proposed purchase of the concession was lawful: the co. were not attempting to erect or set up any lottery in this country within the meaning of above Act; the general statements in the prospectus did not amount to a publication, advertisement or notice of a foreign lottery, within Lotteries Act, 1836 (c. 66).—*MACNEE v. PERSIAN INVESTMENT CORPN.* (1890), 44 Ch. D. 306; 59 L. J. Ch. 695; 62 L. T. 894; 38 W. R. 596; 6 T. L. R. 280.

Annotation.—*Refd.* Stoddart *v.* Argus Printing Co. (1901), 17 T. L. R. 549.

459. Publication of proposal for lottery.]—The printer of a newspaper, publishing an illegal proposal for gambling in the lottery, incurs a penalty under Lottery Act, 1782 (c. 47), s. 13.—*KING v. SMITH* (1791), 4 Term Rep. 414; 100 E. R. 1093.

460. Lotteries Act, 1836 (c. 66) — Prospectus of company formed to carry on foreign lottery.]—*MACNEE v. PERSIAN INVESTMENT CORPN.*, No. 458, *ante*.

461. — Lotteries Act, 1823 (c. 60), s. 41— Sale of newspaper containing scheme.]—*HALL v. MCWILLIAM*, No. 445, *ante*.

462. Offence not capable of commission by limited company.]—A joint stock co. incorporated under Cos. Acts cannot be convicted of an offence under above Act.—*HAWKE v.*

PART IV. SECT. 5, SUB-SECT. 1.

d. Setting up lottery.—Indictable as common nuisance.]—The Imperial Statute 10 & 11 Wm. III. c. 17, s. 1, is in force in W. A., & by that sect. the keeping or setting up of a lottery is made a public nuisance, & is punishable as such; & as s. 93 of Police Act dealt only with the mode of recovering penalties, it is not a variation or repeal by implication of that sect., but operates as a repeal of s. 2. The subsequent repeal of s. 93 does not revive the repealed portion of 10 & 11 Wm. III. c. 17; 52 Vict. No. 23 (Constitution Act), s. 57, is merely declaratory of the common law, & therefore all the laws of England in force at the time of the arrival of the first settlers in the colony, & which are applicable to the conditions of the infant colony, must from the outset become & continue to be the law of the colony, until by its own legislature it proceeds to shape, modify, or abrogate the existing law, so as to adopt it to its own circumstances & situation.—*R. v. DE BAUN* (1901), 3 W. A. L. R. 1.—*AUS.*

459 i. Publication of proposal for lottery.]—Respondent took a written document containing an invitation to the public to order suits of clothes to an advertising canvasser, & asked that it should be inserted in a newspaper. The document was subsequently published as an advertisement. Besides the invitation, the document contained

a statement that one suit would be given free in every hundred orders received:—*Held*: the publication of the document was an advertisement of a lottery, & evidence that a lottery was intended to be carried on.—*O'SULLIVAN v. TANNER*, [1921] S. A. S. R. 248.—*AUS.*

459 ii. —.]—An advertisement & circular in words containing immaterial variances were issued on behalf of a limited co., inviting applications for shares on an increase of capital. The advertisement stated that applicants were required to pay for the shares in full & to undertake to pass on two "pass on" slips to two friends; that the applicant then became entitled to participate in a distribution of £5,000 divided into 412 allotments, to be paid in cash; that the method of allotment rested with a committee, whose decision would be fair & final: that if intending applicants took up several shares at different times, they would improve their prospect of participating in the cash distribution. The secretary of the committee stated that no lot or drawing was to take place, but his scheme was to grade the allotments according to the effort of applicants in disposing of shares. There was no evidence that this scheme would have been adopted by the committee:—*Held*: as the selection of the participants in the distribution was to be by arbitrary choice, the advertisement &

circular constituted an offence against Lottery & Gaming Act, 1917.—*KNEEBONE v. WHITTLE*, [1922] S. A. S. R. 257.—*AUS.*

459 iii. —.]—An advertisement in New Zealand of a lottery in Queensland in connection with horse-races in Australia is an advertisement inviting persons to take shares in sweepstakes, lotteries, & schemes for the distribution of prizes of money within Gaming & Lotteries Act, 1881, Amendment Act, 1885, s. 3 (3).—*BRUNT v. HENDERSON* (1895), 14 N. Z. L. R. 585.—*N.Z.*

e. Beneficial interest in lottery.— Whether necessary for conviction.]—A person not "beneficially interested" in a lottery cannot be summarily convicted under Police Offences Statute, 1865, No. 265, s. 31, for drawing for a prize in such lottery by a mode of chance.—*BERGIN v. COHEN* (1866), 3 W. A. B. & W. 133.—*AUS.*

f. — Proof of Partner.]—A statement in a conviction that deft. had been convicted of being a partner in a lottery held sufficient, without showing that deft. had any beneficial interest in the lottery, the one being a necessary inference from the other.—*R. v. CAREW, Ex p. YA CHANG*, 2 J. R. N. S. 177.—*N.Z.*

g. Assisting in managing a lottery.— Disclosure of prosecutor's name essential.]—Three summonses were issued against three defts. for assisting

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HULTON (E.) & Co., Ltd., [1909] 2 K. B. 93; 78 L. J. K. B. 633; 100 L. T. 905; 73 J. P. 295; 25 T. L. R. 474; 22 Cox, C. C. 122; 16 Mans. 164, D. C.

Is.—Reid. R. v. Daily Mirror Newspapers, R. v. Glover, [1922] 2 K. B. 530. **Mentd.** R. v. Ascanio Puck & Palce (1912), 76 J. P. 487.

463. — **Article favourably criticising sweepstake.]—Held:** an article in a newspaper, favourably criticising a proposal for a sweepstake upon a horse race, & giving information as to from whom, & at what price, tickets could be purchased, was not the "publication of a proposal or scheme for the sale of tickets in an unauthorised lottery" within the meaning of above Act; & consequently, neither the editor nor the printer of the newspaper was guilty of an offence.—**BOTTOMLEY v. PUBLIC PROSECUTIONS DIRECTOR** (1914), 84 L. J. K. B. 354; 112 L. T. 458; 79 J. P. 153; 31 T. L. R. 58; 24 Cox, C. C. 578, D. C.

464. — **Ordering circulars advertising lottery.]—Applt. ordered circulars containing a**

in managing a lottery. The sum monses were heard together & defts. were convicted. The prosecutor's name was not disclosed in the summons, & the Crown Solicitor declined to give it when asked at the hearing:—**Held:** it was not necessary to show any beneficial interest in any one in the lottery; defts. were properly tried together; but the refusal to disclose prosecutor's name was fatal.—**R. v. STURT, Ex p. AH TACK** (1876), 2 V. L. R. 103.—**AUS.**

h. Selling ticket in lottery.—Lottery conducted outside jurisdiction.]—A., a shop-keeper at Brisbane, received money from B. for the purpose of obtaining for B. a ticket in a lottery conducted & drawn at Hobart, a place outside the territorial limits of Queensland. The ticket was sent by letter, posted at Hobart, & directed to B. at the address given by him to A., when paying the purchase money:—Held:** an offence had been committed under Suppression of Gambling Act, 1895, s. 6, notwithstanding that the lottery was a foreign lottery.—**GEISE v. HENNESSEY** (1904), S. R. Q. 37.—**AUS.****

k. — No reference on ticket to lottery.]—R. v. LEE (1918), T. P. D. 407.—**S. AF.**

l. Injunction to restrain.—Whether court will grant.—At suit of Attorney-General.]—The ct. will not grant an injunction to restrain the promotion or conduct of a lottery. The jurisdiction of the ct. to grant an injunction at the suit of the A.-G. considered.—A.-G. v. MERCANTILE INVESTMENTS, LTD.** (1920), 21 S. R. N. S. W. 183; 38 N. S. W. W. N. 31.—**AUS.****

m. Power of court to compel informant to elect charge.—Discretion when several offences proved.—Lottery & Gaming Acts, 1917–1921.]—In proceedings in respect of an offence under Lottery & Gaming Acts, 1917–1921, the ct. of summary jurisdiction has no power to compel an informant to elect on which of his charges he intends to proceed even after the evidence for the defence has been called.

It rests with the ct. when (after full opportunity to make a defence has been given) it is satisfied that more than one offence charged has been proved, to convict of such one of the offences charged as he thinks fit.

The ct. after having come to the conclusion that more than one offence has

been proved, is at liberty to hear the parties as to how its discretion should be exercised, & of which of the proved offences deft. is to be convicted.—**ALLCHURCH v. TASKER**, [1922] S. A. S. R. 336.—**AUS.**

n. Disposal of property by mode of chance.]—Complainant went to deft.'s place of business, & having been told by deft. that in certain spaces on the two shelves there were in cans of tea a gold watch, a diamond ring, or \$20 in money, he paid one dollar & received a can of tea, which contained an article of small value; he handed the can back, paid an additional fifty cents, & received another can, which also contained an article of small value. He handed this can back also, paid another fifty cents, & secured another can, which also contained an article of small value. He then refused to pay any more money, & went away, taking the third can & the article in it with him:—Held:** the transaction came within R. S. C. c. 159, s. 2.—**lt. v. FREEMAN** (1889), 18 O. R. 524.—**CAN.****

o. —.]—Deft. held a kind of concert in the street & having gathered an audience he proceeded to sell boxes of what he called "Parker's Pacific Pens." Before selling the pens, he placed in an empty box 100 envelopes, each containing a \$1 bill, 10 envelopes with a \$5 bill in each, 5 envelopes with a \$10 bill in each, & one envelope with a \$50 bill, making altogether \$250 in 116 envelopes. He also placed in the box 116 envelopes containing only blank pieces of paper. Every person paying one dollar for one box of pens was entitled to draw one envelope, & persons paying \$5 for a box of pens could draw eight envelopes; but he would not take more than \$5 from any one person. If the \$50 bill was drawn before two-thirds of the pens were sold, he would put another \$50 bill in the envelope & 50 envelopes with blank papers:—Held:** deft. was rightly convicted of an offence under R. S. C. c. 159, s. 2.—**R. v. PARKER** (1893), 0 Man. L. R. 203.—**CAN.****

p. —.]—R. v. LORRAIN (1896), 28 O. R. 123.—**CAN.**

q. —.]—Upon a case reserved to whether the interposition of a condition that the winner of a prize in a lottery should shoot a turkey at fifty yards in five shots, or if a lady, that she could choose a substitute to shoot

proposal for the sale of tickets in a lottery on horse races to be printed, & they were printed & delivered to applt. inclosed in envelopes, & applt. paid the printers:—**Held:** the proposal was published to the printers, & applt. was rightly convicted of publishing a proposal for the sale of tickets in a lottery within above Act.—**DEW v. PUBLIC PROSECUTIONS DIRECTOR** (1920), 89 L. J. K. B. 1166; 124 L. T. 240; 85 J. P. 81; 37 T. L. R. 22; 18 L. G. R. 829; 26 Cox, C. C. 664, D. C.

465. Keeping a place for lottery.—Gaming Act, 1802 (c. 119), s. 2.—Use of room on one occasion.]—The use of a room on one occasion for the drawing of tickets in a lottery is not an offence under above Act which forbids the keeping of any place for the purpose of a lottery.—MARTIN v. BENJAMIN**, [1907] 1 K. B. 64; 76 L. J. K. B. 81; 96 L. T. 197; 71 J. P. 30; 23 T. L. R. 53; 51 Sol. Jo. 50; 21 Cox, C. C. 378, D. C.**

Annotation:—Reid. Veasey v. Smith (1916), 115 L. T. 833.

466. Aiding & abetting in keeping of lottery.—Gaming Act, 1802 (c. 119), s. 2.]—Applt. had been charged summarily before a Metropolitan Police Magistrate, of aiding, abetting, counselling, &

for her, would prevent a conviction under Criminal Code, 1892, s. 205, it was stated that the evidence showed that any person could easily shoot a turkey under the circumstances:—**Held:** it was a question for the jury whether the making of that condition was intended as requiring a real test of skill, or merely as a device for covering up a scheme for disposing of the property by lot; the verdict of guilty involved a finding that it was merely a device; the evidence set out in the case justified that finding & the conviction should be affirmed.—**R. v. JOHNSON** (1902), 22 C. L. T. 125; 14 Man. L. R. 27.—**CAN.**

r. Scheme for prizes by mode of chance.—Offering totalisator odds on horse race.]—The making of wagers on a horse race by a person who agrees to pay to the winners the same dividend as shall be paid on the race by the totalisator is conducting a scheme by which prizes of money are competed for by a mode of chance, & is a breach of Gaming & Lotteries Act, 1881, s. 18.—PORTER v. O'CONNOR** (1887), 5 N. Z. L. R. 257, S. C.—**N.Z.****

s. — Pa-ka-poo.]—If there is a scheme by which prizes of money are gained by a mode of chance, the case comes within Gaming & Lotteries Act, 1881, s. 18, & it is immaterial out of what fund the prizes come, or whether the interests of those who take part in it are or are not conflicting.—LEE SUN v. CONOLLY** (1905), 24 N. Z. L. R. 553.—**N.Z.****

t. — Scope of section.]—Gaming & Lotteries Act, 1881, s. 18, applies only to lotteries established or commenced in New Zealand.—HARRISON v. McGRATH** (1903), 22 N. Z. L. R. 676.—**N.Z.****

u. — Summary jurisdiction.—Right of accused to elect.]—Pltf. was charged upon information by deft., under Gaming & Lotteries Act, 1881, s. 81, with unlawfully selling a lottery ticket. After hearing the charge the magistrate announced that pltf. would be convicted, & deft. then stated, though not upon oath, that pltf. had been previously convicted of a similar offence. Pltf. was not asked before the trial commenced or at any time afterwards if he desired to be tried by a jury, & no evidence was given of the alleged previous conviction:—Held:** as pltf. was a person charged with an offence on summary conviction for which he was liable to be imprisoned for a term**

procuring the keeping of a lottery contrary to above Act. The lottery was carried on by the sale of sweetmeats in the form of "turnovers," a certain number of which turnovers contained sweetmeats enclosing coins. Applt. was proved to have supplied such turnovers wholesale, well knowing for what purpose they were to be used, & further that he had urged upon the retail dealer the purchase of his, applt.'s, "turnovers," on the ground that they contained a greater number of money prizes than those supplied elsewhere. The magistrate convicted applt. but stated a case:—*Held*: the conviction was right, on the ground that the supplying of such materials for a lottery, knowing how they were to be used, amounted to aiding & abetting in the keeping of such a lottery, & the evidence that applt. incited the retail dealer in such illegal dealing was evidence to support the conviction.—*BARRATT v. BURDEN* (1893), 63 L. J. M. C. 33; 10 T. L. R. 124; 57 J. P. Jo. 772; 10 R. 602, D. C.

Conspiracy to obtain money from illegal lottery.]

—See CRIMINAL LAW, Vol. XV., p. 985, No. 11,008.

Offences in connection with coupon competitions.]

—See Part VI., Sect. 1, *post*.

SUB-SECT. 2.—PENALTIES.

467. Jurisdiction of justices—Lottery Act, 1787, c. 1.]—(1) Above Act, which takes away the summary jurisdiction of magistrates over offences concerning the lottery, only extends to State lotteries; & does not repeal their power over games of chance or lotteries prohibited by Gaming Act, 1738 (c. 28), s. 2.

(2) The ct. on deciding on the legality of a con-

viction, cannot take cognisance of any fact contained in the *certiorari*, by which the conviction is removed & therefore they refused to quash a conviction on Gaming Act, 1738 (c. 28), directing the penalty to be distributed according to that Act, though it appeared in the *certiorari* that the conviction was made at one of the seven public offices established by 32 Geo. 3 (c. 53), which directs that all penalties levied by the justices under that Act shall be paid to the receivers appointed by that Act.—*R. v. LISTON* (1793), 5 Term Rep. 338; Nolan, 259; 101 E. R. 189.

Annotations:—*As to* (1) *Consd.* *R. v. Tuddenham* (1841), 9 Dowl. 937. *Generally, Mendt.* *R. v. Cashiobury Hundred JJ.* (1823), 3 Dow. & Ry. K. B. 35.

468.

Lottery Act, 1806 (c. 148), s. 59.]—

Proceedings for the recovery of penalties relating to lotteries, contrary to Gaming Act, 1842 (c. 119), must, since above Act, be sued for with name of the A.-G., & not before magistrates, whether the lotteries are private or state lotteries.—*R. v. TUDDENHAM* (1841), 9 Dowl. 937; 10 L. J. M. C. 163; 5 Jur. 871.

Annotation:—*Refd.* *Taylor v. Smetten* (1883), 11 Q. B. D. 207.

469. Penalties incurred by several persons—

Necessity for separate affidavits.]—Where several persons have separately incurred penalties for printing illegal schemes of the lottery, a separate affidavit must be made & filed against each of them, & if they be all joined in one affidavit, the irregularity is not waived by their putting in bail; but the ct. on motion will stay the proceedings against all of them.—*GOODWIN v. PARRY, GOODWIN v. SMITH* (1792), 4 Term Rep. 577; 100 E. R. 1185.

Annotations:—*Refd.* *Holland v. Johnson* (1792), 4 Term Rep. 695. *Mendt.* *Hodson v. Pennell* (1838), 4 M. & W. 373; *Graham v. Ingleby* (1848), 1 Exch. 651.

exceeding three months, & had not been asked, in accordance with Indictable Offences Summary Jurisdiction Amendment Act, 1900, s. 6, whether he desired to be tried by a jury, the conviction must be quashed.—*LEE SUN v. HERBERT* (1906), 26 N. Z. L. R. 370.—N.Z.

b. — Form of conviction.]—Pltf. was convicted upon the information of deft., under Gaming & Lotteries Act, 1881, s. 13, of selling a *pa-k-a-poo* ticket. Deft., who was a detective, & another detective gave evidence that they each bought two *pa-k-a-poo* tickets from pltf. The information did not state in respect of which sale it was laid.—*Held*: the conviction was bad, inasmuch as, four tickets having been sold, it should have stated which ticket & which sale the conviction was in respect of.—*JOE GEE v. WILLIAMS* (No. 2) (1908), 27 N. Z. L. R. 932.—N.Z.

c. Imperial Act, 12 Geo. 2, c. 28 —In force in Canada.]—The Imperial statute against lotteries, 12 Geo. 2, c. 28, held to be in force in this country.—*CRONYN v. WIDDER* (1858), 16 U. C. R. 356.—CAN.

d. — —.]—*CORBY v. McDANIEL* (1858), 16 U. C. R. 378.—CAN.

e. — —.]—*CRONYN v. GRIFITHS* (1859), 18 U. C. R. 396.—CAN.

f. — —.]—*MARSHALL v. PLATT* (1859), 8 C. P. 189.—CAN.

g. Carrying on business by modes of chance.]—Deft. was convicted of

carrying on a business by modes of chance. Agents of deft. made representations to several customers that such was the case, & after such representation had been brought to the knowledge of deft., the agents were still continued in deft.'s employ without being instructed to discontinue such representations.—*Held*: the gravamen of the charge was that of unlawfully carrying on of a business by modes of chance, not that deft. was fraudulently representing that such business was so carried on. It was incumbent upon the Crown to show either actual drawings by lot or some other mode of chance, or to show facts from which it might reasonably be inferred that the selections were so made.—*R. v. LUMGARR* (1911), 20 O. W. R. 563; 3 O. W. N. 309; 19 Can. Crim. Cas. 123.—CAN.

h. Grant of loans by company—On result of horse race.]—The objects of a co. were to grant loans to certain bondholders on approved security at certain rates of interest. The application of a bondholder for a loan was, however, not to be considered unless he drew one of the first three horses in a horse race nominated by the Board of Directors.—*Held*: such an arrangement contravened the Lottery Law.—*LEVY v. COMPANIES REGISTRAR* (1915), T. P. D. 297.—S. AF.

k. Conducting a lottery—Proof that

to wit, *Fafee*, 11
7 of 1890, s. 1:—*Held*: it was essential

to prove that *Fafee* was a lottery & the fact that the ct. had in a previous case decided on the evidence that a certain game called *Fafee* was a lottery did not destroy the necessity for such evidence.—*R. v. ZOZI* (1922), T. P. D. 508.—S. AF.

PART IV. SECT. 5, SUB-SECT. 2.

1. Jurisdiction of justices—Police Offences Act, 1890.]—Justices have jurisdiction under Police Offences Act, 1890, s. 37, to award imprisonment in addition to a fine in the case of conviction as for any second offence, even though the offence of which deft. is convicted is subsequent to the second.

Justices have jurisdiction under Police Offences Act, 1890, s. 39, to order distress in default of payment of the fine imposed & also imprisonment in default of such distress.—*GLEESON v. AH HOUN, GLEESON v. AH YEN* (1896), 22 V. L. R. 156.—AUS.

m. Forfeiture of land sold by lottery—Delay in filing information.]—Pltf. filed his information to forfeit land sold by lottery, contrary to 12 Geo. 2, c. 28, more than five years after the sale complained of.—*Held*: too late, for the case came within 31 Eliz. c. 5, by which he was limited to one year.

Where it appears upon the record in a penal action, that it is brought too late, deft. may take advantage of the objection without having specially pleaded it.—*MEWBURN v. STREET* (1862), 21 U. C. R. 498.—CAN.

Part V.—Races and Racecourses.

SECT. 1.—RACES.

SUB-SECT. 1.—HORSE RACES.

470. Illegal under Gaming Act, 1710 (c. 19).]—*OATES v. COLLINS* (1733), Kel. W. 269; 2 Barn. K. B. 291; 25 E. R. 608.

Annotation :—*Refd.* *Goodburn v. Marley* (1741), 2 Stra. 1159.

471. —.—*GODMAN v. MORLEY* (1741), 7 Mod. Rep. 438; 87 E. R. 1342; *sub nom.* *GOODBURN v. MARLEY*, 2 Stra. 1159.

Annotations :—*Refd.* *Lynall v. Longbothom* (1756), 2 Wils. 36; *Blaxton v. Pye* (1766), 2 Wils. 309; *Shillito v. Theed* (1831), 7 Bing. 405; *Applegarth v. Colley* (1842), 10 M. & W. 723; *Hyams v. Stuart King*, [1908] 2 K. B. 696.

472. —.—*BLAXTON v. PYE* (1766), 2 Wils. 309; 95 E. R. 828.

Annotations :—*Refd.* *Good v. Elliott* (1790), 3 Term Rep. 693; *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484; *Maskell v. Hill*, [1921] 3 K. B. 157.

473. —.—*APPLEGARTH v. COLLEY*, No. 203, *ante*.

474. Legal if run without fraud.]—Declaration for libel. Defts. pleaded not guilty, & several pleas in justification, some alleging in substance the truth of the above imputations; but all the issues were found for pltf. & it did not otherwise appear on the record that pltf. had in fact betted :—*Held* : pltf. was entitled to recover, for there was no illegality in a horse race run without fraud.—*GREVILLE v. CHAPMAN* (1844), 5 Q. B. 731; *Dav. & Mer.* 553; 13 L. J. Q. B. 172; 2 L. T. O. S. 419; 8 Jur. 189; 114 E. R. 1425.

Annotation :—*Mentd.* *Helsham v. Blackwood* (1851), 17 L. T. O. S. 166.

475. Steeplechases—Legal if for more than fifty pounds.]—*EVANS v. PRATT*, No. 484, *See, now*, Gaming Act, 1845 (c. 109).

SUB-SECT. 2.—FOOT RACES.

476. Illegal under Gaming Act, 1710 (c. 19).]—A foot race is a game within above Act. But it must appear that a man was playing at such game, or else a wager above £10, laid upon his side, is not a betting within the Act.—*LYNALL v. LONGBOTHOM* (1756), 2 Wils. 36; 95 E. R. 671.

Annotations :—*Fold.* *Brown v. Berkeley* (1775), 1 Cowp. 281. *Refd.* *Blaxton v. Pye* (1766), 2 Wils. 309; *Good v. Elliott* (1790), 3 Term Rep. 693; *Hodson v. Terrill* (1833), 1 Cr. & M. 797; *Brogden v. Marriott* (1836), 3 Bing. N. C. 88.

477. —.—A foot race is a game within above Act.—*BROWN v. BERKELEY* (1775), 1 Cowp. 281; 98 E. R. 1086.

Annotation :—*Refd.* *Mouls v. Owen*, [1907] 1 K. B. 746.

478. —.—*PARKER v. ALCOCK*, No. 196, *ante*.

479. Legal under Gaming Act, 1845 (c. 109).]—A foot race is a "lawful game, sport, or pastime," within sect. 18 of above Act.

Two persons agreed to run a foot race & ach of them deposited £10 with a third person,

the whole £20 to be paid over to the winner :—*Held* : the loser could not recover back his deposit from the stakeholder.—*BATTY v. MARRIOTT* (1848), 5 C. B. 818; 17 L. J. C. P. 215; 11 L. T. O. S. 68; 12 J. P. 313; 12 Jur. 462; 136 E. R. 1101.

Annotations :—*Distd.* *Parsons v. Alexander* (1855), 5 E. & B. 263; *Coombes v. Dibble* 1866, L. R. 1 Exch. 248; *Batson v. Newman* (1876), 1 C. P. D. 573. *Overd.* *Diggle v. Higgs* (1877), 2 Ex. D. 422. *Consd.* *Trimble v. Hill* (1879), 5 App. Cas. 342. *Mentd.* *Hunt v. Fripp*, [1898] 1 Ch. 675.

SUB-SECT. 3.—OTHER RACES.

480. Coursing—Illegal under Gaming Act, 1710 (c. 19).]—*DAINTREE v. HUTCHINSON*, No. 47, *ante*.

SECT. 2.—RACECOURSES.

Customary rights in connection with races & racecourses.]—*See* CUSTOMS, Vol. XII., p. 17, Nos. 166–169.

Rating of racecourses.]—*See* RATES & RATING.

Licensing of racecourses.]—*See* THEATRES.

SECT. 3.—POWERS AND DUTIES OF STEWARDS.

481. Finality of [decision]—Decision of one of two stewards.]—*MARRYAT v. BRODERICK*, No. 98, *ante*.

482. Absence of final decision.]—A race was run subject to certain conditions, one of which was, that the riders should be "gentlemen, farmers, or tradesmen, being persons never having ridden as regular jockeys or paid riders"; another, that the decision of the committee on any dispute that might arise should be final. At the trial it appeared that the rider of pltf.'s horse, which came first to the winning chair, had been in the habit of riding at races, sometimes receiving his expenses, but never having been paid for his services; & that pltf.'s right to the stakes was disputed on the ground of an alleged cross, on the subject of which the committee had heard evidence, & intimated an opinion adverse to pltf., but had come to no final decision :—*Held* : the rider of pltf.'s horse was not disqualified, nor pltf. under the circumstances disentitled to maintain the action.

Semble : the pendency of the matter before the committee, & the absence of a decision thereon by them, if an answer to pltf.'s right to recover upon the special contract, should have been pleaded specially.—*WALMSLEY v. MATHEWS* (1841), 3 Man. & G. 133; 3 Scott, N. R. 584; 5 Jur. 508; 133 E. R. 1087.

483. —.—An action will not lie to recover the stakes of a race, where stewards are

appointed whose decision is to be final, unless the stewards have determined that *pltf.'s* horse is the winner. But, if it in any way becomes impossible for the stewards to determine the fact, the contributors to the stakes may recover back their money as on a condition that has failed.—*BROWN v. OVERBURY* (1856), 11 Exch. 715; 25 L. J. Ex. 109; 20 J. P. 454; 4 W. R. 252; 150 E. R. 1018.

Annotations.—*Apld.* *Scott v. Avery* (1856), 5 H. L. Cas. 811. *Consd.* *Parr v. Witheringham* (1859), 1 E. & E. 394. *Expld.* *Mills v. Bayley* (1863), 2 H. & C. 36. *Distd.* *Sadler v. Smith* (1869), L. R. 4 Q. B. 214. *Refd.* *Braunstein v. Accidental Death Insee.* (1861), 1 B. & S. 782; *Dines v. Wolfe* (1869), L. R. 2 P. C. 280; *Spackman v. Plumstead Board of Works* (1885), 10 App. Cas. 229.

484. —]—(1) A steeplechase for £50 or upwards is a lawful race.

(2) In a memorandum respecting a race, the race was described as “four miles across a country”:—*Held*: evidence was admissible to show that “across a country” means that the riders are to go over all obstructions, & are not at liberty to avail themselves of an open gate.

(3) Where, in such a memorandum, an umpire is appointed, & it is stipulated that “the decision of the umpire is to be final,” it is not competent to either party to dispute the umpire’s decision.—*EVANS v. PRATT* (1842), 3 Man. & G. 759; 1 Dowl. N. S. 505; 4 Scott, N. R. 378; 11 L. J. C. P. 87; 6 Jur. 152; 133 E. R. 1344.

Annotations.—*As to* (1) *Consd.* *Challand v. Bray* (1842), 11 L. J. Q. B. 204. *Refd.* *Bentinel v. Connop* (1844), 5 Q. B. 693; *Coombs v. Dibble* (1866), 14 L. T. 415. *Plf. as to* (3) *Refd.* *Carr v. Martinson* (1859), 1 E. & E. 456; *Sadler v. Smith* (1869), L. R. 4 Q. B. 214.

485. — Without hearing the parties.]—*BENBOW v. JONES*, No. 120, *ante*.

486. — One umpire only appointed.]—Where one of the conditions in a shooting match is that umpires shall be appointed, & one umpire only is appointed in the presence of all the members taking part in the match, & without any objection on their part, & he gives a decision as to the winner of the match, it is to be left to the jury to say whether an umpire was appointed by the parties, & whether the parties did not thereby mean that his decision was to be final. The jury finding these points in the affirmative, cannot, in the absence of fraud, impeach the decision of the umpire. This was an action arising out of a shooting match, in which the subscribers paid 10s. each & the prize was a pig. Deft. was the person who had put up the pig to be shot for, & *pltf.* had been declared by the umpire to have been the winner, but *deft.* had delivered the pig to E. who claimed to be the winner, because the last shot fired by *pltf.* was not a fair shot. Deft. proposed to tender evidence to show that the shot was in fact an unfair one, & that therefore, E. was the winner.

I consider that evidence is quite inadmissible here. The meaning of the contract I take to be that J. should act as umpire, & that as umpire his decision should be final between the parties. I shall put these questions to the jury, & if they agree with me the verdict must be for *pltf.* (*ERLE, J.*).—*BRIND v. ASKILL* (1846), 6 L. T. O. S. 480, N. P.

PART V. SECT. 3.

484 i. *Finality of decision.*]—*NEWCOMEN v. LYNCH* (1876), L. R. 10 C. L. 948 —15

o. *Limit of powers*—*Questions arising on course.*]—The powers possessed by stewards of a horse-race are limited, & their limit is the decision of all questions which may arise on

487. — One steward financially interested in result.]—One of the conditions of a race was that “all disputes should be settled by the stewards, whose decision should be final.” There were four stewards, & a dispute having arisen as to whether *pltf.'s* horse or *deft.'s* mare was the winner, three of the stewards voted in favour of *pltf.'s* horse. One of the three had betted against *deft.'s* mare:—*Held*: the steward was not disqualified from acting by reason of his pecuniary interest in the event of the race; & even assuming that he was, that did not annul the decision of the other stewards.—*ELLIS v. HOPPER* (1858), 3 H. & N. 760; 28 L. J. Ex. 1, 32 L. T. O. S. 77; 22 J. P. 724; 4 Jur. N. S. 1025; 7 W. R. 15; 157 E. R. 677.

Annotations.—*Apprd.* *Parr v. Witheringham* (1859), 1 E. & E. 394. *Refd.* *Dines v. Wolfe* (1869), L. R. 2 P. C. 280. *Mentd.* *Carr v. Martinson* (1859), 1 E. & E. 456.

488. — Decision by majority.]—Stewards of horse races are not in the strict legal position of judges or arbitrators; & where there are more than one, it is not necessary, to make the decision valid, that it should have been arrived at jointly. It need only be fair & final. The three stewards of a horse race, as to which their decision was to be final, met & discussed an objection raised to the winner by a competitor. No actual decision was then arrived at; & no other meeting of the three was held. Afterwards two of the three stewards made known their decision; & the third, upon hearing it, made known his dissent from it:—*Held*: the decision of the two was valid.—*PARR v. WINTERINGHAM* (1859), 1 E. & E. 394; 28 L. J. Q. B. 123; 32 L. T. O. S. 253; 5 Jur. N. S. 787; 7 W. R. 288; 120 E. R. 957.

Annotations.—*Refd.* *Carr v. Martinson* (1859), 28 L. J. Q. B. 126; *Dines v. Wolfe* (1869), L. R. 2 P. C. 280.

489. — Power to reopen decision.]—*Pltf.'s* horse ran in a race, subject to these conditions: that he had been fairly hunted with certain hounds during the season; that he had been a certain time in possession of his owner; & the stewards were to disqualify any horse that they did not consider to have been hunted in a genuine & *bonâ fide* manner, “& their decision in all cases of dispute will be final.” The horse came in first, & his owner claimed the stakes. On objection that the horse had not been fairly hunted, the stewards at once went into the question, & held that he had, leaving the question whether *pltf.* was the owner within the conditions for future decision. They subsequently decided that he was such owner, but, at the same time, disqualified the horse as not having been fairly hunted, because he had not been ridden by his owner:—*Held*: the first decision was inchoate only, & the stewards could re-open the question, & the ultimate decision, disqualifying the horse, was by the conditions final.—*SMITH v. LITTLEDALE* (1866), 15 W. R. 69.

490. — Jockey Club rules.]—In an action for the recovery of the amount of the stake deposited by one of the parties to a horse race, to abide the event of the race, the jury found for *pltf.* on the ground that the race, though run under the auspices of the Australian Jockey Club, was not run under the Jockey Club rules as provided by the agreement; the ct. below granted a new trial on the ground that the race was properly

the ground between horses actually entered, & affecting the manner in which the races are run; but do not include the power to enter fresh horses, or to alter the fundamental conditions

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run under the agreement:—*Held*: on the construction of the agreement & the rules of the Jockey Club which it referred to, that the finding of the jury was wrong, & a new trial was properly granted.—*DINES v. WOLFE* (1869), L. R. 2 P. C. 280; 5 Moo. P. C. C. N. S. 382; 20 L. T. 251; 16 E. R. 559, P. C.

491. — Objection not taken before stewards.]

—A race was run under the Newmarket rules, one of which is that "no complaints can be entertained after the conclusion of the race meeting" except charges of fraud, etc. A complaint was made as to E. being entitled to the stakes in a race won by his horse. The complaint was not, however, made until three days after the race, but no objection was made on this ground when the complaint was heard by the committee. The committee having decided in favour of S., the stakeholder E. brought an action to recover the stakes:—*Held*: the objection as to time not having been taken before the committee, they had jurisdiction to entertain the complaint, & it was too late to raise such objection in the action.—*EVANS v. SUMMERS* (1871), 35 J. P. Jo. 761.

492. When entitled to decide.]—*CARE v. MARTINSON*, No. 85, *ante*.

493. —.]—Pltf. deposited a stake with deft. with a view to a race between pltf. & K., upon the terms "that the race was to be a right away sculler's race, & the decision of the referee to be final." In such races, the start is made by the men themselves, but if they fail to start through default of either or both, the referee has power to interfere. There was a default in the start, & the referee, who was stationed at some distance from the starting-post, ordered that K. should inform pltf. that if he did not start K. was to row over the course without him. K. rowed over the course without having communicated this order to pltf. or giving him any opportunity of starting, & the referee, without inquiry or communication with pltf. ordered the stakes to be paid to K. An action having been brought by pltf. to recover his deposit:—*Held*: as the order of the referee was conditional upon its being communicated to Pltf. the order not having been communicated, there never was such a start or race as was contemplated; the referee's jurisdiction to award the stakes, therefore, did not attach, & his decision was not final, & pltf. was entitled to recover.—*SADLER v. SMITH* (1869), L. R. 5 Q. B. 40; 10 B. & S. 17; 39 L. J. Q. B. 17; 21 L. T. 502; 34 J. P. 212; 18 W. R. 148, Ex. Ch.

494. Failure to perform duties.]—A declara-

tion stated that pltf. was owner of a horse, duly entered to run for a race, & which was the winner of the said race; that defts. had accepted the office of & became stewards of the said race, & agreed with the owners of the horses to perform their duties as such stewards; that it was their duty, as such stewards, to nominate a proper person to adjudge which was the winning horse, etc.; but that through their carelessness & negligence in not performing their duties as such stewards, & not appointing a proper party to adjudge the winners, etc., pltf.'s horse was not adjudged winner, & he lost the stakes:—*Held*: bad on demurrer, as not disclosing any liability to pltf.—*BALFE v. WEST* (1853), 13 C. B. 466; 1 C. L. R. 225; 22 L. J. C. P. 175; 21 L. T. O. S. 90; 1 W. R. 335; 138 E. R. 1281.

Annotation:—*Refd.* *Cooper v. Shuttleworth* (1856), 25 L. J. Ex. 114.

495. Right to eject ticketholder from inclosure.]

—Lord E. was steward of D. races; tickets of admission to the grand stand were issued with his sanction & sold for one guinea each, entitling the holders to come into the stand & the inclosure round it during the races. Pltf. bought one of the tickets & was in the inclosure during the races. Deft. by the order of Lord E. desired him to leave it, & on his refusing to do so, deft. after a reasonable time had elapsed for his quitting it put him out, using no unnecessary violence, but not returning the guinea:—*Held*: the jury were properly directed to find the issue for deft.—*WOOD v. LEADBITTER* (1845), 13 M. & W. 838; 14 L. J. Ex. 161; 4 L. T. O. S. 433; 9 J. P. 312; 9 Jur. 187; 153 E. R. 351.

Annotations:—*Consd.* *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334. *Expld.* *Francis v. Cockrell* (1870), 22 L. T. 203; *Hurst v. Picturo Theatres*, [1915] 1 K. B. 1. *Refd.* *Adams v. Andrews* (1850), 15 Q. B. 284; *Taplin v. Florence* (1851), 10 C. B. 744; *Davies v. Marshall* (1861), 10 C. B. N. S. 697; *Wells v. Kingston-upon-Hull Corpn.* (1875), L. R. 10 C. P. 402; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Butler v. M. S. & L. Ity.* (1888), 21 Q. B. D. 207; *Kerrison v. Smith*, [1897] 2 Q. B. 445; *Lowe v. Adams*, [1901] 2 Ch. 598; *Said v. Butt*, [1920] 3 K. B. 497. *Mentd.* *Langford v. Brighton, Lewes, & Hastings Ity.* (1845), 4 Ry. & Can. Cas. 69; *Mayfield v. Robinson* (1845), 7 Q. B. 486; *Thomas v. Fredericks* (1847), 11 Jur. 942; *Washbourne v. Burrows* (1847), 16 L. J. Ex. 266; *Hewitt v. Isham* (1851), 7 Exch. 77; *Roffey v. Henderson* (1851), 17 Q. B. 574; *Electric Telegraph Co. v. Salford Overseers* (1855), 11 Exch. 181; *Frogley v. Lovelace* (1859), John. 333; *Wright v. Stavert* (1860), 2 E. & E. 721; *Evans v. Robins* (1862), 1 H. & C. 302; *Hill v. Tupper* (1863), 32 L. J. Ex. 217; *Wakley v. Froggatt* (1863), 2 H. & C. 669; *Vaughan v. Hampson* (1875), 33 L. T. 15; *Smith v. Lambeth Assmt. Com.* (1882), 52 L. J. M. C. 1; *Ward v. Livesey* (1887), 5 R. P. C. 102; *Hall v. Metcalfe*, [1892] 1 Q. B. 208; *Aldin v. Latimer*, *Clark, Muirhead*, [1894] 2 Ch. 437; *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5; *L. C. C. v. Dundas*, [1904] P. 1; *Warr v. L. C. C.* (1904), 73 L. J. K. B. 362; *Jones v. Tankerville*, [1909] 2 Ch. 440.

Licences generally, see LANDLORD & TENANT.

of a race.—*BAKER v. WARREN* (1867), 1 S. A. L. R. 92.—*AUS.*

p. —.]—*Held*: a rule of a coursing meeting, that all disputes

should be settled by the secretary & stewards, applied only to differences arising on the course, & did not import an agreement to submit to their decision a dispute regarding the

patrimonial interest in the prize.—*GRAHAM v. POLLOK* (1848), 10 Dunt. (Ct. of Sess.) 646; 20 Sc. Jur. 200.—*SCOT.*

Part VI.—Competitions.

SECT. 1.—COUPON COMPETITIONS.

496. No money received with coupon.]—Resp. a newspaper proprietor, published weekly a "Racing Record," which contained information as to races which had been recently run, & as to those which were about to take place; at the end of the book was a coupon, which the purchaser of the book might cut off, & after writing upon it the names of the horses which he thought would win the six races mentioned on it might send to resp.'s office; resp. offered prizes to the persons who selected six, five, or four winners, the prizes varying in amount according to the number of winners selected. The "Racing Records" were sold principally through newsvendors or stationers, & a few copies only were sold by resp. over the counter at his office:—*Held*: resp. had not committed any offence under either Betting Act or Lottery Act.—*CAMINADA v. HULTON* (1891), 60 L. J. M. C. 116; 64 L. T. 572; 55 J. P. 727; 17 Cox, C. C. 307; *sub nom.* *R. v. HULTON*, 39 W. R. 540; 7 T. L. R. 491, D. C.

Annotations:—*Consd.* *Stoddart v. Sagar*, *Sagar v. Stoddart*, [1895] 2 Q. B. 474. *Distd.* *Hall v. McWilliam* (1901), 85 L. T. 239; *R. v. Stoddart*, [1901] 1 K. B. 177. *Consd.* *Hawke v. Hulton* (1905), 22 T. L. R. 169. *Refd.* *Hall v. Cox*, [1899] 1 Q. B. 198.

497. Money received with coupon—Betting Act, 1823 (c. 60), s. 41.]—Defts. published a newspaper containing an advertisement of a "Coupon Competition," which was to be carried out by means of coupons to be filled up by purchasers of the paper with the names of the horses selected by the purchasers as likely to come in first, second, third, & fourth in a race. For every coupon filled up after the first purchaser paid a penny, & defts. promised a prize of £100 for naming the first four horses correctly:—*Held*: the transaction did not amount to either a lottery or betting within the Acts [for the suppression of lotteries], & defts. were not liable to be convicted.—*STODDART v. SAGAR*, *SAGAR v. STODDART*, [1895] 2 Q. B. 474; 64 L. J. M. C. 234; 73 L. T. 215; 59 J. P. 598; 44 W. R. 287; 11 T. L. R. 568; 39 Sol. Jo. 710; 18 Cox, C. C. 165; 15 R. 579, D. C.

Annotations:—*Distd.* *R. v. Stoddart*, [1901] 1 K. B. 177. *Consd.* *Hawke v. Hulton* (1905), 22 T. L. R. 169. *Refd.* *Hall v. Cox*, [1899] 1 Q. B. 198.

498. — Betting Act, 1853 (c. 119), ss. 1, 5.]—Deft. was the occupier of an office & the proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice

of what was called a "coupon competition"—that is to say, of a promise by deft. to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse race then shortly about to be run, & should write their guesses upon certain forms called "coupons," which were issued with each number of the newspaper, & should return the coupons so filled up to deft.'s office, together with the sum of one penny in respect of each guess made. A large number of persons every week sent in to deft.'s office coupons filled up as aforesaid, accompanied by remittances of money. Deft. was upon these facts convicted under above Act of having unlawfully kept the office for the purpose of money being received by her as the consideration for undertaking to pay thereafter money on events relating to horse races:—*Held*: the conviction was right.—*R. v. STODDART*, [1901] 1 K. B. 177; 70 L. J. Q. B. 189; 83 L. T. 538; 64 J. P. 774; 49 W. R. 173; 17 T. L. R. 55; 45 Sol. Jo. 61; 19 Cox, C. C. 587, C. R.

Annotations:—*Consd.* *Stoddart v. Argus Printing Co.* (1901), 70 L. J. K. B. 711; *Davis v. Stoddart* (1902), 50 W. R. 397. *Follid.* *Hawke v. Mackenzie* (Nos. 1 & 2), [1902] 2 K. B. 225. *Apld.* *Mackenzie v. Hawke*, [1902] 2 K. B. 216. *Consd.* *Hawke v. Hulton* (1905), 22 T. L. R. 169. *Refd.* *Lennox v. Stoddart*, *Davis v. Stoddart*, [1902] 2 K. B. 21; *Stoddart v. Hawke*, [1902] 1 K. B. 353; *Sago v. Eicholz*, [1919] 2 K. B. 171.

499. — —.]—Gaming Act, 1892 (c. 9), s. 1, which provides that no action shall be brought or maintained to recover money paid in respect of any contract or agreement rendered null & void by Gaming Act, 1845 (c. 109), does not impliedly repeal Betting Act, 1853 (c. 119), s. 5, which provides that any money received by any person, being the owner or occupier of a betting house, as a deposit on a bet shall be deemed to have been received to or for the use of the person from whom the same was received, & such money may be recovered in any ct. of competent jurisdiction; & therefore a person who has paid money in a coupon competition in respect of horse races may, under Betting Act, 1853 (c. 119), s. 5, maintain an action for the recovery of such money.—*DAVIS v. STODDART* (1902), 50 W. R. 397; 18 T. L. R. 260; 46 Sol. Jo. 267; *affd. sub nom.* *LENNOX v. STODDART*, *DAVIS v. STODDART*, [1902] 2 K. B. 21, 33, C. A.

Annotation:—*Refd.* *R. v. Thompson & Thompson* (1924), 18 Cr. App. Rep. 31.

PART VI. SECT. 1.

q. Money received with coupon—*Criminal Code*, s. 227.]—A newspaper advertised & solicited money to be sent for the purpose of paying said money, less expenses, to the winners in a football competition conducted by the newspaper under rules laid down by it. The expenses of organising & conducting the competition were to be paid out of the moneys sent in. The advertisement contained a coupon showing the names of the competing teams. These coupons were to be filled up & sent to the contest editor, accompanied by twenty-five cents per coupon. The prize money was exclusively made up of the contributions, less expenses. The winners of the competition were those who forecasted as indicated by the marks on their coupons the largest number of winning teams in games to be played on a future date. The rules provided that

be withdrawn; & each person sending in a coupon was required to sign the undertaking at the foot of it agreeing to be bound by the published rules & to accept the judges' decision as final & binding:—*Held*: these were sufficient evidence to establish the keeping of a common betting-house.—*R. v. WOODWARD & WILCOCKS*, [1922] 2 W. W. R. 818; 69 D. L. R. 552; 38 Can. Crim. Cas. 154; 32 Man. L. R. 148.—*CAN.*

r. Guessing or foretelling result of contest—Football.]—Accused published a newspaper in which prizes were offered to persons subscribing to the paper & paying the subscription & sending in on coupons printed in the paper guesses as to certain football games. On a certain date games were to be played between certain sets of teams, each two of which playing against each other on that day had also played against each other in a similar series a year before. The subscriber was asked to guess or foretell whether one of the contesting teams in each set would win the same or a more or

less number of goals, in the game to be played, than it did in its game against the same opposing team in the series of the previous year:—*Held*: such a guess or foretelling did not come within the meaning of the words "guess or foretell the result of any contest" as used in *Criminal Code* 235 (1) (g); although what was done by accused came within the spirit of the enactment, that is not sufficient; it must also come within the fair meaning of the letter of the words used in the prohibitive clause. "The result of any contest" means the result about which the contesting parties are struggling, the result which each side is aiming to achieve.—*R. v. PROVERBS*, [1923] 3 D. L. R. 384; 40 Can. Crim. Cas. 26; [1923] 2 W. W. R. 622.—*CAN.*

s. — — —.]—*R. v. MULLHOLLAND*, [1923] 2 W. W. R. 594.—*CAN.*

t. — — —.]—The office of a newspaper becomes a common betting-house, where the proprietor of the

Sect. 1.—Coupon competitions. Sect. 2.]

500. ———.]—Applt. was the occupier of an office in London & the proprietor of a newspaper, called *Football Chat*, published weekly at that office. T., the occupier of an office at Middelburg in Holland, conducted a "football coupon competition," that is to say, a scheme in which there was a promise by T. to pay a sum of money to such persons as should correctly guess the results of certain football matches, & should write their guesses on certain forms called coupons. The competition was advertised week by week in applt.'s newspaper, & the coupons were printed as part of the advertisement & could be procured at applt.'s office; they were, when filled up, to be cut out of the paper & sent with the entrance money to "*Football Chat*, Middelburg, Holland"; the names of the winners & the results of the competitions were also advertised in applt.'s newspaper. Applt. received for the insertion of these advertisements a sum considerably more than the charge for ordinary advertisements, but he had no other interest in the competition, nor had T. any interest in the newspaper. Upon the hearing of summonses against applt. under above Act, for (a) unlawfully permitting the office to be used by T. for the purpose of money being received by T. as the consideration for an undertaking to pay money on events or contingencies relating to the game of football, & (b) unlawfully keeping the office for the purpose of money being received by or on behalf of T. for the like consideration, a magistrate found that T., by permission of applt., used applt.'s office for the purpose of money being received by him as the consideration for his promise to pay money on the result of football matches, & that applt. opened & kept the office for the purpose of the user by T.; he accordingly convicted applt.:—*Held*: there was evidence on which the magistrate could properly find that the office was used as an essential part of the machinery for receiving money for an illegal purpose, & the conviction was right.—*MACKENZIE v. HAWKE*, [1902] 2 K. B. 216; 71 L. J. K. B. 561; 87 L. T. 122; 66 J. P. 696; 51 W. R. 233; 18 T. L. R. 550; 46 Sol. Jo. 501; 20 Cox, C. C. 305, D. C.

Annotation:—*Reid*. *Hawke v. Mackenzie* (Nos. 1 & 2), [1902] 2 K. B. 225.

501. ———.]—*HAWKE v. HULTON & Co.* (1905), 22 T. L. R. 169; 50 Sol. Jo. 158, D. C.

newspaper conducts, through the medium of his publication, a competition amongst his subscribers asking them to state whether or not the home teams in football matches will make as many goals as they did in the preceding year & offering a percentage of something as prizes to the successful competitors, & the evidence shows that the prizes were paid out of the money received from the competitors.—*R. v. HILL*, [1923] 3 W. W. R. 653; 33 Man. L. R. 293.—*CAN.*

a. ———.]—Accused advertised in a newspaper, offering numerous prizes of money to persons subscribing to the paper & paying the subscriptions. Each subscription entitled the subscriber to coupons varying in number with the length of time for which the paper was subscribed for. The coupons were to be filled in with guesses as to whether the "home team" in each game of a number to be played on a certain date would score more or less or the same as the number of runs in the average baseball score, namely, four:—*Held*: the advertisement came within Criminal Code, s. 235 (1) (g),

& accused was properly convicted.—*R. v. LUTES*, [1923] 3 W. W. R. 766; 41 Can. Crim. Cas. 181; 17 S. C. R. 402.—*CAN.*

b. ———.]—*HART v. HAY, NISBET & Co., LTD.* (1900), 2 F. (Ct. of Sess.) 39; 37 Sc. L. R. 653; 7 S. L. T. 426, J.—*SCOT.*

c. ———.]—*LENG & Co., LTD. v. MACKINTOSH*, [1914] S. C. (J.) 77.—*SCOT.*

d. ———.]—*STRANG v. BROWN*, [1923] S. C. (J.) 74.—*SCOT.*

e. *Placing coupons in packets of tea* —Prizes for largest number of coupons submitted—*Whether disposal of property by lottery or chance*.—Appls. were grocers, & by way of pushing the sale of their teas, placed a coupon in each packet sold, & offered prizes to those sending in to them the largest numbers of these coupons on or before certain quarterly days:—*Held*: as the collection of the coupons involved the expenditure of money, time, or trouble, & the number sent in by any competitor for a given competition de-

SECT. 2.—MISSING WORD, ETC., COMPETITIONS.

502. Result depending on chance — Missing word competition.—*Deft.*, who was the proprietor of a newspaper, carried on in connection therewith a competition under the following conditions. He published in his paper a paragraph omitting the last word. In same paper he printed a coupon with a direction that persons wishing to enter the competition must cut out the coupon, fill in the word missing from the paragraph, together with their names & addresses, & send it, with a postal order for 1s., to the office of the paper. It was further stated in the paper that the missing word was in the hands of a chartered accountant, enclosed in a sealed envelope; that his statement with regard to it would appear, with the result of the competition, in a subsequent issue of the paper; & that the whole of the money received in entrance fees would be divided equally amongst those competitors who filled in the missing word correctly. In an action by the successful competitors against *deft.* & the unsuccessful competitors, seeking administration of the trusts of the moneys in the hands of *deft.* for the purposes of the competition, & distribution among the persons entitled thereto:—*Held*: (1) that the competition constituted a lottery within the meaning of Gaming Act, 1802 (c. 119), & was illegal; (2) so far as the money in the hands of *deft.* was impressed with any trust, it was one which had arisen out of an illegal transaction, & the ct. would not render any assistance in its administration; & *semble*: (3) notwithstanding the illegality of the competition the competitors had a legal right, enforceable by action at law, to the return of their contributions at all events, provided that they gave notice of their claim before the money had been distributed by *deft.*—*BARCLAY v. PEARSON*, [1893] 2 Ch. 154; 62 L. J. Ch. 636; 42 W. R. 74; 3 R. 388; *sub nom.* *BARCLAY v. PEARSON*, *OPPLER v. PEARSON*, 68 L. T. 709; 9 T. L. R. 269; 37 Sol. Jo. 268.

Annotations:—As to (1) *Appld. Smith's Advertising Agency v. Leeds Laboratory Co.* (1910), 26 T. L. R. 335. *Reid*. *Hall v. Cox* (1898), 47 W. R. 161; *Blyth v. Hulton* (1908), 72 J. P. 401; *Re International Securities Corp.* (1908), 99 L. T. 581; *Scott v. Public Prosecutions Director*, [1914] 2 K. B. 868. As to (3) *Reid*. *Hermann v. Charlesworth*, [1905] 2 K. B. 123; *Blyth v. Hulton* (1908), 72 J. P. 401.

503. Limerick competition.—The owners of a journal announced in an issue of the journal a competition in which they offered a prize

pending upon his judgment as to the number necessary to secure a prize, the distribution of the prizes did not depend entirely upon chance, & did not, therefore, amount to an offence against Gaming & Lotteries Act, 1881, s. 16.—*WARDELL v. McGRATH* (1900), 19 N. Z. L. R. 114.—*N.Z.*

PART VI. SECT. 2.

f. *Result depending on chance—Missing word competition—Jumbles competition.*—Accused promoted two competitions, in one of which a missing word competition, six words were omitted from a sentence, & the correct solution was placed in a sealed envelope by accused. Competitors had to pay a fee for an attempt. First, second, & third & consolation prizes were advertised; in the event of a tie the prize was to be divided, & in the event of no correct solution being sent prizes were to be awarded to other solutions according to merit. In the other, the jumbles competition, accused took five words of five letters from a dictionary (a record of which was placed in a sealed envelope), cut up

£300 for the best last line of a limerick. They also offered a second prize of £100, two more of £50 each, & stated that they would "send sovereigns to a hundred other readers by way of consolation." The conditions, so far as material, were as follows: "With each entry a postal order for 6d. must be sent. . . . Out out the printed lines given in the unfinished limerick coupon below. Then write clearly in ink the line that suggests itself as being the smartest & most appropriate completion of the limerick. . . . Entries must reach this office not later than the morning, Wednesday, Dec. 25. We can enter into no correspondence whatever appertaining to the contest, & the editor's decision must in all cases be accepted as final. The names of the winners in this competition will be announced in the issue of *Ideas* on sale on Jan. 3, 1908, dated Jan. 9, & in the *Sunday Chronicle* of Jan. 5." Each coupon had printed upon it the following condition to be signed by the competitor: "I agree to abide by the decision published in *Ideas* & the *Sunday Chronicle*, & to accept it as final; & I enter only on this understanding, & I agree to the conditions printed on this page." The announcement stated further: "We would emphasise the fact that every coupon is carefully examined by a competent staff, & that every effort is judged entirely on its merits." Pltf. claimed to have sent in a last line identical with that which was announced as the winning line, & in respect of which the prize of £300 was awarded to another competitor. In an action brought by pltf. to recover the £300:—*Held*: the competition was a lottery & the action was not maintainable.—*BLYTH v. HULTON & Co., LTD.* (1908), 72 J. P. 401; 24 T. L. R. 719; 52 Sol. Jo. 599, C. A.

Annotations:—*Fold*. Smith's Advertising Agency v. Leeds Laboratory Co. (1910), 26 T. L. R. 335. *Distd.* Scott v. Public Prosecutions Director, [1914] 2 K. B. 868. *Consd.* Minty v. Sylvester (1915), 84 L. J. K. B. 1982. *Refd.* *Re* International Securities Corp'n. (1908), 99 L. T. 581.

504. ———.]—Defts. employed pltf's. in connection with advertising the conditions of certain "Limerick" competitions, & also the terms of a letter-writing competition in which the public were invited to complete a letter containing blank spaces by adding the missing words. In addition to prizes offered for the best lines, every competitor sending in a line by a certain date was to receive a prize worth a guinea. Consolation prizes were also to be awarded. It was

the words & jumbled the letters together. A prize was given for the correct solution, or nearest, & five consolation prizes:—*Held*: as competitors were asked to guess the exact words, arbitrarily chosen by the promoters, or words most appropriate to such words, the determining factor in the competition, substantially speaking, was chance, & the competitions were therefore lotteries.—*R. v. JONES* (1923), 8 D. L. 97.—*S. AF.*

g. Result depending on skill—Limerick competition.]—Resp. kept a tobacconist's shop at which applt. upon payment of 1s. obtained two cigars & a ticket entitling him to compete in a limerick competition by supplying the last line of the limerick. The ticket stated that the competition was entered into by the holder thereof upon the distinct understanding & agreement that the decision of the committee appointed by resp. should be final & that £500 should be distributed. A judge was appointed who examined

all the lines sent in by the competitors; prizes were awarded in accordance with his decision & in making his award he considered the appropriateness of the line, the metre & the rhyme:—*Held*: this was not a lottery.—*SOBYE v. LEVY* (1909), 9 C. L. R. 496.—*AUS.*

h. ——— Guessing competition.]—Doft. placed in his shop window a globular glass jar; securely sealed, containing a number of buttons of different sizes. He offered to the person who should guess the number nearest to the number of buttons in the jar a pony & cart, which he exhibited in his window, stipulating that the successful one should buy a certain amount of his goods:—*Held*: as the approximation of the number of buttons depended upon the exercise of judgment, observation, & mental effort, this was not a "mode of chance" for the disposal of property.—*R. v. JAMESON* (1884), 7 O. R. 149.—*CAN.*

stated in the conditions that every line would be judged entirely on its merits. Pltfs. having arranged & paid for the insertion of these advertisements sued defts. to recover the money they had so paid, & their commission:—*Held*: the competitions advertised were lotteries; in advertising them pltfs. committed an illegal act; & therefore, pltfs. were not entitled to recover.—*SMITH'S ADVERTISING AGENCY v. LEEDS LABORATORY CO.* (1910), 26 T. L. R. 335; 54 Sol. Jo. 341, C. A.

Annotation:—*Consd.* Scott v. Public Prosecutions Director, [1914] 2 K. B. 868.

505. *Result depending on skill.*]—Doft. published a newspaper containing an offer of a money prize for a correct prediction of the number of births & deaths in London during a named week. Competitors, who were not limited to one prediction, were to fill in the predicted numbers on coupons which were published in the issue of the paper which contained the offer:—*Held*: the competition, not being one the result of which depended entirely on chance was not a lottery.—*HALL v. COX*, [1899] 1 Q. B. 198; 68 L. J. Q. B. 107; 79 L. T. 653; 47 W. R. 161; 15 T. L. R. 82; 43 Sol. Jo. 95, C. A.

Annotation:—*Fold*. Scott v. Public Prosecutions Director, [1914] 2 K. B. 868.

506. ———.]—The proprietors of a newspaper published therein an advertisement of a competition for money prizes, the terms of which were that each competitor was to select one of a number of given words & compose a short sentence which defined or illustrated the word selected, the initial letter of each word in the sentence to be a letter occurring in the selected word; that all the sentences reaching the editor of the newspaper should receive careful consideration; & that the decision of the editor as to the prize-winners should be final:—*Held*: as the competition was one involving some degree of skill on the part of the competitors, & as there was no evidence that the number of competitors was so large as to make it impossible for the sentences to be considered on their merits, the competition was not one the result of which depended entirely on chance, & that it was, therefore, not a lottery within Lotteries Act, 1823, s. 41.—*SCOTT v. PUBLIC PROSECUTIONS DIRECTOR*, [1914] 2 K. B. 868; 83 L. J. K. B. 1025; 111 L. T. 59; 78 J. P. 267; 30 T. L. R. 396; 24 Cox, C. C. 104, D. C.

Annotation:—*Refd.* Minty v. Sylvester (1915), 84 L. J. K. B. 1982.

k. ———.]—*R. v. DODDS* (1884), 4 O. R. 390.—*CAN.*

l. ———.]—*DUNHAM v. ST. CROIX SOAP MANUFACTURING CO.* (1897), 34 N. B. R. 243.—*CAN.*

m. ——— Manipulation of machine.]—*DI CARLO v. M'INTYRE*, [1914] S. C. (J.) 60.—*SCOT.*

n. ——— Picture title competition.]—*D.* inserted an advertisement in a newspaper containing a picture & offered 1st, 2nd, & 3rd, & 50 consolation prizes for the best title to the picture. Competitors were required to send 1s. with each answer. The sole & final decision in the competition rested with a certain B. The prizes were awarded by B. according to his judgment, *bona fide* given, upon the merit of the answers, based upon their originality or wit:—*Held*: this was a competition dependent upon skill & not chance, & did not constitute a lottery within Law 7 of 1890.—*R. v. BERTRAM DAVIES* (1915), T. P. D. 155.—*S. AF.*

GAOL AND GAOLER.

See PRISONS.

GAOL DELIVERY.

See COURTS ; CRIMINAL LAW AND PROCEDURE.

GARDENS.

See AGRICULTURE ; SMALL HOLDINGS AND SMALL DWELLINGS ; OPEN SPACES AND RECREATION
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GAS.

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<i>Acquisition of Land</i>	<i>See</i> COMPULSORY PURCHASE OF LAND.	<i>Rating of Gasworks Streets</i>	<i>See</i> RATES AND RATING.
<i>Explosives</i>	.. PUBLIC HEALTH.	<i>Summary Jurisdiction,</i>	HIGHWAYS.
<i>Highways</i>	.. HIGHWAYS.	<i>Courts of</i>	MAGISTRATES.
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Part I.—Powers to Carry On a Gas Undertaking.

SECT. 1.—GENERAL STATUTORY POWERS.

See Lighting & Watching Act, 1833 (c. 90), s. 4, 45, 46, 48–54, 57, 59, 73, 77; Metropolis Management Act, 1855 (c. 120), ss. 90, 92, 130, 105; Gas & Water Works Facilities Act, 1870 (c. 70); Public Health Act, 1875 (c. 55), ss. 161–163, 276; Local Government Act, 1888 (c. 41), s. 11 (11); Local Government Act, 1894 (c. 73), ss. 7 (1), (4), (5), (7), 19 (4).

1. Under Lighting & Watching Act, 1833 (c. 90)—Fixation of lamps—To private house—Trespass.]—*MEEK v. LANGDON* (1862), 37 L. T. Jo. 181.

2. Under Public Health Act, 1875 (c. 55)—Rural sanitary authority—Invested with powers of urban sanitary authority—Local government order.]—The first paragraph of Public Health Act, 1875 (c. 55), s. 161, empowers an urban sanitary authority to contract with any person for the supply of gas or other means of lighting the streets, markets, & public buildings in their district & to provide the necessary materials. The Local Govt. Board declared by an order under s. 276 of that Act that the provisions of the first paragraph of s. 161 should be in force within certain portions of a rural sanitary district, & invested the rural sanitary authority with all the powers, rights, capacities, etc., of an urban sanitary authority “under those provisions,” within such portions of the district. The rural authority incurred lighting expenses under this order, & treated them as general expenses under s. 229 of the Act. A poor rate having been made to defray the expenses a railway co. was assessed in respect of the full ratable value of its property, which consisted of land occupied & used as a railway:—*Held*: upon the true construction of the order the rural authority was invested only with the power of an urban authority to incur lighting expenses under the provisions of the first paragraph of s. 161, & not with the rating powers applicable to an urban authority under the Act; the expenses were rightly treated as general & not as special expenses under s. 229; & the co. was not entitled to be rated under s. 211 of the Act & in the proportion of one-fourth part only of the ratable value.—*LANCASHIRE & YORKSHIRE RY. CO. v. BOLTON UNION ASSESSMENT COMMITTEE & GREAT LEVER OVERSEERS* (1890), 15 App. Cas. 323; 60 L. J. Q. B. 118; 63 L. T. 358; 54 J. P. 532, H. L.

In the metropolis.]—See Part VIII., *post*.

SECT. 2.—SPECIAL STATUTORY POWERS.

SUB-SECT. 1.—LOCAL AND PRIVATE ACTS.

See Borough Funds Act, 1872 (c. 91), s. 10; Borough Funds Act, 1903 (c. 14); Local Government Act, 1888 (c. 41), s. 15; London Government Act, 1899 (c. 14), s. 6 (6); Public Utility Companies (Capital Issue) Act, 1920 (c. 9); Standing Orders of Each House of Parliament, Nos. 1, 5, 15, 33; Standing Orders of House of Lords, Nos. 139, 140A; Standing Orders of House of Commons, Nos. 134A, 187, 188; PARLIAMENT.

SUB-SECT. 2.—PROVISIONAL ORDER.

See Gas & Water Works Facilities Act, 1870 (c. 70), ss. 2–9, 15, scheds. A., B., Parts I., II., III., IV.; Gas & Water Works Facilities Act, 1870 Amendment Act, 1873 (c. 89), ss. 12–15; Metropolis Management Act, 1855 (c. 120); Public Health Act, 1875 (c. 55), ss. 5, 161, 303; Local Government Act, 1894 (c. 73), ss. 6, 19, 21; Parliamentary Documents Deposit Act, 1837 (c. 83); Borough Funds Act, 1872 (c. 91).

3. Issue of new capital—Effected by provisional order—No special resolutions of company—Validity of issue not affected.]—Where the arts. provided that the capital of a certain gas & water co. might be increased by special resolution, & provisional orders were made under Gas & Water Works Facilities Act, 1870 (c. 70), purporting to effect such increase of capital:—*Held*: the issue of such additional capital was valid, & that the holders thereof were entitled to be treated as members in the distribution of the surplus assets, although no special resolution had in fact been passed authorising such issue.—*Re NEW TREDEGAR GAS & WATER CO., LTD.* (1914), 59 Sol. Jo 161.

SUB-SECT. 3.—SPECIAL ORDER BY BOARD OF TRADE.

See, now, Gas Regulation Act, 1920 (c. 28), s. 10; Gas Regulation Act (Special Orders) Rules, 1920 (Stat. R. & O. 1920, No. 2160); 1922 (Stat. R. & O. 1922, No. 187).

SECT. 3.—TERMS UPON WHICH POWERS GRANTED.

See Gasworks Clauses Act, 1847 (c. 15), ss. 1–38, 40, 42–43, 45–49; Gasworks Clauses Act, 1871 (c. 41), ss. 1, 2, 3, 5; Gas & Water Works Facilities Act, 1870 (c. 70), s. 10; Metropolitan Gas Act, 1860 (c. 125), s. 2; Perjury Act, 1911 (c. 6), ss. 1, 17, Sched.

4. Gasworks Clauses Act, 1847 (c. 15)—Incorporated & construed with Gasworks Clauses Act, 1871 (c. 41)—Effect of incorporation—On Acts passed in intervening period.]—By Gasworks Clauses Act, 1871 (c. 41), s. 1, that Act & Gasworks Clauses Act, 1847 (c. 15), are to read together. By sect. 3 it is to apply to every gas undertaking authorised by any Act thereafter passed; & by sect. 36, whenever the undertakers neglect or refuse to give a supply of gas to any owner or occupier of premises within the limits of the special Act entitled to same under such pressure as is prescribed, they shall be liable to a penalty. The special Act of applt. co. was prior in time to Gasworks Clauses Act, 1871 (c. 41), but Metropolis Gas Act, 1860 (c. 125), which incorporated the Gasworks Clauses Act, 1847 (c. 15), applied, among others, to the applt. co. On a conviction of the applt., under sect. 36, for cutting off the supply of gas from resp.:—*Held*: (1) sect. 36 did

Sect. 3.—Terms upon which powers granted. Sects. 4 & 5. Part II. Sects. 1 & 2: Sub-sects. 1 & 2, A. & B. (a).]

not merely apply to variations from the prescribed pressure, but included cutting off the supply of gas altogether; (2) the Act of 1871 being incorporated with that of 1847, & so with that of 1860, applied to the applt. co. & was not restricted to cos. incorporated after 1871.—*COMMERCIAL GAS CO. v. SCOTT* (1875), L. R. 10 Q. B. 400; 44 L. J. M. C. 171; 32 L. T. 765; 40 J. P. 214; 23 W. R. 874.

Annotations.—*Folld. South Metropolitan Gas Light & Coke Co. v. Noakes* (1889), 61 L. T. 556. *Refd. Dudley Gas Co. v. Warrington* (1881), 50 L. J. M. C. 69.

5. ————.]—*DUDLEY GAS CO. v. WARRINGTON*, No. 106, *post*.

6. ————.]—A private Act which incorporated Gasworks Clauses Act, 1847 (c. 15), except so far as it might be varied by any provision of the special Act, prescribes by sect. 32 a special form in accordance with which the annual accounts of the co. were to be made up, in lieu of provisions as to accounts contained in sect. 38 of the Act of 1847. By sect. 49 of the Act of 1847, undertakers are not to be exempted from any general Act relating to gasworks which may be passed in any future session. By Gasworks Clauses Act, 1871 (c. 41), that Act & the Act of 1847 are to be construed as one Act, & by sect. 35 of the Act of 1871, the undertakers are to make an annual statement of accounts in the form prescribed by that Act, & to furnish copies of same to any applt. Appls. made out their annual statement of accounts in the form prescribed by sect. 32 of their special Act, & did not furnish to resp. on application, a copy of an annual statement of their accounts made out in the form prescribed by the Act of 1871:—*Held*: as applts.' special Act prescribed the form in which the annual statement of accounts was to be made up, the provisions relating to the form of accounts in Gasworks Clauses Act, 1871 (c. 41), s. 35, did not apply.—*LEAMINGTON PRIORS GAS CO. v. DAVIS* (1886), 18 Q. B. D. 107; 56 L. J. M. C. 14; 55 L. T. 734; 51 J. P. 360; 35 W. R. 123, D. C.

7. ————.]—Metropolis Gas Act, 1860 (c. 125), s. 2, incorporates Gasworks Clauses Act, 1847 (c. 15), except so far as the provisions thereof are inconsistent. Sect. 17 of same Act imposes a penalty upon a gas co. if they wilfully fail for seven days after notice in writing by the consumer to furnish a supply of gas. Gasworks Clauses Act, 1871 (c. 41), provides that Gasworks Clauses Act, 1847 (c. 15), & this Act shall be construed together as one Act, & the provisions of this Act shall be held to repeal such of the provisions of the former Act as are inconsistent with it. Sect. 11 of same Act provides that every owner or occupier of a house requiring a supply of gas shall serve a notice upon the undertakers specifying the premises & the day, not being an earlier day than a reasonable time after such notice, upon which such supply is to commence:—*Held*: as by sect. 1 of the Act of 1871, that Act applies, & as it contains a provision in sect. 11 as to the length of notice to be given inconsistent with the provision as to the seven days' notice in sect. 17 of the Act of 1860, the provision in the later Act prevails over that in the sect. 17 of the Act of 1860, so that a metropolitan gas co. to which these Acts apply is bound to give a supply of gas within a reasonable time after notice by the consumer, & is not entitled to a seven days' notice under sect. 17 of the Act of 1860.—*SOUTH METROPOLITAN GAS LIGHT & COKE CO. v. NOAKES* (1889), 61 L. T. 556; 5 T. L. R. 448, D. C.

SECT. 4.—ACCESS TO SPECIAL ACT.

See Gasworks Clauses Act, 1847 (c. 15), ss. 45, 46; Parliamentary Documents Deposit Act, 1837 (c. 83).

SECT. 5.—CESSER OF POWERS TO CONSTRUCT WORKS.

See Gas & Water Works Facilities Act, 1870 (c. 70), s. 11; Public Health Act, 1875 (c. 55), s. 161.

Part II.—Lands and Works.

SECT. 1.—PURCHASE AND TAKING OF LANDS

See Lands Clauses Act, 1845 (c. 18), ss. 16–18, 84–89, 127–132; Gas & Water Works Facilities Act, 1870 (c. 70), ss. 7, 10; Gasworks Clauses Act, 1871 (c. 41), ss. 6, 10; Public Health Act, 1875 (c. 55), ss. 161, 176; Tithe Act, 1878 (c. 42), s. 1; *COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 93 *et seq.*

SECT. 2.—WORKS.

SUB-SECT. 1.—IN GENERAL.

8. *Fixing lamp to private house.*]—*MEEK v. LANGDON* (1862), 37 L. T. Jo. 181.

9. *Gas main—Not part of a factory—Injury to workmen during employment—Workmen's*

Compensation Act, 1897 (c. 37).]—A workman in the employ of a gas co. was, in the course of his employment, engaged in making a trench in the roadway, under which one of their gas mains was laid, at a distance of a quarter of a mile from the works where the gas was manufactured which works came within the definition of a "non-textile factory" given by the Factory & Workshop Act, 1901 (c. 22), s. 149 (1) (c), when he was injured by an accident arising out of & in the course of his employment. The workman having claimed compensation under above Act, the county ct. judge held that, at the time of the accident, he was employed "about a factory," inasmuch as the gas main was part of the gasworks, which were a factory, & accordingly awarded him compensation:—*Held*: the main was not part of a factory & the workman was not employed "about a factory" within the meaning of the

Act, & therefore was not entitled to compensation.—*SPACEY v. DOWLAIS GAS & COKE CO., LTD.*, [1905] 2 K. B. 879; 75 L. J. K. B. 5; 93 L. T. 685; 54 W. R. 138; 22 T. L. R. 29; 50 Sol. Jo. 42; 8 W. O. C. 29, C. A.

See, generally, FACTORIES; MASTER & SERVANT.

10. Conversion of gas residuals—Statutory power—Chemicals necessary for conversion—Power to manufacture.—A statutory gas co. were empowered (a) to make & supply gas, (b) to convert, manufacture, deal with & sell residuals arising from gas-making or from the materials used therein, & (c) to make & sell all articles produced by these means.

They were also empowered (d) to make & maintain gasworks, machinery, & apparatus, (e) to manufacture refuse & products obtained from gas-making, & (f) to "provide" such apparatus & "materials" as they deemed requisite for those purposes.

In order to convert their residual naphthalene into betanaphthol, which was a marketable product, they required an outside chemical re-agent, namely, caustic soda, which was neither a residual nor a product thereof;—*Held*: as no particular method of "providing" the "materials" required for converting their residuals was prescribed or prohibited, the co. were impliedly authorised to manufacture the necessary amount of caustic soda for themselves, & were not bound to purchase it from the chemical manufacturers.—*DEUCHAR v. GAS LIGHT & COKE CO.*, [1925] A. C. 691; 41 T. L. R. 563, H. L.

SUB-SECT. 2.—CONSTRUCTION OF WORKS.

A. In General.

See Gas & Water Works Facilities Act, 1870 (c. 70), s. 7; Gasworks Clauses Act, 1847 (c. 15), s. 29; Gasworks Clauses Act, 1871 (c. 41), ss. 5, 9; Telegraph Act, 1863 (c. 112), s. 8; Telegraph Act, 1878 (c. 70), s. 7.

11. Agreement with highway board—Licence to open up highway—Validity of agreement.—Pltfs., a highway board, agreed with defts., a gas co., that if pltfs. would give defts. a licence to open a highway in their jurisdiction, defts. should make good the surface of the road, & would pay to the pltfs. 1s. per yard of the highway so broken up;—*Held*: the contract was valid; for that the agreement of pltfs. to allow defts. to interfere with the surface of the road

was a good consideration, & the contract was not illegal & did not necessarily contemplate the creation of a nuisance by defts.—*EDGWARE (OR EDGEWARE) HIGHWAY BOARD v. HARROW DISTRICT GAS CO.* (1874), L. R. 10 Q. B. 92; 44 L. J. Q. B. 1; 31 L. T. 402; 38 J. P. 806; 23 W. R. 90.

Annotation:—*Refd.* *Proston Corpn. v. Fullwood L. B.* (1885), 53 L. T. 718.

Nuisances arising from constructions.]—See Part V., Sect. 2, sub-sect. 1, *post*.

B. Laying of Pipes.

(a) In General.

12. Power under private Act—To break up streets—Consent of local commissioners—To what acts consent extends.—An Act empowering a co to contract for purposes of public advantage ought not to receive a narrow construction. Therefore, in construing a gas co.'s Act, which after requiring the consent of certain local comrs. to breaking up of the pavements, provided, that, where any consent was required & should be obtained by the co. to break any pavement, to lay down pipes, or for any other purpose, which might be required under the Act, nothing in the Act contained should, after such consent obtained & after twenty-four hours' notice, prevent the company from breaking up the pavement for the purpose of laying down pipes, or for any other purpose which might be required under the Act:—*Held*: a construction *reddendo singula singulis* was not the correct one, & the power to break the pavement was not to be confined to the particular purpose to which the consent had been expressly given.—*DOVER GASLIGHT CO. v. DOVER CORPN.* (1855), 7 De G. M. & G. 545; 25 L. T. O. S. 277; 19 J. P. 515; 1 Jur. N. S. 812; 44 E. R. 212, L. JJ.

13. Prohibition against extension of gas mains—Service pipe for one consumer—Not within prohibition.—Defts. were incorporated under a local Act of 1895, for the purpose of acquiring the undertaking of the Chesterfield Waterworks & Gas Light Co., & by sect. 4 of that Act the limits for the supply of gas & water were to be the existing limits of the co., & it was provided that it should not be lawful for defts. to extend the existing mains of the co., for the supply of gas in the parishes of B. & W. unless with the previous written consent of pltfs. In 1912 defts., without obtaining such consent, laid a two-inch pipe, eighty-eight yards in length, from one of the mains in their own district along a street in the parish of W. in order to supply gas to one consumer.

PART II. SECT. 2, SUB-SECT. 2.—B. (a).

a. Right of gas company to lay pipes—Subject to right of municipality—To use highway for public purposes.—The right of a gas co. to lay mains in a highway is subject to the paramount right of the municipality to utilise such highway for public purposes.—*TORONTO v. CONSUMERS GAS CO.* (1914), 26 O. W. R. 23, 850; 7 O. W. N. 53; 32 O. L. R. 882.—CAN.

—require company to alter position of pipes.—The statutory right of a gas co. to place its mains & pipes under the streets of a city, subject to the right of the corp. at its own expense to alter or require the co. to alter the situation thereof is a right in perpetuity to the exclusive

possession & use of the portions of the streets for the time being thus occupied.—*AUCKLAND CITY CORPN. v. AUCKLAND GAS CO., LTD.*, [1919] N. Z. L. R. 561.—N.Z.

c. Removal of pipes—Right of gas company to compensation—Sale of highway.—A gas co., having power by statute to lay down gas pipes in the highways of a city, & times to dig up the highways for the purpose of repairs & laying down new plant & pipes, had laid down their pipes under the surface of a street in the city. The city corp. in the exercise of their powers stopped up & sold a part of the street & substituted for that part land which they had acquired for the purpose. The co. thereupon took up their pipes & relaid them on the new line:—*Held*: they

were not entitled to compensation from the city corp. for the cost of taking up & relaying the pipes.—*RE OTTAWA GAS CO. & CITY OF OTTAWA* (1919), 45 O. L. R. 617; 16 O. W. N. 279.—CAN.

d. ———.—A gas co. carried on its operations in a borough over which deft. corp. had jurisdiction. In 1886 defts. fixed the permanent levels of the streets in their borough, in accordance with Municipal Corpns. Act, 1876. After the levels had been so fixed pltfs. laid down their gas mains in certain of the streets before these streets had been formed to the permanent levels. Prior to breaking up the streets for the purpose of these operations pltfs. gave defts. the notice required by their private Act. Defts.,

Sect. 2.—Works: Su—*sect. 2, B. (a) & (i) i., ii., iii. & iv.]*

Pltfs., who were a limited co., formed to supply gas in the parishes of B. & W., brought their action for an injunction to restrain *defts.* from allowing this pipe to remain & from laying any pipes in the parishes contrary to the proviso in the Act:—*Held*: the proviso in the Act of 1895 was limited in its operation to mains properly so called & distinct from service pipes; & the eighty-eight yards length of pipe was laid down & was being used as a service pipe only; & *pltfs.* were not entitled to an injunction.—*WHITTINGTON GAS LIGHT & COKE CO., LTD. v. CHESTERFIELD GAS & WATER BOARD*, [1914] 2 Ch. 146; 83 L. J. Ch. 662; 111 L. T. 422; 78 J. P. 379; 30 T. L. R. 519; 58 Sol. Jo. 577; 12 L. G. R. 892, C. A.

14. Contract to lay pipes—Between undertaker & owner of property—Mutual mistake—Cancellation.]—The ct. refused to set aside a contract entered into [by a gas co. & a railway co. to lay pipes] under a mistake common to both parties.—*GAS LIGHT & COKE CO. v. METROPOLITAN RY. CO.* (1892), 9 T. L. R. 98.

(b) *Under Gasworks Clauses Acts.*

i. *What Streets or Property may be broken up.*

See Gasworks Clauses Act, 1847 (c. 15), ss. 3, 6, 7.

15. "Street, highway or public place"—What is street—Open tract of land—No defined track.]—A gas co. laid down main pipes between two villages on the seashore, in an open tract of land above mean high-water mark which belonged to the owner of the enclosed land fronting the shore. The inhabitants of the villages had always gone to & fro between them along the shore, & at high water passed over this piece of land as they chose, & in accordance with the tide, but by no defined track. The owners brought an action for a mandatory injunction to compel the co. to remove the pipes:—*Held*: the tract of land in question was not a "street, highway, or public place" within the meaning of the Gasworks Clauses Act, 1847 (c. 15).—*MADDOCK v. WALLASEY LOCAL BOARD* (1886), 55 L. J. Q. B. 267; 50 J. P. 401.

16. Dedicated to public use—Extent of dedication—Depth of soil.]—By Gasworks Clauses Act, 1847 (c. 15), s. 6, the undertakers were authorised to break up the soil of streets within the limits of their special Act, & to lay down pipes & other works therein for supplying gas to the inhabitants of the district. Sect. 7 provided that nothing therein should authorise the undertakers to lay down any pipe or other works "in any land not dedicated to public use, without the consent of the owners & occupiers thereof." *Pltf.* was the owner of land on either side of a road dedicated to public use, & had bored a tunnel thereunder for his own purposes. In pursuance of their statutory powers *defts.* proposed to lay gas pipes & works extending to a depth of five feet below the surface of the road on either side

of the tunnel, such pipes being carried up at right angles to the tunnel, & passing over it at a depth of three inches from the surface. It was agreed that eighteen inches was the thickness of soil under the road reasonably necessary for the proper maintenance of the road. The question raised in the action was whether the soil to a greater depth than eighteen inches from the surface was "land not dedicated to public use":—*Held*: the dedication of the road to public use brought it within Gasworks Clauses Act, 1847 (c. 15), s. 6, & no part of it could, for the purposes of gas or water undertakings, be properly held to be land "not dedicated to public use" under sect. 7. The proviso in that sect. extended only to land of which no part was dedicated to public use. Dedication, as between the owner of the soil on the one hand & the controlling authority on the other, involves not merely the occupation by the public of the surface, but also the dedication of so much of the subjacent soil as is necessary for the proper maintenance of the surface as a road or street.—*SCHWEDER v. WORTHING GAS LIGHT & COKE CO.* (No. 2), [1913] 1 Ch. 118; 82 L. J. Ch. 71; 107 L. T. 844; 77 J. P. 41; 57 Sol. Jo. 44; 11 L. G. R. 17.

Annotation:—*Apld.* Porter v. Ipswich Corp., [1922] 2 K. B. 145.

—*See, generally, HIGHWAYS.*

17. Bridge.]—Gasworks Clauses Act, 1847 (c. 15), s. 6, authorises a gas co. to open the surface of a bridge, dig a trench, & lay pipes resting on the bridge. A bridge is not a building within sect. 7 of the Act.—*TAFF VALE RY. CO. v. CARDIFF GAS LIGHT & COKE CO.* (1907), 71 J. P. 350; 23 T. L. R. 528; 5 L. G. R. 993.

18. "Tunnel"—If ejusdem generis with sewer or drain—Not where used as private footway.]—*SCHWEDER v. WORTHING GAS LIGHT & COKE CO.*, No. 23, *post*.

19. Private land—Occupation roads through building estate—For use & convenience of inhabitants—Request of minority of inhabitants.]—Occupation roads laid out through an estate for the use & convenience of the inhabitants are not thereby dedicated to the public. An estate was purchased for the purpose of building houses; a part was laid out as private roads, & upon a partition, the owners taking the roads covenanted that the other freeholders & the occupiers of the houses should have the full use & enjoyment of the roads in as absolute a manner as if they were public roads:—*Held*: a request to be supplied with gas by a minority of the occupiers of houses was sufficient, without the consent of the freeholders, to justify the breaking up the roads by the gas co. to lay down their pipes to comply with such request.—*SELBY v. CRYSTAL PALACE GAS CO.* (1862), 30 Beav. 606; 31 L. J. Ch. 595; 8 Jur. N. S. 422; 10 W. R. 432; 54 E. R. 1025; *affd.*, 4 De G. F. & J. 246, L. J.

20. — Private passage.]—The lighting committee of the Corp. of Liverpool placed a gas lamp on the top of a blank wall within fifty yards of the gas main of *resps.*, who were undertakers within the meaning of the Gasworks Clauses

however, took no steps in connection with the matter, & the mains were thus laid down without any supervision by *defts.*, & without any objection being made by them. In Mar. 1904, *defts.* notified *pltfs.* to alter their mains in certain of the streets, which

were then being cut down & formed to the permanent levels. *Pltfs.* protested against their liability to do this work at their own expense, but altered their pipes in accordance with the requirements of the notice, & then claimed from *defts.* the expenses of the work,

which the latter refused to pay:—*Held*: *pltfs.* were entitled to recover from *defts.* the cost of making the required alterations.—*AUCKLAND GAS CO., LTD. v. GREY LYNN CORPN.* (1908), 25 N. Z. L. R. 617.—N.Z.

Act, 1871 (c. 41). The blank wall adjoined a narrow passage which had never been dedicated to public use, but was owned by two owners of adjoining houses who maintained & repaired it at their own expense. Resps. were required by the lighting committee under Gasworks Clauses Act, 1871 (c. 41), s. 24, to supply gas to the lamp. Resps. on proceeding to lay a connection pipe from their main through the passage to the lamp were stopped by persons said to be the owners of the passage. Thereupon a summons was taken out by applt., the city lighting engineer, under Gasworks Clauses Act, 1871 (c. 41), s. 36, charging resps. with neglecting to supply gas to a public lamp. At the hearing one of the two owners stated that he & his co-owner objected to the laying of the connection pipe. The magistrate dismissed the summons:—*Held*: the magistrate was right in dismissing the summons as resps. had no right to lay down the pipe in the passage by reason of the provisions of Gasworks Clauses Act, 1847 (c. 15), s. 7. Applt. should have proceeded against the owners or occupiers of the premises adjoining the passage requiring them to provide proper means of lighting under Public Health Act, 1875 (c. 55), s. 150.

Qu.: whether proceedings under Gasworks Clauses Act, 1871 (c. 41), s. 36, for refusal to supply gas to a public lamp are available in any case until the lamp has actually been connected with the main.—*BELLAMY v. LIVERPOOL UNITED GAS LIGHT CO.* (1904), 68 J. P. 540; 2 L. G. R. 1182.

21. Buildings—What are buildings—Arches occupied as cellars.—By Gasworks Clauses Act, 1847 (c. 15), s. 6, the undertakers are authorised to open & break up the soil & pavement of the several streets within the limits of their special Act, & to lay down pipes for supplying gas. Sect. 7 provides "that nothing herein shall authorise the undertakers to lay down or place any pipe or other works, into, through, or against any building, or in any land not dedicated to the public use, without the consent of the owners & occupiers thereof . . . A road passed alongside pltf.'s premises, & over certain arches occupied by him as cellars. Defts., a co. constituted under a local Act incorporating Gasworks Clauses Act, 1847 (c. 15), in opening & breaking up the soil of the road for the purpose of laying down gas-pipes, damaged the arches:—*Held*: the arches were buildings within sect. 7, & defts. could not justify breaking through them.—*THOMPSON v. SUNDERLAND GAS CO.* (1877), 2 Ex. D. 429; 46 L. J. Q. B. 710; 37 L. T. 30; 42 J. P. 198; 25 W. R. 809, C. A.

Annotations:—*Folld.* *Schweder v. Worthing Gas Light & Coke Co.*, [1912] 1 Ch. 83. *Consd.* *Porter v. Ipswich Corpn.*, [1922] 2 K. B. 145. *Refd.* *Whitechapel Board of Works v. Crow* (1901), 84 L. T. 595.

22. Bridge.—*TAFF VALE RY. CO. v. CARDIFF GAS LIGHT & COKE CO.*, No. 17, ante.

23. Tunnel—Used as private foot-way.—By Gasworks Clauses Act, 1847 (c. 15), s. 6, the undertakers were authorised to open & break up the soil of streets, & bridges within the limits of their special Act, & to open & break up any sewers, drains, or "tunnels" under such streets, etc., & to lay down pipes therein for supplying gas. But sect. 7 provided that nothing therein should authorise the undertakers "to lay down or place any pipe or other works into, through, or against any building, or in any land, not dedicated to public use, without the consent of the owners & occupiers thereof." Sect. 10

provided that any street, bridge, sewer, drain, or tunnel so broken up should be "reinstated" & made good without delay. Pltf., who was the owner of land on either side of a public highway, bored a tunnel thereunder to be used as a passage way. It was constructed of brick, the roof consisting of girders embedded in cement concrete twelve inches thick, & resting upon brickwork eighteen inches thick. Deft. co., relying on their statutory powers under Gasworks Clauses Act, 1847 (c. 15), & without the consent of pltf., excavated the road over the tunnel, carried away part of the cement concrete, & laid down two gas mains, one of which practically rested upon the roof of pltf.'s tunnel:—*Held*: (1) the tunnel was a "building" within Gasworks Clauses Act, 1847 (c. 15), s. 7; (2) the structure was not a tunnel within sect. 6 with which defts. could interfere; (3) if it were a tunnel within sect. 6, the obligation to restore it to the *status quo ante* under sect. 10 had not been complied with, & therefore a mandatory injunction would be granted to abate the trespass by defts. in laying the pipes into, through or against pltf.'s building.—*SCHWEDER v. WORTHING GAS LIGHT & COKE CO.*, [1912] 1 Ch. 83; 81 L. J. Ch. 102; 105 L. T. 670; 76 J. P. 3; 28 T. L. R. 34; 56 Sol. Jo. 53; 10 L. G. R. 19.

ii. *Notice of Intention to break up Streets, etc.*

See Gasworks Clauses Act, 1847 (c. 15), ss. 8, 11.

24. To whom notice to be given—Highway not repairable by inhabitants—Rural district council.—In whose district highway situate.—By Gasworks Clauses Act, 1847 (c. 15), s. 8, it is enacted that before the undertakers proceed to open or break up any street they shall give to the persons under whose control or management the same may be, or to their clerk, surveyor, or other officer, notice in writing of their intention to open or break up same, as therein directed. A gas co., having occasion to lay a gas main under a highway dedicated to the public but not repairable by the inhabitants at large, opened & broke up the highway without giving notice to the rural district council in whose district same was situate:—*Held*: the rural district council was not a person under whose control or management the highway was within the meaning of the above enactment.—*REDHILL GAS CO. v. REIGATE RURAL COUNCIL*, [1911] 2 K. B. 565; 80 L. J. K. B. 1062; 105 L. T. 24; 75 J. P. 358; 9 L. G. R. 814.

Annotation:—*Mentd.* *Postmaster General v. Hendon U. C.*, [1914] 1 K. B. 564.

iii. *Superintendence of breaking up of Streets, etc.*

See Gasworks Clauses Act, 1847 (c. 15), ss. 9, 11, 12.

iv. *Reinstatement of Streets, etc.*

See Gasworks Clauses Act, 1847 (c. 15), ss. 10, 11.

25. Reinstatement by local authority—Subsequent subsidence of road—Further labour necessary—By whom expense to be borne.—Appls., a gas co., under statutory powers opened up the surface of streets for the purpose of laying & repairing pipes. Resps., a borough council, exercised their powers of filling in the ground & making good the pavement & soil so excavated. It was found, however, impossible to replace all the excavated earth back in the trench, & consequently a subsidence took place in course of time. To obviate

Sect. 2.—Works: Sub-sect. 2, B. (b) iv. & v., (c), & C. Sect. 3. Part III. Sects. 1 & 2: Sub-

this resp. placed, where there had been concrete before, along the line of excavation & the parts contiguous thereto, a line of concrete three inches thicker than it was before. A course of concrete was laid in the excavation where there had before been no concrete. Appls. refused to pay so much of resp.' claim, for making good the surface of the road as was represented by the course of concrete laid where there was no concrete before, & by the extra thickness of concrete where concrete had been before. It was found as a fact that the whole of the concrete, the cost of which appls. refused to pay, was necessary in order that the streets should be as good, & remain as good, as they were before the excavation by appls.:—*Held*: appls. were liable to pay the costs of the extra concrete.—*COMMERCIAL GAS CO. v. POPLAR BOROUGH COUNCIL* (1906), 94 L. T. 222; 70 J. P. 178; 4 L. G. R. 267.

— *Metropolis Management Act, 1855* (c. 120), s. 114.]—*See* Part VIII., Sect. 2, *post*.

26. Liability of undertakers—To reinstate.—*SCHWEDER v. WORTHING GAS LIGHT & COKE CO.*, No. 23, *ante*.

— *Negligent reinstatement.*]—*See* No. 77, *post*.

v. Penalties.

See Part VII., Sect. 2, sub-sect. 1, *post*.

(c) *Under Lighting and Watching Act, 1833.*

See *Lighting & Watching Act, 1833* (c. 90), ss. 46, 47, 49, 51.

Lamp fixed to private house.]—*See* No. 1, *ante*.

C. Negligence in Construction of Work—Liability for.

See Part V., Sect. 1, sub-sect. 1, *post*.

SECT. 3.—SUPPORT TO WORKS AND PIPES.

See *Public Health Act, 1875* (Support of Sewers) Amendment Act, 1883 (c. 37), s. 3.

27. Right to support—Subsidence of highway

—**Damage to pipes.**]—A limited gas co., acting without any statutory authority, & without the authority of the landowner, but with the permission of the highway authority, laid pipes under the soil of the highway. Subsequently a gas co. was constituted by a private Act which incorporated Gasworks Clauses Acts 1874 (c. 15), & 1871 (c. 41). The private Act of this co. provided for the dissolution of the limited co., & enacted that all the lands, gasworks, easements, mains, pipes, plant, & apparatus placed by, vested in, or which were the property of the limited co. immediately before the passing of the Act, should be similarly vested in the incorporated co., & the incorporated co. were empowered to maintain the existing gasworks & to lay down & maintain additional mains & pipes. Gasworks Clauses Act, 1847 (c. 15), gives power to undertakers of gasworks to open the soil within their district, to lay & repair pipes therein, & to do other acts necessary for supplying gas, making compensation for any damage done in the execution of such powers. Gasworks Clauses Act, 1871 (c. 41), renders it compulsory on undertakers of gasworks to supply gas on certain conditions & within certain limits. Defts., the lessees of the minerals under & adjacent to the highway under which plths. had laid their pipes, had by working the coal thereunder let down the soil of the highway & caused injury to plths. pipes:—*Held*: plths. were entitled to support for their pipes, & the landowner was entitled to compensation for the burden thus imposed upon him; plths. could therefore recover damages by action for any injury caused to their pipes, while the owner of the minerals could recover compensation in an arbn. for the limitation thus put upon the user of his land.—*NORMANTON GAS CO. v. POPE & PEARSON, LTD.* (1883), 52 L. J. Q. B. 629; 49 L. T. 798; 32 W. R. 134, C. A.

Annotations:—*Reid*, *Truman v. L. B. & S. C. Ry.* (1883), 25 Ch. D. 423; *South Staffordshire Waterworks Co. v. Mason* (1886), 56 L. J. Q. B. 255; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *Schweder v. Worthing Gas Light & Coke Co.* (No. 2) (1912), 77 J. P. 41.

28. —Support derived from minerals—Working of minerals prohibited—Compensation to mineral owner.]—*NORMANTON GAS CO. v. POPE & PEARSON, LTD.*, No. 27, *ante*.

—*See, generally, EASEMENTS, Vol. XIX., pp. 163 et seq.; MINES.*

Part III.—Supply of Gas.

SECT. 1.—GENERAL POWERS AND DUTIES.

See *Gasworks Clauses Act, 1871* (c. 41), ss. 11, 24; *Electric Lighting Act, 1882* (c. 56), s. 29.

29. Area of supply—Beyond statutory powers—Remedy only upon information—By Attorney-General.]—Plths. & defts., two neighbouring gas cos., were by their respective Acts empowered to make & supply gas within certain defined limits. Defts. proceeded to supply gas to buildings beyond their own parliamentary limits & within those of plths., who thereupon filed a bill to restrain defts. from so doing. The bill alleged that by the unauthorised acts of defts., plths. would be

deprived of the profits arising from the sale of gas to the buildings illegally supplied or about to be supplied by defts., & that great loss would be sustained by plths. if such illegal acts were allowed to continue. A demurrer by defts. for want of equity was allowed, on the ground that the bill had not alleged such a private injury as a ct. of equity could take notice of, & that the question of excess of parliamentary powers could only be determined upon an information by the Attorney-General.—*PUDSEY COAL GAS CO. v. BRADFORD CORPN.* (1873), L. R. 15 Eq. 167; 42 L. J. Ch. 293; 28 L. T. 11; 37 J. P. 340; 21 W. R. 286.
Annotation:—*Consd. Preston Corpn. v. Fullwood L. B.* (1885), 53 L. T. 718.

SECT. 2.—SUPPLY FOR PRIVATE PURPOSES.

SUB-SECT. 1.—RIGHTS OF OWNERS AND OCCUPIERS.

See Gasworks Clauses Act, 1847 (c. 15), s. 13; Gasworks Clauses Act, 1871 (c. 41), ss. 11, 12, 36, Sched. A., Part II.; Defence of the Realm (Acquisition of Land) Act, 1916 (c. 63), s. 7; Gas (Standard of Calorific Power) Act, 1916 (c. 25); Gas Regulation Act, 1920 (c. 28), ss. 1-3, 16-18; Stat. R. & O. 1921, No. 380; Stat. R. & O. 1922, No. 142; Gas Companies (Removal of Sulphur Restrictions) Act, 1907 (c. v); Gas Light & Coke Company Act, 1909 (c. lxxxvii), s. 39.

30. Right to supply—Gasworks Clauses Act, 1871 (c. 41), ss. 11, 12, 36—Supply of prescribed pressure.]—COMMERCIAL GAS CO. v. SCOTT, No. 4, ante.

31. ——— & purity.]—An action will not lie against a gas co., to which the provisions of above Act apply, for damages sustained by a consumer by reason of their failure to give him a supply of gas sufficient in amount & in purity to satisfy the requirements of above Act. The consumer's only remedy is to proceed for penalties under sect. 36 of above Act.—CLEGG, PARKINSON & CO. v. EARBLY GAS CO., [1896] 1 Q. B. 592; 65 L. J. Q. B. 339; 44 W. R. 606; 12 T. L. R. 241, D. C.

*Annotations:—*Reid. Bourne & Hollingsworth v. Marylebone B. C. (1908), 72 J. P. 129. *Mentd.* Myers v. Bradford Corpn. (1914), 79 J. P. 130.

32. Remedies for neglect or refusal to supply—Statutory penalty—Supply cut off.]—COMMERCIAL GAS CO. v. SCOTT, No. 4, ante.

PART III. SECT. 2, SUB-SECT. 1.

a. Right to supply of gas—Whether gas company compellable—Contract unenumerative.]—Defts. had agreed to supply pfts. with natural gas free, for ordinary purposes for use in their private dwellings. The operation of the gas field became no longer profitable or possible from a commercial standpoint, & defts. ceased to supply the gas free.—*Held*: the commercial failure of the gas wells did not absolve defts. from their obligation to pfts.—SUNDY v. DOMINION NATURAL GAS CO. (1912), 23 O. W. R. 228; 4 O. W. N. 167; 6 D. L. R. 863.—CAN.

f. ———.]—A gas co. having no exclusive right to manufacture gas in a city, but having by statute power to lay pipes, etc., & contract for the supply of gas, cannot be compelled to supply gas to any person applying for it.—WELLINGTON GAS CO. v. PATTEN (1881), 3 N. Z. L. R. C. A. 205.—N.Z.

PART III. SECT. 2, SUB-SECT. 2.

g. Necessity for inspection of meters—Gas supplied through un-inspected meter—Whether company can recover cost of gas supplied.]—In an action by a gas co. for the price of gas supplied through an un-inspected & unstamped meter.—*Held*: there must be implied, from the prohibition against fixing a meter for use, a prohibition against supplying gas through it, & pft. could not recover.—MANTVOBA ELECTRIC & GAS LIGHT CO. v. GERRIE (1887), 4 Man. L. R. 210.—CAN.

h. Improperly using & burning gas—Supplied by meter—Contrary to statute.]—A complaint charged a person with having improperly used & burned gas supplied to him by meter, contrary to Gas Works Clauses Act, 1847 (c. 15), s. 18:—*Held*: the complaint was

irrelevant, in respect that the only gas dealt with in the sect. was gas supplied other than by meter.—FALKIRK CORPN. v. RUSSELL (1911), 48 Sc. L. R. 838.—SCOT.

PART III. SECT. 2, SUB-SECT. 3.

k. Whether price of gas included—In words terms & conditions.]—*Semble*: under Act 24 Vict. No. 102, ss. 66, 67, the price of gas is included in the words "terms & conditions," which the parties may refer to arbn.—Re SANDHURST CORPN. & BENDIGO GAS CO. (1886), 12 V. L. R. 682.—AUS.

l. Right of commission appointed by statute—To inquire into "highest selling price of gas."—Notwithstanding Gas Act, 1912, ss. 15-20, gas supplied by the cos. mentioned in the first sched. to that Act is a "necessary commodity" within Necessary Commodities Control Act, 1914, & therefore its highest selling price may be inquired into & reported upon by a commission appointed under the latter Act.—LUKEY v. EDMUNDS (1916), 21 C. L. R. 336.—AUS.

m. Action by ratepayers—Representative action—Intention to reduce price of gas.]—A ratepayer having brought an action against a gas co. on behalf of himself & all other consumers of gas for an account of moneys alleged to have been improperly obtained in the past from gas consumers & with the intent of reducing the price of gas to them, defts.' executive committee reported in favour of authorising the city council to grant money to carry on the action.—*Held*: pft. was entitled to an injunction to restrain any such payment by defts., the same being without consideration & not in pursuance of any prior agreement or understanding.—JARVIS v. FLEMING (1896), 27 O. R. 309.—CAN.

33. ——— Failure of prescribed pressure.]—COMMERCIAL GAS CO. v. SCOTT, No. 4, ante.

34. Not action for damages—Gasworks Clauses Act, 1871 (c. 41), s. 36.]—CLEGG, PARKINSON & CO. v. EARBLY GAS CO., No. 31, ante.

SUB-SECT. 2.—SUPPLY BY METERS.

See Gasworks Clauses Act, 1847 (c. 15), ss. 14, 15; Statute Law Revision Act, 1875 (c. 66); Gasworks Clauses Act, 1871 (c. 41), ss. 13, 14, 15, 17, 18, 19, 20, 21, 38; Sale of Gas Act, 1859 (c. 66), s. 17; Sale of Gas Act, 1860 (c. 146), s. 1; Stat. R. & O. 1920, No. 2354.

35. Obligation to supply meter—Gasworks Clauses Act, 1871 (c. 41), s. 11.]—CLAYTON v. PONTYPRIDD URBAN DISTRICT COUNCIL, No. 76, post.

Protection from seizure in distress.]—See DISTRESS, Vol. XVIII., p. 308, Nos. 438, 439.

Negligence in connecting or disconnecting.]—See Nos. 75, 76, post.

Testing & stamping meters.]—See Sect. 5, sub-sect. 2, post.

SUB-SECT. 3.—PRICE OF GAS SUPPLIED.

See Gas & Water Works Facilities Act, 1870 (c. 70), s. 12.

n. ——— For non-compliance with statute.]—Where by an Act extending the powers of resp. co. certain duties & obligations were imposed on it for the benefit of its customers with a view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default & no right of action given to persons aggrieved, provision, however, being made for its accounts being audited by direction of the mayor of the corpn. with whose assent the co. was originally established.—*Held*: no individual customer had a right of action against the co. for non-compliance with the Act.—JOHNSTON & TORONTO TYPE FOUNDRY CO. v. CONSUMERS' GAS CO. OF TORONTO, [1898] A. C. 447.—CAN.

o. Agreement to supply consumers at fixed price—Breach of agreement by company.]—A gas co. contracted with persons entitled to be supplied by the co. with gas under an agreement between a gas co. & a corpn.:—*Held*: the co. violated their contract contained in that agreement, in exacting from such persons an obligation to take, or to pay if they did not take, a fixed quantity of gas monthly, or in other fixed periods.—Re CITY OF HAMILTON & UNITED GAS & FUEL CO. OF HAMILTON, LTD. (1917), 39 O. L. R. 542; 37 D. L. R. 246.—CAN.

p. Supply of natural gas—Payment equal to highest domestic rate in municipality.]—DOMINION SUGAR CO. v. NORTHERN PIPE LINE CO. (1920), 47 O. L. R. 119; 51 D. L. R. 548; 17 O. W. N. 470.—CAN.

q. Meaning of "existing rate"—Jurisdiction of Public Utility Commissioners—To increase rate not yet charged.]—A rate merely stipulated as a maximum which a gas co. may impose but which has not yet been

Sect. 2.—Supply for private purposes: Sub-sects. 4, 5 & 6.]

SUB-SECT. 4.—SECURITY FOR GAS CHARGES.

See Gasworks Clauses Act, 1871 (c. 41), ss. 11, 16.

SUB-SECT. 5.—RECOVERY OF GAS RENTS AND CHARGES.

See Gasworks Clauses Act, 1847 (c. 15), s. 16; Statute Law Revision Act, 1875 (c. 66); Gasworks Clauses Act, 1871 (c. 41), ss. 23, 39, 40, 41.

36. Recovery of arrears.—From incoming tenant.—No agreement to pay arrears.—With outgoing tenant.]—A tenant of premises is not, under Gas Works Clauses Acts, 1847 (c. 15), & 1871 (c. 41), & Metropolis Gas Act, 1860 (c. 125), personally liable for arrears of gas rate left unpaid by the preceding tenant; therefore where the Act says that payment of arrears left unpaid by the outgoing tenant shall not be required from the next tenant unless he agreed with the defaulting consumer to pay the arrears, they do not impose any personal liability upon an incoming tenant who may be within the exception, so as to entitle the gas co. to summon him before a magistrate for non-payment. Resp. became tenant of a public house by assignment of the lease & purchase of the goodwill & business from the outgoing tenant M. When M. left the premises he owed to applts. one quarter's unpaid gas rate. Payment of these arrears was demanded from resp. soon after his entry, & as he refused to pay them, applts. summoned him before a police magistrate:—*Held*: there was no personal liability upon resp. to pay which the magistrate could enforce; the above Acts gave no power to a magistrate to make an order for payment in such a case.

Qu.: whether the co. might not cut off the gas from the premises of resp. for non-payment of the arrears.—*GAS LIGHT & COKE CO. v. MEAD* (1876), 45 L. J. M. C. 71; 33 L. T. 729; 40 J. P. 662, D. C.

Annotation:—*Apprvd. Cannon Brewery Co. v. Gas Light & Coke Co.*, [1904] A. C. 331.

37. ——— No intention of becoming customer.—Of gas company.]—An incoming tenant who buys & continues the business of the outgoing tenant, but is not & does not intend to be a customer of the gas co., is not liable under Gas Light & Coke Co.'s Act, 1872 (c. xxiii), s. 18, for arrears due for gas supplied to his predecessor.—*CANNON BREWERY CO. v. GAS LIGHT & COKE CO.*, [1904] A. C. 331; 73 L. J. K. B. 747; 91 L. T. 110; 68 J. P. 461; 52 W. R. 657; 20 T. L. R. 543; 2 L. G. R. 949, H. L.; *reusg.* S. C. *sub nom.* *GAS LIGHT & COKE CO. v. CANNON BREWERY CO.*, [1903] 1 K. B. 593, C. A.

38. ———.]—The evidence was that defts. under a misapprehension, required the new occupiers to pay the arrears of the outgoing tenant. Such a claim was expressly forbidden by the Act [Gasworks Clauses Act, 1871 (c. 41), s. 39] (*MATHEW, J.*).—*GRIFFITHS v. ILFORD GAS LIGHT & COKE CO.* (1899), 63 J. P. 297.

charged or fixed as a charge is not an "existing rate" within Public Utilities Act, Alberta, s. 23 (c), & to increase the same is beyond the jurisdiction of the Board of Public Utility Comrs.—*Re*

PUBLIC UTILITIES ACT, NORTHERN ALBERTA NATURAL GAS DEVELOPMENT CO., LTD. v. EDMONTON, [1921] 1 W. W. R. 656; 56 D. L. R. 388; 61 S. C. R. 213.—*CAN.*

39. ——— Who is incoming tenant.—Official receiver.]—A gas co. cut off the gas from premises, then occupied by the official receiver, until all the arrears owing by the debtor were paid. The receiver paid under protest:—*Held*: the trustee in bkpcy. could not recover the money so paid, for the receiver was not in the position of an incoming tenant to whom gas must be supplied without payment of arrears but the occupation of the debtor continued notwithstanding the receiving order.—*Re SMITH, Ex p. MASON*, [1893] 1 Q. B. 323; 67 L. T. 596; 57 J. P. 72; 41 W. R. 150; 9 T. L. R. 15; 37 Sol. Jo. 30; 9 Morr. 304; 5 R. 47.

Annotations:—*Apld.* *Paterson v. Gas Light & Coke Co.*, [1896] 2 Ch. 476. *Reid.* *Re Marriage, Neave, North of England Trustee Debenture & Assets Corpn. v. Marriage, Neave* (1896), 75 L. T. 169.

40. ——— Receiver & manager.]—A limited co., M. & Co., was supplied with gas by a gas co. In Feb. 1896, P. was appointed manager & receiver of the business of M. & Co. by debenture holders & shortly afterwards P. & S. were appointed by the ct. joint receivers & managers in an action on behalf of a higher class of debenture-holders. They entered & carried on the business, & were supplied with gas by the gas co. At the time when P. was appointed there was due to the gas co. £90 for gas supplied to M. & Co. The gas co. threatened to cut off the supply unless the £90 arrears was paid & the receiver brought an action to restrain them:—*Held*: the relation of pltf. to M. & Co. was not that of incoming & outgoing tenants but of caretaker & owner, & pltf. were in no better position against the gas co. than M. & Co. were, & could not claim a supply of gas except on payment of the arrears.—*PATERSON v. GAS LIGHT & COKE CO.*, [1896] 2 Ch. 476; 65 L. J. Ch. 709; 74 L. T. 640; 60 J. P. 532; 45 W. R. 39; 12 T. L. R. 459; 40 Sol. Jo. 652, C. A.

Annotations:—*Follid.* *Husey v. Gas Light & Coke Co.* (1902), 46 Sol. Jo. 267. *Consd.* *Gas Light & Coke Co. v. Cannon Brewery Co.*, [1903] 1 K. B. 593. *Reid.* *Re Marriage, Neave, North of England Trustee Debenture & Assets Corpn. v. Marriage, Neave*, [1896] 2 Ch. 663.

41. ——— Receiver.]—As to all the premises other than the hotel it does not appear that pltf. [the receiver] has entered into possession; he might receive the rents, but he was not in occupation. It has been suggested that he was entitled to claim as owner, if not as occupier; but there is no sect. of the Gas Acts entitling an owner to a supply when arrears remained unpaid. It was not disputed that there were large arrears, & that under Gas Clauses Act, 1847 (c. 15), s. 16, the supply could be cut off. Sect. 18 of the deft. co.'s special Act, 1872, contained an exception with respect to incoming tenants. But pltf., as regards the premises other than the hotel, is not in the position of an incoming tenant, & is not, therefore, entitled, as such, to a supply of gas without paying the arrears. Neither is he entitled to do so as owner or occupier. Gas Works Clauses Acts, 1871 (c. 41), s. 11, which entitled an owner or occupier to demand a supply of gas, & sect. 16 of the Act of 1847, which enabled a gas co. to cut off the supply if the rate was in arrear, must be read together. The right of an owner to require a supply did not extend to a case in which the gas

r. Contract for supply of gas—Not covered by War Legislation Act, 1917, s. 17.]—PETONE BOROUGH v. LOWER HUTT BOROUGH, [1918] N. Z. L. R. 844.—*N.Z.*

rate in respect of the same premises was in arrear. With respect to the hotel it has been argued that for the purpose of carrying on the hotel the receiver must be in possession. But even assuming that he has entered into possession, that is not enough. It is true that in *Paterson v. Gas Light & Coke Co.*, No. 40, *ante*, the order did not give possession to the receiver. But the true position of a receiver was pointed out in that case, & the mere fact that in the present case he was ordered to be given possession does not sufficiently constitute him a tenant within sect. 18 of the special Act of 1872 so as to entitle him to a supply (*SWINFEN EADY, J.*).—*HUSEY v. GAS LIGHT & COKE CO.* (1902), 18 T. L. R. 299; 46 Sol. Jo. 267.

42. Slot-meter—Money stolen therefrom—No negligence of consumer—Gas company cannot recover.—*Resps.*, who supplied gas within their district, erected upon applt.'s premises an automatic slot meter fitted with index dials which registered the quantity of gas passing through it, & there was a box attached to the meter into which shillings could be dropped, on each occasion when a shilling was dropped in a certain quantity of gas passing into the meter. *Resps.* were the only persons who had the right to open the box, the key of which was kept by them. When *resps.*' inspector came to collect the money the meter showed that 19s. worth of gas had been consumed, but there was no money in the box. The money had been stolen through no negligence on the part of applt. *Resps.* claimed to recover from applt. 19s. for the gas supplied:—*Held*: applt., by putting the money into the box, had paid for the gas & was not liable to pay again.—*EDMUNDSON v. LONGTON CORPN.* (1902), 19 T. L. R. 15; 47 Sol. Jo. 31, D. C.

43. While contract for supply subsists—Change of status of consumer—Re-marriage of widow.—*Resp.*, after the death of her first husband, continued to reside in the same house as before, & took from, & paid applts. for a supply of gas, the accounts being made out in her widowed name. She married again, & her second husband then became the tenant & occupier of the house in which she had been living during her widowhood, but the fact of her remarriage was not made known to applts. who continued to supply gas to the house. *Resp.* paid one quarter's account for gas after her remarriage, but, not having paid the account for a later quarter, applts. took proceedings against her to recover the amount:—*Held*: there was a contract by *resp.* to pay for the gas supplied to the house until she gave applts. notice to discontinue the supply or gave them notice of her marriage, & as she had done neither she was liable for the amount.—*IEA BRIDGE DISTRICT GAS CO. v. MALVERN*, [1917] 1 K. B. 803; 86

L. J. K. B. 553; 116 L. T. 311; 81 J. P. 141; 15 L. G. R. 412, D. C.

44. — Until notice given to discontinue supply.—*LEA BRIDGE DISTRICT GAS CO. v. MALVERN*, No. 43, *ante*.

45. Mode of recovery—Action for breach of contract—Although contract not under seal.—A *corpn.*, created for the purpose of supplying gas, may maintain *assumpsit* for breach of a contract by *deft.* to accept gas from year to year, at £121 16s. *per annum*, the consideration being alleged to be the promise of *plfts.* to supply it on those terms. Such promise by the *co.*, though not under seal, is valid, & a good consideration. It makes no difference as to the right of a *corpn.* to sue on a contract entered into by them without seal, whether the contract be executed or executory. Nor whether the promises be express or implied.—*CHURCH v. IMPERIAL GAS LIGHT & COKE CO.* (1838), 6 Ad. & El. 846; 3 Nev. & P. K. B. 35; 1 Will. Woll. & H. 137; 7 L. J. Q. B. 118; 112 E. R. 324.

Annotations:—*Consd.* *Dyde v. St. Pancras Board of Grdns.* (1872), 27 L. T. 342. *Refd.* *Gibson v. East India Co.* (1859), 1 Arn. 493; *Ludlow Corpn. v. Charlton* (1840), 6 M. & W. 815; *Arnold v. Poole Corpn.* (1842), 2 Dowl. N. S. 574; *Hall v. Swansea Corpn.* (1844), 5 Q. B. 526; *Henderson v. Australian Royal Mail Steam Navigation Co.* (1855), 24 L. J. Q. B. 322; *Freud v. Dennett* (1858), 4 C. B. N. S. 576; *Wells v. Kingston-upon-Hull Corpn.* (1875), L. R. 10 C. P. 402; *Young v. Royal Leamington Spa Corpn.* (1883), 8 App. Cas. 517. *Mentd.* *Fishmongers' Co. v. Robertson* (1843), 6 Scott. N. R. 56; *Paine v. Strand Union* (1846), 8 Q. B. 326; *Clarke v. Cuckfield Union, Sussex Grdns.* (1852), Ball Ct. Cas. 81; *Finlay v. Bristol & Exeter Ry.* (1852), 7 Exch. 409; *Austin v. Bethnal Green Grdns.* (1874), L. R. 9 C. P. 91; *Lawford v. Billerica R. C.* (1903), 72 L. J. K. B. 554.

46. — Whether contract executed or executory—Expressed or implied.—*CHURCH v. IMPERIAL GAS LIGHT & COKE CO.*, No. 45, *ante*.

— *Distress.*—*See* DISTRESS, Vol. XVIII., pp. 451–452, Nos. 1875–1877.

— *Bankruptcy of consumer.*—*See* BANKRUPTCY, Vol. V., pp. 956–958, Nos. 7843–7845, 7852–7853.

— *Penalty.*—*See* Part VII., Sect. 2, subsect. 2, *post*.

Supply for public purposes.—*See* Sect. 3, *post*.

SUB-SECT. 6.—DISCONTINUANCE OF SUPPLY AND REMOVAL OF FITTINGS.

See Gasworks Clauses Act, 1847 (c. 15), s. 17; Statute Law Revision Act, 1875 (c. 66); Gasworks Clauses Act, 1871 (c. 41), s. 22.

47. Notice to discontinue supply—Necessity for

PART III. SECT. 2, SUB-SECT. 6.

a. Notice to discontinue supply—Jurisdiction of Public Utility Commissioners.—Following upon the decision of the Supreme Ct. of Canada in *Lethbridge v. Can. West. Natural Gas, etc. Co. Ltd.*, [1923] S. C. R. 652, [1923] 3 W. W. R. 976, a gas *co.* notified the city, & the consumers of gas, of the *co.*'s intention to cease to sell gas within the city on Jan. 8, 1924. An application by the city was thereupon made to the Board of Public Utilities Comrs. for an order restraining the *co.* from shutting off its gas supply. An application by the *co.* was then made to the Board for an order fixing increased, just & reasonable individual

rates for the gas sold by the *co.* within the city. The Board ordered the *co.* to comply with the terms of the agreement at the rates therein set out, until further order of the Board, & the Board reserved power to modify or vary its order in case it was thereafter found that the Board had jurisdiction to vary the rates & an application were made to it for that purpose:—*Held*: the Board had power to construe the agreement in order to deal with its enforcement & it also had jurisdiction to deal with the questions of supply & rates as to it might seem just.—*LETHBRIDGE v. CANADIAN WESTERN NATURAL GAS, LIGHT, HEAT & POWER CO.*, [1924] 3 D. L. R. 648; 3 W. W. R. 59; 20 Alta. L. R. 529.—*CAN.*

t. Gas cut off during current quarter—Rent paid for preceding quarter—Whether company will restrain gas company.—A *co.*, incorporated under 16 Vict. c. 173, for supplying a city with gas, will be restrained during the currency of a quarter from cutting off the gas from a house, the occupant of which had paid the rent for the preceding quarter.—*SMITH v. LONDON GAS CO.* (1859), 7 Gr. 112.—*CAN.*

a. Account unpaid—Refusal to supply gas until paid.—A gas *co.*, incorporated under C. S. C., c. 65, having made a charge for a special illumination, which was disputed, refused to supply gas to the same premises for ordinary purposes until

Sect. 2.—Supply for private purposes: Sub-sect. 6. Sects. 3, 4 & 5: Sub-sects. 1 & 2. Sects. 6 & 7. Part IV. Sects. 1 & 2: Sub-sect. 1.]

—**Liability of consumer—Until notice given.**—*LEA BRIDGE DISTRICT GAS CO. v. MALVERN, No. 43,*

SECT. 3.—SUPPLY FOR PUBLIC PURPOSES.

See Gasworks Clauses Act, 1871 (c. 41), ss. 24–27, 36; Companies Clauses Consolidation Act, 1845 (c. 16), ss. 128–134.

48. Interruption of failure of supply—No default of gas company—Liability of consumer for payment—Climatic interference.—By special Acts, with which were incorporated Gasworks Clauses Acts, 1847 (c. 15) & 1871 (c. 41), the R. Gas Co. were required to supply gas to the public lamps in the parish of R., & the charge for supplying such gas was fixed at a certain annual sum per lamp, the lamps to be lighted from sunset to sunrise, & the burners used therein not to consume less than a certain amount per hour. During the months of Dec. 1890, & Jan. 1891, in consequence of exceptional frost, the pipes became blocked with ice, & the supply of gas to the public lamps was insufficient:—*Held*: the corp. of R. were bound to pay the fixed annual sum in respect of such lamps, notwithstanding the insufficiency of the supply of gas.—*Re RICHMOND GAS CO. & RICHMOND (SURREY) CORPN., [1893] 1 Q. B. 56; 62 L. J. Q. B. 172; 67 L. T. 554; 56 J. P. 776; 41 W. R. 41; 9 T. L. R. 5; 36 Sol. Jo. 866; 5 R. 29, D. C.*

49. ——— Defence of Realm order.—Pltfs. contracted with defts. to light their district for five years from Aug. 1911. Pltfs. were to provide gas standards, lamps, & other plant, to connect same with their mains in the district, to supply gas & to light, extinguish, clean, & repair the lamps, & maintain the plant during the term. Defts. were to pay an inclusive fixed sum per lamp *per annum*, payable in four equal quarterly instalments, to cover the cost of the gas & the cost of providing the necessary plant. In Jan. 1915, the contract having so far been performed by both parties, an order made by the competent military authority under Defence of the Realm Regulations, 1914, prohibited until further order the lighting of the street lamps. Pltfs. sued for the three quarterly instalments that fell due after the date of the order. Defts. denied their liability on the ground that the order rendered the contract illegal & impossible of performance:—*Held*: (1) defts. were liable for the order did not render the contract once for all wholly illegal or impossible of performance, & the consideration for pltfs.' services could not be apportioned; (2) the supply

of gas was not a condition precedent to pltfs. right to recover the quarterly payments.—*LEISTON GAS CO. v. LEISTON-CUM-SIZEWELL URBAN COUNCIL, [1916] 2 K. B. 428, 85 L. J. K. B. 1759; 115 L. T. 172; 80 J. P. 385; 32 T. L. R. 588; 60 Sol. Jo. 554; 14 L. G. R. 922, C. A.*

Annotations:—As to (1) Consd. Metropolitan Water Board v. Dick, Kerr, [1917] 2 K. B. 1. Appl. Wycombe Borough Electric Light & Power Co. v. Chipping Wycombe Corp. (1917), 33 T. L. R. 489.

50. Proceedings against gas company—Whether lamp & main must first be connected.—*BELLAMY v. LIVERPOOL UNITED GAS LIGHT CO., No. 20, ante.*

51. Recovery of charges—Right to recover—Supply of gas not condition precedent.—*LEISTON GAS CO. v. LEISTON-CUM-SIZEWELL URBAN COUNCIL, No. 49, ante.*

SECT. 4.—SUPPLY FOR SPECIAL PURPOSES.

See Baths & Wash-houses Act, 1846 (c. 74), s. 28; Housing of Working Classes Act, 1890 (c. 70), s. 69; PUBLIC HEALTH.

52. Buildings supported out of rates—Free supply to—Workhouse situated out of rating area—Local Act.—The Oldham poor law union comprises eight townships, & the union workhouse is maintained out of the common fund of the union, consisting of the aggregate of the poor-rates within those townships. Oldham Corp. Gas & Water Act, 1853 extends only to four of those townships, & to two townships not within the union. By sect. 58 of that Act "the corp. shall at all times afford an ample supply of gas & water without charge to all hospitals & infirmaries within the limits of the Act, & all baths & wash-houses & all buildings within those limits respectively maintained at the expense of the borough rates or the rates for the relief of the poor, or other rates raised within those limits":—*Held*: the corp. were not bound to supply gas & water gratuitously to the union workhouse, as it was not maintained by rates wholly raised within the limits of the Act.—*OLDHAM UNION GUARDIANS v. OLDHAM CORPN. (1854), 23 L. T. O. S. 245; 18 J. P. 601; 2 W. R. 590.*

SECT. 5.—MEASURES USED IN SALE OF GAS.

SUB-SECT. 1.—BOARD OF TRADE AND LOCAL STANDARDS.

See Sale of Gas Act, 1859 (c. 66), ss. 2–4, 6–8; Sale of Gas Act, 1860 (c. 146), s. 1; Metropolis Gas Act, 1861 (c. 79), ss. 1, 2; Weights & Measures

their claim had been paid:—*Held*: this was not justified, but that a *mandamus* could not lie, as the statute imposed no duty; & the only remedy was by action.—*Re COMMERCIAL BANK OF CANADA & LONDON GAS CO. (1860), 20 U. C. R. 233.—CAN.*

b. ——— Right to cut off gas generally.—By the true construction of Canada Act (12 Vict. c. 183), s. 20, borrowed from Gasworks Clauses Act, 1847 (c. 15), *Imp., applt. co. is authorised to cease supplying resp. with gas at any of his houses on his*

neglect to pay its bill for any one of them.—*MONTREAL GAS CO. v. CADIEUX, [1899] A. C. 589.—CAN.*

PART III. SECT. 3.

c. Breach of agreement by gas company—Exactions from consumer.—*Re CITY OF HAMILTON & UNITED GAS & FUEL CO., OF HAMILTON, LTD. (1917), 39 O. L. R. 542; 37 D. L. R. 246.—CAN.*

d. Agreement between producers & distributors of gas—To supply gas to city—Whether liable to supply to territory

—*Annexed after agreement.*—The U. Co. are producers of gas & the C. Co. is empowered to sell & distribute the commodity to consumers in C. By a contract between the two cos. the U. Co. was to supply & the C. Co. to take all the gas required by the latter for such sale & distribution:—*Held*: the U. Co. was not obliged to supply gas for distribution & sale by the C. Co. in territory annexed to the city after the contract was made.—*UNION NATURAL GAS CO. v. CHATHAM GAS CO. (1917), 56 S. C. R. 253; 40 D. L. R. 485.—CAN.*

Act, 1878 (c. 49), ss. 33, 41, 66; **Weights & Measures Act, 1889** (c. 21), s. 15; **Local Government Act, 1888** (c. 41), ss. 3, 34 (3), 39 (1), 40 (8); **City of London Sewers Act, 1897** (c. cxxxiii.); **City of London (Union of Parishes) Act, 1907** (c. cxl.).

SUB-SECT. 2.—TESTING AND STAMPING METERS.

See **Sale of Gas Act, 1859** (c. 66), ss. 9-22, 25; **Sale of Gas Act, 1860** (c. 146), s. 1; **Gas Regulation Act, 1920** (c. 28), ss. 11-15, 19; **Stat. R. & O., 1920**, Nos. 2058, 2063; **Stat. R. & O., 1922**, No. 625.

SECT. 6.—TESTING QUALITY AND PRESSURE OF GAS.

See **Gasworks Clauses Act, 1871** (c. 41), ss. 28-31, 33, 34, 36, 37, 42-46, **Sched. A., Parts I., II.**; **Gas Regulation Act, 1920** (c. 28), ss. 4-9, 20.

53. Form of burner—Prescribed by special Act—Improvements in burner—At date of test.]—

Applt. gas co. were required by a special Act of 1888 to supply gas of such quality as to produce, from an Argand burner having fifteen holes & a seven inch chimney & consuming five cubic feet of gas per hour, a light of fourteen candle power:—Held: the obligation thus imposed on the gas co. was fulfilled by the supply of gas capable of producing light of the given candle power from an Argand burner, complying with the specified conditions, of the best type known for the time being, though the gas was not capable of producing light of that candle power from an Argand burner, complying with the specified conditions, of the best type known at the date of the special Act.—**BRENTFORD GAS CO. v. CHISWICK URBAN DISTRICT COUNCIL** (1908), 72 J. P. 378; 6 L. G. R. 725, D. C.

SECT. 7.—BREACH OF CONTRACT BY UNDERTAKER'S EMPLOYEES.

See **Malicious Damage Act, 1861** (c. 97), s. 58; **Conspiracy & Protection of Property Act, 1875** (c. 86), ss. 4, 5, 9, 12, 15; **CRIMINAL LAW, Vol. XV., pp. 705 et seq.**; **TRADE & TRADE UNIONS.**

Part IV.—Protection of Property of Undertakers.

SECT. 1.—IMPROPER USE OF GAS AND GAS FITTINGS.

See **Lighting & Watching Act, 1833** (c. 90), ss. 55, 56; **Sale of Gas Act, 1859** (c. 66), ss. 14, 15; **Gasworks Clauses Act, 1847** (c. 15), ss. 18-20; **Gasworks Clauses Act, 1871** (c. 41), s. 38.

54. Misuser of gas—Fake meter—Altered by previous tenant—No wilful intention by consumer.] FOWLER v. NEWBIGGING (ON BEHALF OF ROSSENDALE UNION GAS CO.) (1859), 23 J. P. Jo. 52.

—**Larceny of gas.]—See CRIMINAL LAW, Vol. XV., p. 911, Nos. 10,024, 10,025.**

55. Improper use of gas fittings—Increased supply pipe—Notice to but no consent of gas company—No intention of fraud.]—Applts., on their own premises, substituted for part of a gas pipe belonging resps. a larger pipe for the purpose of increasing their supply. This was done without any fraud, waste, or misuse of the gas, but without resps. consent, although notice of intention to disconnect the pipe from the meter was duly given under Gasworks Clauses Act, 1871 (c. 41), s. 15.

PART III. SECT. 5, SUB-SECT. 2.

e. Gas supplied through unstamped meter—Whether gas company can recover price of gas used.]—MANITOBA ELECTRIC & GAS LIGHT CO. v. GERRIE (1887), 4 Man. L. R. 210.—CAN.

1. Posting of certificates of testing—When necessary.]—Gas Inspection Act, R. S. C. 1906 (c. 87), s. 44, requiring the posting up of the certificates of tests made by the gas inspector, does not become operative till sect. 34 has been acted on & a testing place prescribed & notified by the under-

taker.—CARBERRY GAS CO. v. HALLETT (1908), 8 W. L. R. 119; 17 Man. L. R. 525.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.

56 1. Pipes—Damage by steam roller.]—Pitfs., a gas co., laid down pipes under the surface of certain roads, as they were entitled by statute to do, in order to supply gas for public & private purposes. Defts. were charged by statute with the duty of maintaining the roads in the county, & were for that purpose authorised to

purchase or hire a steam roller. Defts. used steam rollers for the repair of the roads, but the rollers were so heavy as to frequently injure pitfs. pipes, though they were laid at a depth sufficient to be safe from injury by the ordinary traffic & ordinary mode of repair, if such rollers had not been used.]—Held: pitfs. were entitled to an injunction to restrain defts. from using steam rollers in such way as to injure the pipes of pitfs. then properly laid under the roads, regard being had to what, at the time of the laying of the pipes, was the ordinary traffic, & the

SECT. 2.—DAMAGE TO PROPERTY.

SUB-SECT. 1.—IN GENERAL.

See **Lighting & Watching Act, 1833** (c. 90), ss. 55, 56; **Sale of Gas Act, 1859** (c. 66), ss. 14, 15; **Gasworks Clauses Act, 1847** (c. 15), ss. 18-20; **Gasworks Clauses Act, 1871** (c. 41), s. 38.

56. Pipes—Damage by steam roller.]—GAS

Sect. 2.—Damage to property: Sub-sects. 1 & 2.
[Sect. 3.]

LIGHT & COKE CO. v. ST. MARY ABBOTT'S, KENSINGTON VESTRY, No. 63, post.

57. ———.—[Defts., the highway authority for the district, used a heavy steam roller for the repair of the streets, which crushed by its weight the gas mains, & so caused an escape of gas into the sewer, which resulted in an explosion whereby pltf. was injured. The gas mains were laid at such a depth as to be unhurt by ordinary traffic:—*Held*: defts. had been guilty of negligence in using such a steam roller.—**DRISCOLL v. POPLAR DISTRICT BOARD OF WORKS** (1897), 62 J. P. 40; 14 T. L. R. 99, D. C.

58. Street lamp—Damage by vehicle—Liability of master of driver.—[A driver accidentally injured a metropolitan street lamp while driving a van laden with baskets. B. the master was summoned under Metropolitan Management Act, 1855 (c. 120), s. 207 & the justices, holding it to be an accident & not a negligent act, dismissed the charge:—*Held*: the justices were right.—**HARDING v. BARKER** (1888), 53 J. P. 308; 37 W. R. 78; 5 T. L. R. 42, D. C.

59. ——— Necessity for proof of negligence.—[The driver of an omnibus is liable, under Metropolitan Local Management Act, 1855 (c. 120), s. 207, for the accidental breaking of a street lamp without any negligence on his part, although the accident may be caused by the projection of the lamp-post to some extent over the roadway, & by the rail of the omnibus striking the lamp in consequence.—**BURGESS v. MORRIS** (1897), 77 L. T. 97; 61 J. P. 553; 41 Sol. Jo. 642, D. C.

*Annotation:—***Reid. Ashton v. Eccles Corp'n.** (1906), 71 J. P. 55.

60. ———.—[On a summons against applt. for "unlawful & carelessly" damaging a lamp post under Gasworks Clauses Act, 1847 (c. 15), s. 20 the magistrates found that there was evidence of "carelessness" & made an order against applt.:—*Held*: on the facts, although the word "accidentally" was not in the summons there was sufficient evidence of carelessness to justify the order, as the kind of carelessness referred to in the sect. is something short of what may be called negligence, & is almost equivalent to pure accident.—**ASHTON v. ECCLES CORPN.** (1906), 71 J. P. 55, D. C.

*Annotation:—***Reid. Birmingham Corp'n. v. Allsopp** (1919), 88 L. J. K. B. 549.

61. ———.—[By Gas Works Clauses Act, 1847 (c. 15), s. 20: "Every person who shall carelessly or accidentally break, throw down, or damage any pipe, pillar, or lamp belonging to the undertakers or under their control shall pay such sum of money by way of satisfaction to the undertakers for the damage done, not exceeding £5, as any two justices or the sheriff shall think reasonable":—*Held*: where a lamp-post had been knocked down by the negligent driving of defts.' servant, pltf's. could

maintain an action for negligence in the county ct. against the masters, as the sect. was not exclusive.—**CRYSTAL PALACE GAS CO. v. IDRIS & CO.** (1900), 82 L. T. 200; 64 J. P. 452, 16 T. L. R. 180; 44 Sol. Jo. 229, D. C.

*Annotations:—***Reid. Ashton v. Eccles Corp'n.** (1906), 71 J. P. 55; **Birmingham Corp'n. v. Allsopp** (1919), 88 L. J. K. B. 549.

62. Gas main—Damage causing explosion.—[A district council, being about to construct a sewer under their statutory powers, employed a contractor to construct it for them. In consequence of his negligence in carrying out the work a gas-main was broken, & the gas escaped from it into the house in which pltf's., a husband & wife, resided, & an explosion took place, by which the wife was injured, & the husband's furniture was damaged. In an action by pltf's. against the district council & the contractor:—*Held*: (1) the district council owed a duty to the public, including pltf's., so to construct the sewer as not to injure the gas-main; they had been guilty of a breach of this duty; (2) notwithstanding that they had delegated the performance of the duty to the contractor, they were responsible to pltf's. for the breach; & the damages were not too remote to be recovered.—**HARDAKER v. IDLE DISTRICT COUNCIL**, [1896] 1 Q. B. 335; 65 L. J. Q. B. 363; 74 L. T. 69; 60 J. P. 196; 44 W. R. 323; 12 T. L. R. 207; 40 Sol. Jo. 273, C. A.

*Annotations:—**As to* (2) **Reid. Jorleson v. Sutton, Southcoates & Drypool Gas Co.**, [1898] 2 Ch. 614; **Penny v. Wimbledon U. C.**, [1899] 2 Q. B. 72; **The Snark**, [1900] P. 105; **Maxwell v. British Thomson Houston Co.** (1902), 18 T. L. R. 278; **Shrimpton v. Hertfordshire County Council** (1910), 74 J. P. 305; **The Devonshire** (1911), 106 L. T. 241; **Robinson v. Beaconsfield R. C.**, [1911] 2 Ch. 188; **Hurlstone v. L. Elec. Ry.** (1914), 30 T. L. R. 398. *Generally, Mentd.* **Blake v. Woolf** (1898), 67 L. J. Q. B. 813; **Groves v. Wimborne**, [1898] 2 Q. B. 402; **Holliday v. National Telephone Co.**, [1899] 1 Q. B. 221; **Performing Right Soc. v. Mitchell & Booker (Palais de Danse)**, [1924] 1 K. B. 762.

63. Remedies for damage—Injunction & damages.—[Pltf's., a gas co., laid down pipes under the surface of certain streets, as they were bound by statute to do, for the purpose of supplying gas to light the streets & houses in the streets. The streets were vested in defts., the vestry of the parish, by certain statutes which gave them the authority of the surveyor of highways, & with the duty to repair, but without prescribing any particular mode of repair. Defts. used steam-rollers for the repair of the streets, as being a mode of repair most advantageous to both the ratepayers & the public, but the rollers they used were so heavy as to frequently injure pltf's.' pipes, though the pipes were sufficiently below the surface not to have been injured by the ordinary mode of repair if such rollers had not been used:—*Held*: pltf's. were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain defts. from using steam rollers in such a way as to injure the pipes of pltf's.—**GAS LIGHT & COKE CO. v. ST. MARY ABBOTT'S, KENSINGTON VESTRY** (1885), 15

reasonable means of repairing the roads.—**ALLIANCE & DUBLIN CONSUMERS GAS CO. v. DUBLIN COUNTY COUNCIL**, [1901] 1 L. R. 492.—**IR.**

g. — Damage by subsidence.—[A gas co. entered into an agreement with the proprietor of certain lands to supply his mansion-house with gas, & laid down a branch line of pipes through his lands, it being part of the

agreement that the pipes should belong to the co. The proprietor subsequently let the shale in his lands to an oil co. which became bound to pay him for surface & other damage caused by their operations, & to relieve him of all claims against him on account thereof. The result of the operations of the oil co. was to cause a subsidence of the ground, which damaged the pipes belonging to the gas co. In an

action by the gas co. against the oil co.:—*Held*: defenders were not liable for damage caused by the subsidence, as it was not averred that they had worked the mineral improperly, & as they were under no obligation to the gas co. express or implied, to support the pipes.—**MID & EAST CALDER GAS LIGHT CO. v. OAKBANK OIL CO., LTD.** (1891), 18 R. (Cl. of Sess.) 788.—**SCOT.**

Q. B. D. 1; 54 L. J. Q. B. 414; 53 L. T. 457; 40 J. P. 470; 33 W. R. 892; 1 T. L. R. 452, C. A.

Annotations.—*Consd.* Bristol Waterworks Co. v. Bristol Corp'n. (1889), 5 T. L. R. 561. *Distd.* Southwark & Vauxhall Water Co. v. Wandsworth Board of Works, [1888] 2 Ch. 603. *Consd.* Chichester Corp'n. v. Foster, [1906] 1 K. B. 167. *Refd.* A.-G. (on Relation of Monmouthshire County Council) & Monmouthshire County Council v. Scott (1904), 89 L. T. 726. *Mentd.* Grosvenor Hotel Co. v. Hamilton (1894), 63 L. J. Q. B. 661.

64. — Action or statutory penalty—Alternative remedies.]—CRYSTAL PALACE GAS CO. v. IDRIS & CO., No. 61, ante.

65. — Recovery of penalty—Action for balance of damage.]—Undertakers, who have recovered a sum of money before justices "by way of satisfaction" under Gasworks Clauses Act, 1847 (c. 15), s. 20 for injury carelessly or accidentally done to their pillar, cannot by a civil action recover the balance of the amount of the damage done.—BIRMINGHAM CORPN. v. ALLSOPP (S.) & SONS, LTD. (1918), 88 L. J. K. B. 549; 119 L. T. 775; 35 T. L. R. 24; 16 L. G. R. 862, D. C.

— Reference by order of court—Allegation of fraud.]—See ARBITRATION, Vol. II., p. 622, No. 2507.

SUB-SECT. 2.—INJURY TO THIRD PARTY ARISING OUT OF DAMAGE.

See, generally, NEGLIGENCE.

66. Liability of party doing damage—Local authority—Constructing sewer.]—HARDAKER v. IDLE DISTRICT COUNCIL, No. 62, ante.

67. — Repair of street.]—DRISCOLL v. POPLAR DISTRICT BOARD OF WORKS, No. 57, ante.

SECT. 3.—ALTERATION OF WORKS BY OTHER UNDERTAKERS.

See Towns Improvement Clauses Act, 1847 (c. 34), ss. 61, 62; Public Health Act, 1875 (c. 55), s. 153; Metropolis Management Act, 1855 (c. 120), s. 98; Telegraph Act, 1863 (c. 112), ss. 6-8; Telegraph Act, 1868 (c. 110), s. 2; Telegraph Act, 1878 (c. 70), s. 7; Railway Clauses Consolidation Act, 1845 (c. 20), ss. 18-23; Tramways Act, 1870 (c. 78), ss. 30, 32, 33; Electric Lighting Act, 1882 (c. 56), ss. 15, 17; Electric Lighting (Clauses) Act, 1899 (c. 19); Sched., Clauses 17, 18; Electric Lighting, Vol. XX., pp. 209-213, Nos. 62-83; & generally, HIGHWAYS, RAILWAYS, TRAMWAY & LIGHT RAILWAYS, TELEGRAPHS & TELEPHONES.

68. Tramway undertaking—Tramway Act, 1870 (c. 78), s. 30—Alteration of position of gas mains—Jurisdiction of arbitrator.]—An arbitrator appointed to determine a difference arising under above sect. of above Act has jurisdiction to order gas mains already laid down to be lowered so that any new service pipes may be carried horizontally underneath the concrete bed of the tramway; & he further can order such gas mains to be moved laterally to such a distance as to enable access to be obtained to them without interference with the concrete bed.—*Re ILFORD GAS CO. & ILFORD*

URBAN DISTRICT COUNCIL (1903), 88 L. T. 236; 67 J. P. 239; 1 L. G. R. 213, D. C.; *subsequent proceedings, sub nom.* ILFORD GAS CO. v. ILFORD URBAN DISTRICT COUNCIL, 67 J. P. 365, C. A.

69. Counter notice by gas company.]—By sub-sect. 1 of above sect. of above Act the promoters are empowered for the purpose of making any tramways to alter the position of any gas or water mains but they must first give seven days notice to the co., or person to whom the mains may belong of their intention to lay down the tramway & the notice must be accompanied by a plan of the proposed work, & "if it should appear to any such co. or person that the construction of the tramway as proposed would endanger any such mains, such co., or person may give notice to the promoters to lower or otherwise alter the position of the mains" so far as necessary:—*Held*: the counter notice to be given by the owner of the mains might be given at any time until the tramway was constructed.—*HASTINGS TRAMWAYS CO. v. HASTINGS & ST. LEONARDS GAS CO.*, [1906] 2 Ch. 578; 76 L. J. Ch. 60; 95 L. T. 684; 70 J. P. 540; 23 T. L. R. 4; 51 Sol. Jo. 12; 5 L. G. R. 142, C. A.

70. — Additional expense imposed on gas company—In laying new pipes & mains—Right of company to recover such expense.]—A gas co. executed work in roads along which a tramway ran, part of which work consisted in laying down new service pipes, so laid for the first time since the construction of the tramway, & connecting same with their mains, which had been laid down before the construction of the tramway. In one instance during the execution of the work where there was a double tram line, the cars of one line were diverted to the other line, & the up & down cars were both carried over the same line for a whole day, such diversion being made at the request of the gas co. for the purpose of enabling them to repair a fractured main which was causing a serious escape of gas. In other instances the tramcars were either slowed down or only brought to a standstill for a sufficient time to enable the workmen of the gas co. to get out of the trenches under or near the tram lines where they were at work on the pipes of the gas co. By reason of the existence of the tramway additional expense was imposed upon the gas co. in connecting the new service pipes with their mains:—*Held*: the gas co. were entitled to recover such additional expense from the tramway co. under Tramways Act, 1870 (c. 78), s. 32 (5) inasmuch as there had been an interruption of the traffic on the tramway within the meaning of Tramways Act, 1870 (c. 78), s. 32 (2), & the connection of a new service pipe with the main as aforesaid involved an alteration of the main; but the proviso in Tramways Act, 1870 (c. 78), s. 32 (5) does not apply in the case of work which is not such as to interrupt the traffic on the tramway.—*Re BRISTOL GAS CO. & BRISTOL TRAMWAYS & CARRIAGE CO., LTD.*, [1910] 1 K. B. 114; 79 L. J. K. B. 219; 101 L. T. 659; 74 J. P. 35; 26 T. L. R. 75; 54 Sol. Jo. 47; 8 L. G. R. 30, C. A.

Injury to property of undertakers.]—See Part IV., Sect. 2, sub-sect. 1, ante.

PART IV. SECT. 2, SUB-SECT. 2.

h. Liability of party doing damage—Repair of street.]—The flowers in pliff's flower store were injured by reason of the escape of gas from a pipe of deft. gas CO. Unknown to the co.,
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a pipe had been fractured as a result of the operations of a steam roller belonging to a third party upon the road under which the pipe was laid:—*Held*: deft. co. was not liable since the fracture was caused without its

knowledge by a third party, over whom it had no control, & the consequence of whose acts it could not reasonably have anticipated.—*TIDY v. CUNNINGHAM* (1815), 30 W. L. R. 547; 7 W. W. R. 1205.—CAN.

Part V.—Negligence and Nuisance—Liability of Undertakers.

SECT. 1.—NEGLIGENCE.

SUB-SECT. 1.—ARISING OUT OF WORKS.

A. Injury to Persons.

See, generally, NEGLIGENCE.

71. General rule.]—A co. which has been entrusted by the legislature with the execution of a power from which mischief may result to the public, is bound to take especial precaution to guard against such mischief, & in default is responsible in damages.

The trench was left open at night; defts. ought not to have allowed so large a portion to remain open; but if they did, it was their duty to have guarded it with especial care; there was no light set up for the purpose of warning the passenger of his danger, & the mound was not sufficient to prevent the mischief which ensued (LORD ELLENBOROUGH, C.J.).—WELD v. GAS LIGHT CO. (1816), 1 Stark. 189, N. P.

72. Unguarded excavation.]—WELD v. GAS LIGHT CO., No. 71, *ante*.

73. Laying pipes—Employment of skilled persons—Compensation.]—Defts., a municipal corp., were empowered by Act of Parliament to construct gas works & to supply gas & sell & dispose of the coke; the surplus profits to go in reduction of the water rates & otherwise towards the improvement of the town. In an action against defts., the declaration alleged that they employed workmen to lay down the pipes, who so negligently conducted themselves that a piece of metal was projected against pltf. Plea.—That the grievances were *bona fide* done by defts. in the course of executing the powers conferred on them by their Act, & without any neglect, misconduct, etc., of defts. otherwise than by their workmen or one of them, & that the workmen were well skilled & qualified & proper persons to be employed by them:—*Held*: the plea was no answer to the action.—SCOTT v. MANCHESTER CORPN. (1857), 2 H. & N. 204; 26 L. J. Ex. 406; 29 L. T. O. S. 233; 22 J. P. 70; 3 Jur. N. S. 590; 5 W. R. 598; 157 E. R. 85, Ex. Ch.

*Annotations:—*Reid. Itchin Bridge Co. v. Southampton L. B. of Health (1858), 6 W. R. 223; Ruck v. Williams (1858), 3 H. & N. 308; Holliday v. St. Leonard, Shoreditch, Vestry (1861), 11 C. B. N. S. 192; Coe v. Wise (1864), 5 B. & S. 440; Mersey Docks Trustees v. Gibbs (1866), 11 H. L. Cas. 686. *Mentl. Gibbs v. Liverpool Docks Trustees* (1858), 3 H. & N. 164; Manley v. St. Helena Canal & Ry. (1858), 2 H. & N. 840; Blake v. Thrisk (1863), 2 New Rep. 80.

PART V. SECT. 1, SUB-SECT. 1.—A.

71. General rule.]—A gas co. is not responsible to occupiers of property for injuries caused by defective fittings not the property of the co.—TREMAINE v. HALIFAX GAS CO. (1874), 9 N. S. R. 360.—CAN.

k. Lighted gas jets in meter room.]—An experienced employee of defts. was killed by an explosion of illuminating gas while discharging his duties in the meter-room at defts. gas works. It was shown that there might possibly have been an escape of gas from the controllers or other fixtures in the room or in the blow-room

adjoining it; that there had been no special precautions by defts. to detect any such escape of gas that might occasionally happen, & that the meter-room had always been & at the time of the accident, was lighted by means of open gas jets. There was no exact proof of any particular fault, attributable to defts., which could have been the whole cause of the explosion, & its origin & course were not explained. In an action for damages by the widow & representatives of deceased, the jury found that the explosion had resulted from the fault & imprudence of defts. in lighting the meter-room by open gas jets, & contributory negligence on the

74. — Unguarded hole—No warning of danger.]—The owner of a house let it to a tenant & agreed to put it in repair & to convert it into two maisonnettes. The owner employed a builder to do the work & instructed him to employ defts., to execute the necessary work in connection with the gas fittings. Defts.' workmen in the course of their work removed a board in the floor on the first floor landing, leaving a hole about three feet long & six inches wide. The tenant, being desirous of letting the upper maisonnette, employed a house agent for that purpose, who gave pltf. an order to view the house. Pltf. went to the house with the order, & was admitted by defts.' workmen. She asked them which part of the house was to let, & they told her the upper part. She then went upstairs, & in crossing the first floor landing she put her foot into a hole, which was unfenced & was injured. The landing was dark, & defts.' workmen, who saw her go upstairs & knew that the hole was unfenced, did not warn her of the danger. In an action against defts. to recover damages for the injuries so sustained the jury found that defts.' workmen were not negligent in leaving the hole unfenced, but were negligent in not warning pltf. of the existence of the hole, & that pltf. was not guilty of contributory negligence. The judge, who tried the case & who by consent had power to draw inferences of fact, found that owing to the insufficient light the unfenced hole was a concealed danger to any one who did not know of its existence & he gave judgment for the pltf. for the damages awarded by the jury:—*Held*: defts.' workmen, having created the dangerous condition of the flooring & knowing that pltf. was lawfully going to the place where the danger was, were under a duty to warn her of the existence of the hole; & this duty arose independently of the occupation of the premises or of any invitation or licence; & as the hole was made in the ordinary course of the workmen's duty defts. were liable.—KIMBER v. GAS LIGHT & COKE CO., [1918] 1 K. B. 439; 87 L. J. K. B. 651; 118 L. T. 562; 82 J. P. 125; 34 T. L. R. 260; 62 Sol. Jo. 329; 16 L. G. R. 280, C. A.

75. Connection or disconnection of supply—Explosion at meter.]—The explosion was caused by the action of those, who had, with the authority of O., set to work to take away the meter without having first given notice to defts. under Gasworks Clauses Act, 1871 (c. 41), s. 15. Admittedly no such notice was given, & it is a question of law

part of deceased was negated:—*Held*: in the circumstances, the jury were justified in finding that there had been such negligence & imprudence on the part of defts., in such use of open gas jets, as would render them responsible for the injury complained of.—MONTREAL LIGHT HEAT & POWER CO. v. REGAN (1908), 40 S. C. R. 580.—CAN.

l. Examination of gas escape with lighted match.]—The manager of a gas co., having been informed of a serious escape of gas in a certain place, proceeded to inquire into the matter, & after an examination of some pipes

whether the sect. applies to the present case. It is one obviously in favour of gas cos. so that where they are supplying gas by meter the meter shall not be tampered with by the persons using the gas without their knowledge. But, from the moment defts. decided not to continue supplying O. with gas, & disconnected their pipe, he could no longer be called a "consumer." The sect. was therefore not applicable. Defts. were bound to have anticipated that, if they allowed an escape of gas into a house, the probability was that it would explode & injure people in the house & in the street. It is clear that the gas supply to O.'s meter was intended to be permanently cut off, & the question is whether in cutting off the supply the servants of defts. failed to use precautions which in reason they ought to have taken. Gas is so dangerous a thing that it requires the greatest precaution, whether the supply is intended to be cut off permanently or even only temporarily. The jury has properly looked upon the fact of defts. not having cut off the supply of gas to O.'s meter either at the main or at the place where it entered the cellar of the inn as showing negligence (LORD ESHER, M.R.).—*PATERSON v. BLACKBURN CORPN.* (1892), 9 T. L. R. 55, C. A.

76. — Public Authorities Protection Act, 1893 (c. 61), s. 1.]—Gasworks Clauses Act, 1871 (c. 41), which by sect. 11 imposes on gasworks undertakers the obligation of supplying gas to owners & occupiers who require a supply & of laying the necessary pipes, & by sect. 14 obliges them to supply any meters which they require the consumers to use, also impliedly imposes on them the obligation of fixing the meters. Defts. were the gasworks undertakers in their district. had been empty for some time & the gas had been cut off. On its becoming occupied the occupier required defts., to supply the premises with gas. They sent one of their servants to reconnect the pipes. While he was engaged in fixing the meter an explosion of the gas occurred through his negligence whereby pltf., a person employed on the premises by the occupier was injured. The action was not commenced until more than six months after the accident:—*Held*: defts., in fixing the gas meter were acting in the execution of their statutory duty, & above Act afforded a defence.—*CLAYTON v. PONTYPRIDD URBAN DISTRICT COUNCIL*, [1918] 1 K. B. 219; 87 L. J. K. B. 645; 118 L. T. 219; 82 J. P. 246; 16 L. G. R. 141. *Annotation*:—*Consd.* *Edwards v. Metropolitan Water Board*, [1922] 1 K. B. 291.

77. Reinstatement of street—Negligent filling in of trench.]—A gas co., in laying down a main along the side of a public road, filled up the trench so carelessly & defectively that the wheel of the

vehicle in which pltf. was driving sank into the trench, whereby the vehicle was upset & pltf. injured. A jury having found not only that the co. were guilty of negligence in the filling up of the road, but also that they left the road in such a state as to constitute a nuisance & a danger to those using the road:—*Held*: as the co. had left the road in a condition which amounted to a public nuisance, they were liable to pltf. notwithstanding the provisions of Gasworks Clauses Act, 1847 (c. 15), s. 11.—*GOODSON v. SUNBURY GAS CONSUMERS' CO., LTD.* (1896), 75 L. T. 251; 60 J. P. 585; 40 Sol. Jo. 730.

78. — By local authority—Instead of by gas company.]—Where a gas co. has under its statutory powers opened a street, but the local authority have under Metropolis Management Act, 1855 (c. 120), s. 114 reinstated such street, the gas co. are not liable for damage caused owing to such reinstatement having been done negligently.—*ORESSY v. SOUTH METROPOLITAN GAS CO.* (1906), 94 L. T. 790; 70 J. P. 405; 4 L. G. R. 1049, D. C. *Annotations*:—*Consd.* *Brame v. Commercial Gas Co.*, [1914] 3 K. B. 1181. *Refd.* *Thompson v. Bradford Corp.* & *Tinsley* (1915), 79 J. P. 364.

79. Repair to gas main—Unguarded fire pail overturned.]—Workmen employed by defts., a gas co., for the purpose of carrying out repairs to a gas main in a highway placed a fire pail, on which was a ladle containing molten lead, on unenclosed land adjacent to the highway. Pltf., a young child, was playing with other children near the fire when a passer-by accidentally knocked over the pail, & the molten lead was spilled on pltf., causing her injury. In an action by pltf. to recover damages the county ct. judge found that defts. were guilty of negligence in leaving the fire unattended & unguarded with the knowledge that it was surrounded by children & that it was being used for molten lead:—*Held*: there was evidence on which the county ct. judge could find that defts. were negligent; & defts. were also liable on the ground that what they were doing was a nuisance in that it was dangerous unless precautions were taken to guard persons using the highway from the danger.—*CRANE v. SOUTH SUBURBAN GAS CO.*, [1916] 1 K. B. 33; 85 L. J. K. B. 172; 114 L. T. 71; 80 J. P. 51; 32 T. L. R. 74; 60 Sol. Jo. 222; 14 L. G. R. 382, D. C.

B. Damage to Property.

See, generally, NEGLIGENCE.

80. Shop window broken.]—A gas co. for the purposes of their undertaking broke up the concrete pavement of a street within the limits of their special Act. In the course of such work a servant

in the street, went into one of the adjoining shops & examined the supply pipes with a lighted match which ignited the gas which had accumulated under the shop floor & caused a serious explosion, whereby pltf.'s two workmen were injured:—*Held*: in dealing with such dangerous matters as escapes of gas companies & their servants are bound to exercise the highest degree of care.—*HUGHES & ROY v. BALLYNAHINCH GAS CO., LTD.* (1899), 33 I. L. T. 74.—*IR.*

m. Connection or disconnection of supply—Explosion—Defective pipe.]—Pltf.'s wife was injured by an explosion of gas, caused by some defect in the gas pipe, in the room of a house rented & occupied by pltf. The room had previously been used as an office for a

factory adjoining, & received its supply of gas from the factory. The factory had for some time been unoccupied, & the gas turned off by the gas co. Subsequently & shortly prior to the accident, gas was turned on again at the factory:—*Held*: the gas co. was not liable for the injury, not being liable for the condition of the gas pipes inside of any private building.—*TREMAINE v. HALIFAX GAS LIGHT CO.* (1877), 11 N. S. R. (2 R. & C.) 394.—*CAN.*

n. — — —.]—BASTIEN v. MONTREAL LIGHT HEAT & POWER CO. (1907), 4 E. L. R. 173.—*CAN.*

PART V. SECT. 1, SUB-SECT. 1.—B.

a. Damage to house—Broken gas pipe—Company not responsible for

fillings in house.]—The occupants of a factory & an adjoining house had defts. put gas in both & in order to do so it was necessary to have a branch pipe from the co.'s main down a private lane leading to the buildings. The only stopcock between the main & the buildings was at the street. The buildings becoming vacant the co. removed their meters, turned off the gas & carefully closed up all the pipes. Subsequently pltf. purchased the premises, & at his request defts. turned on the gas again. While the house had been vacant the pipe in one of the rooms had been cut or wrenched off by some unknown person & left open so that when the gas was put on it had access into the building & coming in contact with a light an explosion occurred damaging the building, & for

*Sect. 1.—Negligence: Sub-sect. 1, B.; sub-sect. 2.
Sect. 2: Sub-sect. 1.]*

of the co., in striking the concrete with a pick, caused a piece of the concrete to fly up some distance & break a plate-glass window upon adjoining premises. In an action by the owner of the premises to recover damages:—*Held*: the co. were liable under Gasworks Clauses Act, 1847 (c. 15), s. 6 which was incorporated in their special Act.—*HORNBY v. LIVERPOOL UNITED GAS LIGHT CO.* (1883), 47 J. P. 231, D. C.

SUB-SECT. 2.—ARISING OUT OF USER OF GAS.

See, generally, NEGLIGENCE.

81. Escape of gas—Contributory negligence—Stop-cock not closed—By occupier on leaving house.]—A gas co., supplied a house with gas by means of a short pipe from their main, communicating with fittings within the house belonging to the owner during his occupation, & also during the subsequent occupation of his tenant. There was a meter & a stop-cock, of which the key was hung by its side within the house, but there was no stop-cock between the outside of the house & the main. Upon the tenant quitting, he sent notice to the co. that he would no longer be liable for gas rate. Ten days after he quitted, an explosion took place, in consequence of the escape of the gas within the house, by which it was much injured, & a person going into the house found the gas issuing from the pipe above the meter & the stop-cock, which had not been turned so as to prevent the passage of gas. There was no ground to believe that the upper part of the pipe had been removed by some dishonest person:—*Held*: the owner could not, on these facts, recover compensation for the damage done from the co. in an action on the case for negligence, as pltf. was, by his omission to close the stop-cock within the house, contributory to the mischief, & as there was no obligation imposed on the co. by their Act of Parliament or the law to place a stop-cock on the outside of the house.—*HOLDEN v. LIVERPOOL NEW GAS & COKE CO.* (1846), 3 C. B. 1; 15 L. J. C. P. 301; 7 L. T. O. S. 208; 10 Jur. 883; 136 E. R. 1.

Annotation:—Held. Ellis v. L. & S. W. Ry. (1857), 2 H. & N. 424.

82. Failure to close window—To prevent gas reaching naked light.]—In an action

against a gas co. for negligently allowing the escape of gas from their main into premises where lights were known to be burning; the case for pltf. being, that the gas found entrance through an open window nearly level with the trench from the main after a hole had been made in the main for the insertion of the service pipe:—*Held*: even if the jury thought the gas so entered, it was still a question for them whether defts.' men might reasonably have foreseen it, & were bound to have the window closed.

To allow a quantity of gas to escape into premises where lights are burning was necessarily attended with danger of ignition, & must have been known to be so; & those who carry on operations dangerous to the public are bound to use all reasonable precautions, all the precautions which ordinary reason & experience might suggest to prevent the danger. It is not enough that they do what is usual if the course ordinarily pursued is imprudent & careless; for no one can claim to be excused for want of care because others are as careless as himself; on the other hand, in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business (*COCKBURN, C.J.*).—*BLENKIRON v. GREAT CENTRAL GAS CONSUMERS CO.* (1861), 2 F. & F. 437; *previous proceedings, sub nom. BLENKIRON v. GREAT CENTRAL GAS CONSUMERS CO., STURGEON v. GREAT CENTRAL GAS CONSUMERS CO.* (1860), 3 L. T. 317.

83. — Carrying lighted candle.]—Defts., a gas co., contracted to supply pltf. with a proper service pipe to convey gas from the main outside to a meter inside his premises. Gas escaped from the pipe laid down under the contract into pltf.'s shop. The servant of a gasfitter employed by pltf. happened to be at work in another room at the time of the escape, & went into the shop upon hearing of it with a view of finding out its cause. He was carrying a lighted candle in his hand, & immediately on entering the shop an explosion took place, doing damage to pltf.'s stock & premises. On the trial of an action against defts. for their breach of contract in not supplying a proper service pipe, the jury found, first, that the escape of gas was occasioned by a defect in the pipe, & that that defect existed in the pipe when supplied; & secondly, that there was negligence on the part of the gas-fitter's servant in carrying a lighted candle. Upon these findings:—*Held*: pltf. was entitled to recover, & defts. were not relieved from liability by the negligent act of the gasfitter's servant.—*BURROWS v. MARCH GAS & COKE CO.* (1872), L. R. 7 Exch.

this pltf. brought his action. The state of the pipe was known four hours before the explosion to the wife of the occupier of the house. Deft. co. had nothing to do with the fittings inside the buildings as they belonged to the occupier, & their only duty was to see that the pipes were properly secured when the meters were taken away & this they had done:—*Held*: pltf. was not entitled under the evidence to recover.—*DODGE v. HALIFAX GAS CO.* (1874), 9 N. S. R. 325.—*CAN.*

p. Negligence of independent contractor—Liability of gas company.]—Deft. co., acting within their corporate powers & under statutory powers, instructed a contractor to make connection with the place of business of pltf.'s tenant for the supply of natural gas thereto. The contractor's employees negligently allowed gas to

escape while constructing a trench for the service pipe from defts.' main line, which had been laid along a public street, thus damaging pltf.'s property:—*Held*: defts. were liable.—*BALLETINE v. ONTARIO PIPE LINE CO.* (1908), 12 O. W. R. 273; 16 O. L. R. 654.—*CAN.*

q. Escape of gas from gas main—Damage to tramway system.]—A gas co. in laying its mains beneath the surface of streets, with the consent of the town council, laid a high pressure main in such a way that it intersected the crown of a disused sewer. It appeared that this must have been done with the consent of the officials of the council at the time when the main was laid. Subsequently the council built a new sewer & closed up the ends of the disused sewer. In the part which was closed up there were some manholes, but these were also

closed up & cemented. Some three weeks after the disused sewer was closed up, rails were being laid by a tramway co. over the site of the disused sewer. In laying these rails it was the custom of the tramway co. to employ a system by which iron filings were molten on the spot & the ends of the rails welded by being encased in the iron so molten. Whilst this process was being carried out, under the supervision of workmen skilled in the use of the process, an explosion took place:—*Held*: the explosion was due to such negligence on the part both of the town council & the gas company as to make them liable in damages for expense to & loss of revenue by the tramway co. in consequence of the explosion.—*METROPOLITAN TRAMWAYS CO., LTD. v. CAPE TOWN, TOWN COUNCIL* (1906), 23 S. C. 397.—*S. AF.*

96; 41 L. J. Ex. 46; 26 L. T. 318; 36 J. P. 517; 20 W. R. 493, Ex. Ch.

Annotations.—*Consd.* Clark v. Chambers (1878), 3 Q. B. D. 327. *Distd.* Henderson v. Newcastle & Gateshead Gas Co. (1893), 37 Sol. Jo. 403. *Refd.* Lilley v. Doubleday (1881), 7 Q. B. D. 510; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560. *Mentd.* Sayer v. Hatton (1885), Cab. & El. 492; Mowbray v. Merryweather, [1895] 2 Q. B. 640; Weld-Blundell v. Stephens, [1920] A. C. 956.

84. — Tampering with gas plant.—In actions for damages in respect of an accident against applt. gas co. it appeared that applts. were not occupiers of the premises on which the accident had occurred & had no contractual relations with plffs., but that they had installed a machine on the premises, & the jury found that the accident was caused by an explosion resulting from gas emitted, owing to applts.' negligence, through its safety valve direct into the closed premises instead of into the open air:—*Held*: the initial negligence having been found against applts. in respect of an easy & reasonable precaution which they were bound to have taken, they were liable unless they could show that the true cause of the accident was the act of a subsequent conscious volition, *e.g.*, the tampering with the machine by third parties.—DOMINION NATURAL GAS CO., LTD. v. COLLINS & PERKINS, [1909] A. C. 640; 79 L. J. P. C. 13; 101 L. T. 359; 25 T. L. R. 831, P. C.

Annotations.—*Consd.* Blacker v. Lake & Elliot (1912), 106 L. T. 533. *Refd.* Jefferson v. Derbyshire Farmers, [1921] 2 K. B. 281. *Mentd.* White v. Steadman, [1913] 3 K. B. 340; *Ituoff* v. Long, [1916] 1 K. B. 148; *Montreal City v. Watt & Scott*, [1922] 2 A. C. 555.

85. — Failure by company to detect—Escape discoverable.—A gas co. are bound to keep up such a reasonable inspection of their mains & pipes as may enable them to detect when there is such an escape of gas, by fracture or imperfection of pipes, as may lead to danger of an explosion; & if an explosion takes place from a fracture or defect which has existed for several days, during which time it has also been discoverable, by reason of the smell of the escaped gas, & would have been discovered by proper inspection, that is evidence of negligence on the part of the co.; nor is it enough to relieve them from liability that upon notice of the escape they sent a workman to repair the defect, who arrived too late to do so.—MOSE v. HASTINGS & ST. LEONARDS GAS CO. (1864), 4 F. & F. 324.

86. — — — — ——Owing to excavations made by the Comrs. of Sewers within two feet & a-half of a gas main embedded in a highway at a depth of ten & a-half inches, one of the gas pipes was deprived of support from beneath. The weight of traffic above cracked the pipe & an escape & accumulation of gas occurred for two or three days, resulting in an explosion which injured a man passing. The gas co. were unaware of the escape of gas, as well as of the excavation, of which they had received no notice:—*Held*: the character of the crack in the pipe, the length of time the gas was escaping, & the absence of any one on behalf of the gas co. at the time of the excavation, constituted evidence of negligence on their part.—PRICE v. SOUTH METROPOLITAN GAS CO. (1895), 65 L. J. Q. B. 126; 12 T. L. R. 31, D. C.

Annotation.—*Refd.* Charing Cross, West End & City

Electricity Supply Co. v. London Hydraulic Power Co., [1913] 3 K. B. 442.

87. — No negligence of company.—JACKSON v. CARSHALTON GAS CO. (1888), 5 T. L. R. 89.

88. — Through pipe supplied & fixed by third party.—Under Gasworks Clauses Act, 1871 (c. 41), s. 11, the gas co. are bound to furnish & lay any pipe that may be necessary for the purpose of giving a supply of gas to the premises. When the house was built a service pipe to the upper flat was then laid by the owner, & when the gas co. were asked to supply gas they were in truth asked to supply gas to that pipe. It was not necessary to lay any pipe to carry the gas to the upper flat, as there was a pipe already laid. The connecting pipe to the main was necessary, & the gas co. laid a sound pipe & made the connections properly. Therefore they performed their obligations under sect. 11 properly, & they turned the gas on properly. There was no duty on them to test the service pipe laid by plff., nor to wait & see after the gas was turned on whether it leaked or not. *Defts.*, therefore, are not liable.—HENDERSON v. NEWCASTLE & GATESHEAD GAS CO. (1893), 37 Sol. Jo. 403, C. A.

SECT. 2.—NUISANCE.

SUB-SECT. 1.—IN GENERAL.

See Gasworks Clauses Act, 1847 (c. 15), s. 29; Gasworks Clauses Act, 1871 (c. 41), s. 9; Public Health Act, 1875 (c. 55), s. 68; Alkali, etc. Works Regulation Act, 1906 (c. 14), Sched. I.; Notice of Accidents Act, 1906 (c. 53), s. 4; & generally, NUISANCE.

89. Liability of directors of undertaking—For acts of superintendent—Ignorance of directors—Of methods employed.—In an indictment against a gas co. for a nuisance, in conveying the refuse of gas into a great public river, whereby the fish were destroyed, & the water was rendered unfit for drink, etc., the question for the jury was, whether the special acts of the particular co. complained of amounted to a nuisance. The circumstance, that, by the diminution of fish, a considerable number of fishermen were thrown out of employ, is not itself sufficient ground to sustain such an indictment. The directors were answerable for an act done by their superintendent & engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, & though such plan was a departure from the original & understood method, which the directors had no reason to suppose was discontinued.—R. v. MEDLEY (1834), 6 C. & P. 292, N. P.

Annotations.—*Refd.* R. v. Stannard (1863), 12 W. R. 208; Tarry v. Ashton (1876), 1 Q. B. D. 314; I. R. v. Cardiff Conservative Club Co. (1894), 58 J. P. 120; Sherras v. De Rutzen, [1895] 1 Q. B. 918.

—*See, generally*, COMPANIES, Vol. X., pp. 1151, 1152, Nos. 8138–8148.

90. Pollution of water—Provisions of private Act—Washings from gas works.—A private Act of Parliament, which incorporated a gas co., & empowered them to make the necessary works,

against a gas co. for a nuisance, a plea of justification containing the averment that they are now managing their works carefully, & that the vapours complained of unavoidably arise, is

bad, as applying the defence to the time of pleading, & not of action brought.—WATSON v. TORONTO CITY GAS CO. (1818), 5 U. C. R. 262.—CAN.

PART V. SECT. 2, SUB-SECT. 1.

r. Defence to action for nuisance—Plea of justification—Vapours unavoidably arising.—In an action

Sect. 2.—Nuisance: Sub-sects. 1

contained an enactment, that if the co. should at any time "cause or suffer to be conveyed or to flow" into any stream, etc., or place for water, within the limits of the Act, any washing produced in making gas, or do any act to the water contained in any such stream, etc., or place for water, whereby the water therein should be fouled or corrupted, then the company should forfeit for every such offence £200. The site for the gas-tank was selected by an experienced engineer, & the co. built it in a proper manner, & with all ordinary care & prudence. They knew that mines had been worked in the neighbourhood, but did not know that any mines had been worked under their own lands. After some years the gas-tank cracked at the bottom, the washings, produced in the process of making gas, escaped, percolated underground through the earth, & polluted the water in pltf.'s well. The co. then found on inquiry, that mines had been worked by strangers to them, under part of their land, & close up to the tank. The crack in the tank was caused by the subsidence of the soil, owing, in all probability, to the mining operations:—*Held*: the co. were liable under [the private Act] to the penalty of £200 for polluting pltf.'s water by their gas washings.—*HIPKINS v. BIRMINGHAM & STAFFORDSHIRE GAS LIGHT CO.* (1860), 6 H. & N. 250; 30 L. J. Ex. 60; 158 E. R. 103; *sub nom.* BIRMINGHAM & STAFFORDSHIRE GAS LIGHT CO. v. *HIPKINS*, 7 Jur. N. S. 213; 9 W. R. 168, Ex. Ch.

Annotation:—*Reid*, *Millington v. Griffiths* (1874), 30 L. T. 65.

91. — Wilful pollution — Omission to mitigate evil.—By Thames Conservancy Act, 1894 (c. clxxxvii), s. 92, "If any person without lawful excuse . . . wilfully causes or suffers any washing or other substance produced in making or supplying gas or any other offensive matter, whether solid or fluid, to flow or pass into the Thames or into any tributary . . ." he shall for every such offence be liable to a penalty not exceeding £20, & to a daily penalty not exceeding £10:—*Held*: persons were not guilty of wilfully suffering offensive matter to pass into the Thames by an omission to do something which might have mitigated the evil.—*HIGH WYCOMBE CORPN. v. THAMES CONSERVATORS* (1898), 78 L. T. 463; 14 T. L. R. 358, D. C.

— **Prescription to pollute.**—*See* EASEMENTS, Vol. XIX., pp. 156–158, Nos. 1074–1096.

— *See, generally*, PUBLIC HEALTH, WATER SUPPLY, WATERS & WATERCOURSES.

92. Withdrawal of support — Subsidence.—A gas co. which was empowered by a private Act, conferring no compulsory powers & containing no compensation clauses, to purchase by agreement certain land as a site for gasworks & to construct such works thereon, employed contractors to excavate on part of the site so purchased a circular tank in which a gasholder was intended to float. A subsidence of the adjoining land was caused by water & silt drained therefrom in making the excavations, & the houses on that land were damaged. The co. also proposed to erect on the site of the excavations a gasholder of such a height as to obstruct the lights of some of the houses. The owner of the adjoining land brought an action against the co. & the contractors for an injunction & damages:—*Held*: the co. were expressly liable under the Gasworks Clauses Act, 1847 (c. 15), & 1871 (c. 41), for private nuisance occasioned by

the construction of their works as well as by the manufacture of gas; & although no negligence on the part of the contractors in making the excavations had been shown, the co. & the contractors were jointly liable for the damage occasioned to the adjoining land & houses; & an injunction was rightly granted against the co. prohibiting them erecting a gasholder so as to obstruct the lights of the houses.—*JORDESON v. SUTTON, SOUTHCOATES & DRYPOOL GAS CO.*, [1899] 2 Ch. 217; 68 L. J. Ch. 457; 80 L. T. 815; 93 J. P. 692; 15 T. L. R. 374, C. A.

Annotations:—*Folld*, *Batcheller v. Tunbridge Wells Gas Co.* (1901), 84 L. T. 765. *Reid*, *Fletcher v. Birkenhead Corpn.*, [1906] 1 K. B. 805; *English v. Metropolitan Water Board*, [1907] 1 K. B. 588. *Mentl*, *Goldberg v. Liverpool Corpn.* (1900), 82 L. T. 362; *Home & Colonial Stores v. Colls* (1901), 85 L. T. 701; *Salt Union v. Brunner, Mond*, [1906] 2 K. B. 822; *Fletcher v. Birkenhead Corpn.*, [1907] 1 K. B. 205.

— *See, generally*, EASEMENTS, Vol. XIX., pp. 163 *et seq.*, & MINES.

93. Obstruction of ancient light.—*JORDESON v. SUTTON, SOUTHCOATES & DRYPOOL GAS CO.*, No. 92, *ante*.

— *See, generally*, EASEMENTS, Vol. XIX., pp. 123 *et seq.*

Obstruction of prospect or view.—*See, generally*, EASEMENTS, Vol. XIX., pp. 180, 181, Nos. 1303–1315.

94. Discharge of noxious fumes — Damage to trees.—Pltf. was the owner & occupier of a dwelling-house & park which adjoined defts.' gasworks. The house was situated at a distance of between four hundred & five hundred yards from the gasworks. Immediately adjoining defts.' premises was a plantation of trees sixteen yards in width & seventy-five yards in length which had been planted by pltf. to screen off the gasworks. The fumes & smoke from the gasworks were carried by the prevailing wind across the plantation for a distance of a hundred to two hundred yards on to pltf.'s premises & had destroyed & injuriously affected them to such an extent that the tops of some of the trees were dying whilst others were dead. There was no house on pltf.'s property within the affected area. In an action brought by pltf. for an injunction to restrain defts. from carrying on their works so as to cause a nuisance or injury to pltf. or his property:—*Held*: the fumes & smoke discharged by defts.' gasworks over pltf.'s premises caused a serious, growing, & permanent injury to pltf.'s property; the injury being of a continuous nature it was impossible to measure the damage thereby occasioned with any certainty; & pltf. was therefore entitled to the injunction he asked.

If the owner of property, be it a house, or a garden, or a park, or anything else, not necessarily a house or structure at all, is so substantially injured in the reasonable enjoyment of his property as that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction to restrain the continuance of the nuisance (*BUCKLEY, L.J.*).—*WOOD v. CONWAY CORPN.*, [1914] 2 Ch. 47; 83 L. J. Ch. 498; 110 L. T. 917; 78 J. P. 249; 12 L. G. R. 571, C. A.

95. Remedies for nuisance—Injunction—Not if nuisance only apprehended.—Where an injunction was sought to restrain defts. from proceeding to erect gas works, for which they had commenced the buildings, & from making & manufacturing gas upon a plot of ground described, alleged by the bill to be so near to pltf.'s mansion as to cause

serious injury to health & damage to his property ; & also from creating the nuisance which would be caused by the establishment of gas works on that spot ; & defts. by their affidavits, having stated that they had obtained a patent for processes, not, however, disclosed, by which a gas factory would be rendered no nuisance :—*Held* : the ct. would not grant the injunction until there had been actual injury.—*HAINES v. TAYLOR* (1847), 2 Ph. 209 ; 9 L. T. O. S. 193 ; 11 Jur. 73 ; 41 E. R. 922, L. C.

Annotations :—*Consd.* *Pattison v. Gifford* (1874), L. R. 18 Eq. 259 ; *Hendriks v. Montagu* (1881), 17 Ch. D. 638. *Refd.* *Soltau v. De Held* (1851), 2 Sim. N. S. 133 ; *A.-G. & Sheffield United Gas Light Co. v. Sheffield Gas Consumers' Co.* (1852), 19 L. T. O. S. 344 ; *Fletcher v. Bealey* (1885), 54 L. J. Ch. 424. *Mentd.* *Adstread v. Chapman* (1850), 15 L. T. O. S. 341 ; *A.-G. v. Manchester Corpn.*, [1893] 2 Ch. 87.

96. Prior action at law—Plaintiffs rights established.—A gas co. having erected works close to B.'s market garden, & thereby injured the vegetation, B. brought an action at law, which was referred to an arbitrator, with power to direct what was to be done in future, & under which reference a sum was awarded to B. as damages. The co. having still carried on these works with a few alterations not material, B. applied to a ct. of equity for an injunction :—*Held* : (1) the award being equivalent to a verdict of a jury, pltf. had complied with the condition that he should first establish his title at law ; no new action was necessary in consequence of an alteration in the works, Ct. of Ch. being satisfied that the nuisance still substantially existed, & therefore B. was entitled to an injunction ; (2) the injury complained of not being done under the authority of the co.'s Act of Parliament, there was no remedy under Lands Clauses Act, 1845 (c. 18).—*IMPERIAL GAS LIGHT & COKE CO. (DIRECTORS, ETC.) v. BROADBENT* (1859), 7 H. L. Cas. 600 ; 29 L. J. Ch. 377 ; 34 L. T. O. S. 1 ; 23 J. P. 675 ; 5 Jur. N. S. 1319 ; 11 E. R. 239, II. 1. ; *affg.* *S. O. sub nom. BROADBENT v. IMPERIAL GAS CO.* (1857), 7 De G. M. & G. 430, L. C.

Annotations :—*As to* (1) *Expld.* *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125. *Consd.* *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287. *Refd.* *Re Brogden & Llynvi Valley Rly.* (1860), 9 C. B. N. S. 229 ; *Crump v. Lambert* (1867), 17 L. T. 133 ; *Cowper v. Laidler*, [1903] 2 Ch. 337 ; *Saunby v. London, Ontario, Water Comrs.*, [1906] A. C. 110 ; *Price's Patent Candle Co. v. L. C. C.* (1908), 78 L. J. Ch. 1 ; *A.-G. v. Birmingham, Tame, & Rea Drainage Board*, [1910] 1 Ch. 48 ; *Wood v. Conway Corpn.*, [1914] 2 Ch. 47 ; *Stollmeyer v. Petroleum Development Co.*, [1918] A. C. 498, n. ; *Slack v. Leeds Industrial Co.-Op. Soc.*, [1923] 1 Ch. 431. *As to* (2) *Consd.* *Ferrar v. City of London Sewers Comrs.* (1869), L. R. 4 Exch. 227 ; *Hammersmith & City Rly. v. Brand* (1869), L. R. 4 H. L. 171. *Refd.* *Ware v. Regent's Canal Co.* (1858), 3 De G. & J. 212 ; *New River Co. v. Johnson* (1860), 2 E. & E. 435 ; *Bagnall v. L. & N. W. Rly.* (1861), 7 H. & N. 423 ; *R. v. Cheshire Clerk of the Peace* (1864), 4 New Rep. 167 ; *Re Stockport, Timperley & Altringham Rly.* (1864), 33 L. J. Q. B. 261 ; *Coe v. Wise* (1866), L. R. 1 Q. B. 711 ; *Dungey v. London Corpn.* (1869), 38 L. J. C. P. 298 ; *Bedford v. Dawson* (1875), 39 J. P. 804 ; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614. *Generally, Mentd.* *Southampton & Itchin Floating Bridge Co. v. Southampton L. B. of Health* (1858), 4 Jur. N. S. 1298 ; *A.-G. v. Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71.

97. —.]—*WOOD v. CONWAY CORPN.*, No. 94, *ante*.

See, generally, INJUNCTION.

98. — Under Lands Clauses Act, 1845 (c. 18), s. 68—When available.—*IMPERIAL GAS LIGHT & COKE CO. (DIRECTORS, ETC.) v. BROADBENT*, No. 96, *ante*.

SUB-SECT. 2.—UNDER GASWORKS CLAUSES ACTS.

See Gasworks Clauses Act, 1847 (c. 15), ss. 21–29, 40 ; Gasworks Clauses Act, 1871 (c. 41), s. 9 ; Waterworks Clauses Act, 1847 (c. 17), ss. 62–67 ; Public Health Act, 1875 (c. 55), s. 68 ; generally, NUISANCE.

99. Pollution of water—Gasworks Clauses Act, 1847 (c. 15), incorporated in private Act—Penalties imposed by both Acts—Recoverable only under Gasworks Clauses Act, 1847 (c. 15).—By Croydon Improvement Act, 1829 (c. lxxiii), s. 27, it is enacted that, if the comrs., or any co. or other person making or supplying gas within the limits of the Act, shall suffer any impure matter to flow into any stream, etc., they shall be liable to a penalty of £200, to be sued for by any common informer, & to a further penalty of £20 a day for the continuance of the nuisance after notice, to be paid to the informer or the party injured, as the justices should think fit. By Gasworks Clauses Act, 1847 (c. 15), s. 21, a like penalty is imposed upon the undertakers of any gas works for the same offence, which penalty is, by sect. 22, “to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act :” & by sect. 23, a daily penalty of £20 is imposed on them for the continuance of the nuisance after notice, to be recovered in like manner :—*Held* : a gas co. established under an Act of Parliament in which the provisions of Gasworks Clauses Act, 1847 (c. 15), are incorporated, are liable to the penalties imposed by the Gasworks Clauses Act, 1847 (c. 15), but not to those imposed by Croydon Improvement Act, 1829 (c. lxxiii).—*PARRY v. CROYDON COMMERCIAL GAS & COKE CO.* (1863), 15 C. B. N. S. 568 ; 3 New Rep. 212 ; 9 L. T. 694 ; 28 J. P. 86 ; 10 Jur. N. S. 172 ; 12 W. R. 212 ; 143 E. R. 908, Ex. Ch.

100. Prohibition against—Defences not open to offending company.—Pltfs. were the owners & the occupiers of two houses which obtained their water supply from a well by means of a pipe laid in the main road, & belonging to the owners of the houses. Defts. were a gas co. incorporated under Acts of Parliament, & owned gas mains & pipes which were laid in the same road. In an action by pltfs. to restrain the co. from polluting the water supply with gas escaping from their pipes, which pltfs. alleged to be defective :—*Held* : (1) defts. had no statutory authority to create a nuisance, & there was a nuisance ; as, however, it had ceased after action brought, there would be no injunction, but a declaration that defts. were not entitled to pollute pltfs.' water. (2) Evidence was inadmissible on the following three points raised by defts. : (a) That their pipes were well laid, & they had a statutory right to do what they did, some escape of gas being unavoidable. (b) That pltfs.' water pipe was defective. (c) That pltfs.' water supply was otherwise unfit for domestic purposes.—*BACHELLER v. TUNBRIDGE WELLS GAS CO.* (1901), 84 L. T. 765 ; 65 J. P. 680 ; 17 T. L. R. 577 ; 45 Sol. Jo. 577.

— *Prescription to pollute.*—*See EASEMENTS*, Vol. XIX., pp. 156–158, Nos. 1074–1096.

—.]—*See, generally, PUBLIC HEALTH ; WATER SUPPLY ; WATERS & WATERCOURSES.*

Remedies.—*See Nos. 95, 96, ante.*

Sect. 2.—Nuisance: Sub-sect. 3. Part VI. Sects.

SUB-SECT. 3.—UNDER LIGHTING AND WATCHING ACT, 1833.

See Lighting & Watching Act, 1833 (c. 90), ss. 48–54, 63; generally, NUISANCE.

101. Pollution of water—Disused well—Non-user due to gas contamination—Statutory penalty.]—Where noxious matter percolates through the soil from gasworks, so as to foul a well, such percolation will render the defendants liable under Lighting & Watching Act, 1833 (c. 90), which imposes a penalty of £200 on any gas co., "who shall suffer any washings, etc. to be conveyed into any well." A well which, on account of its having become contaminated, has been disused by the

owner for several years, & has been covered over, does not cease to be a well within the Act. Non-user, & closing of his own well in consequence of its being polluted, even coupled with the acceptance by pltf. of the use of substituted wells of defts. is not such an abandonment of the former as to alter its character & make it no longer a well, nor can any licence to pollute be inferred from such a state of facts.—*MILLINGTON v. GRIFFITHS* (1874), 30 L. T. 65.

Annotation:—Mentd. Hulley v. Silverspring Bleaching Co., [1922] 2 Ch. 268.

— **Prescription to pollute.]—See EASEMENTS, Vol. XIX., pp. 156–158, Nos. 1074–1096.**

— **]—See, generally, PUBLIC HEALTH; WATER SUPPLY; WATERS & WATERCOURSES.**

Remedies generally.]—See Sub-sect. 1, ante.

Part VI.—Profits and Accounts.

SECT. 1.—PROFITS.

See Gasworks Clauses Act, 1847 (c. 15), ss. 30–38; Gasworks Clauses Act, 1871 (c. 41), ss. 7, 8; Gas & Water Works Facilities Act, 1870 (c. 70); Companies Clauses Consolidation Act, 1845 (c. 16); Companies Clauses Act, 1863 (c. 118), Parts I–III.

102. Dividends—Reduction of prescribed rate—Not pro rata on each class of share—Court will not interfere.]—In a gas co. certain shares, by the joint effect of the special Act, & Gas Works Clauses Act, 1847 (c. 15), had £10 as the prescribed maximum rate of dividend, & certain other shares had, by the special Act, £7 as the maximum rate. The profits not being sufficient to pay both maximum rates, the co. declared a dividend of £8 on the first-mentioned shares, & £7 on the latter. Thereupon the holders of the first shares filed a bill for the purpose of having it declared that the dividends ought to be in proportion of ten to seven. On demurrer to the bill:—*Held*: there was no ground for the interference of the ct.—*MAUGHAN v. LEAMINGTON PRIORS GAS CO.* (1866), 15 L. T. 437; 31 J. P. 237; 15 W. R. 333.

103. Deficiency drawn from contingent fund—Deficiency in any given year.]—*CHAMBERLAIN v. WORCESTER NEW GASLIGHT CO.* (1875), *Times*, June 5.

104. — No reduction where price of gas raised—Injunction against company.]—*MASON v. ASHTON GAS CO.*, No. 105, *post*.

— **Inclusion of Income Tax.]—See, generally, INCOME TAX.**

105. Accumulation of profits—No reduction in price of gas—Action for mandamus to reduce—Consumers cannot maintain.]—Pltfs., as consumers, complained that deft. co. had created a reserve fund greatly in excess of that authorised

by their Act, & had carried over from year to year large undivided profits, thereby avoiding the obligation on them to reduce the price of gas. At the trial the judge granted a *mandamus* directing defts. to reduce the price of their gas so as to exhaust the excess in their reserve fund & undivided profits:—*Held*: pltfs. were not entitled to raise the question as they had no interest in it, the shareholders only being interested, & the fund could not be ordered by the ct. to be applied in reduction of prices.

If the co. were to raise the price of gas & not diminish their dividends, the consumers might obtain an injunction to restrain the co. from so doing (*LOPES, L.J.*).—*MASON v. ASHTON GAS CO.* (1886), 54 L. T. 708; 50 J. P. 628; 2 T. L. R. 555, C. A.

— **Examination of account books.]—See Sect. 2, *post*.**

SECT. 2.—ACCOUNTS.

See Gasworks Clauses Act, 1847 (c. 15), ss. 35, 38; Gasworks Clauses Act, 1871 (c. 41), ss. 35, 38, Sched. 13; Gas Regulation Act, 1920 (c. 28), s. 15.

106. Obligation to supply accounts—Gasworks Clauses Act, 1871 (c. 41), s. 35—Application to provisions of special Act.]—Gasworks Clauses Act, 1871 (c. 41), s. 35, requires the undertakers to fill up & forward to the local authority by Mar. 25, in each year, an annual statement of accounts, made up to the preceding Dec. 31, in a certain form, & to keep copies of such statement, & to sell same to any appct. A penalty is imposed in case they make default in complying with the above provisions, & for recovery of penalties complaint

PART VI. SECT. 2.

*a. Provision for auditing accounts
—In statute extending powers of com-*

pany.]—Where by an Act extending the powers of resp. co. certain duties & obligations were imposed on it for the benefit of its

view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default & no right of

is to be made before a justice within six months after the commission of the offence. The same Act, in sect. 1, says that "Gasworks Clauses Act, 1847 (c. 15), & this Act shall be construed together as one Act; & the provisions of this Act shall be held to repeal & supersede such of the provisions of that Act as are inconsistent with this Act;" & in sect. 3 that "the provisions of this Act shall apply to every gas undertaking authorised by any special Act hereafter passed." Applt. gas co. by its special Act, passed in 1853, incorporated Gasworks Clauses Act, 1847 (c. 15), which, by sect. 49, provides that "nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any general Act relating to gasworks." On Mar. 24, 1880, resp. made complaint before justices that applts. had failed on Mar. 3, 1880, to sell to him a copy of the annual statement of accounts made up to Dec. 31, 1878. The co. had in fact never made up the accounts in the manner prescribed by the Act of 1871, nor forwarded any statement to the local authority of which a copy could be made:—*Held*: (1) applts. were subject to the provisions of the Act of 1871, which amended not only the Act of 1847, but also every private Act with which the Act of 1847 had been incorporated; (2) the complaint was in time.—*DUDLEY GAS CO. v. WARMINGTON* (1881), 50 L. J. M. C. 69; 44 L. T. 475; 45 J. P. 649; 29 W. R. 680, D. O. Annotation:—*Distd. Leamington Priors Gas Co. v. Davis* (1886), 18 Q. B. D. 107.

107. —————.]—*LEAMINGTON PRIORS GAS CO. v. DAVIS*, No. 6, *ante*.

108. **Gasworks Clauses Act, 1847 (c. 15), s. 35—Gas engineer as additional examiner.**—The ct. of quarter sessions has no jurisdiction, under above sect. of above Act to appoint a gas engineer to assist an accountant appointed thereunder to examine & ascertain the actual state & condition of the concerns of the gas co., & where such order is made, a writ of *certiorari* will lie to bring up the order to be quashed.—*R. v. BRINDLEY* (1885), 54 L. T. 435; 50 J. P. 534; 2 T. L. R. 208.

109. **No power to re-cast & vary accounts.**—By above sect. above Act, a ct. of quarter sessions may, on the petition of two gas-rate payers, appoint some accountant, or other competent person, to examine & ascertain at the expense of the gas co. (the amount of the expense to be determined by the ct.), the actual state & condition of the concerns of the co., & to make a report thereof to the ct., & power is given to the ct. to examine witnesses on oath touching

the truth of the accounts & the matters therein referred to; & if it appear to the ct. that the profits of the co. during the preceding year have exceeded the prescribed rate, the ct. has power, in case the whole of the reserve fund has been & remains invested, & in case dividends to the amount thereinbefore limited have been paid, to make an order reducing the price of the gas supplied by the co. A petition was, under above sect., presented to the recorder of Hanley praying him to appoint a person to inquire into the actual condition of the undertaking of the prosecutors, & an accountant was appointed. During the inquiry he examined not only the accounts of the then previous year, but re-opened all the accounts of previous years to 1871, & a report based upon this inquiry was sent in by him to the recorder. It was admitted that the whole of the reserve fund was not then & never had been invested, & that the prescribed maximum dividend had not been paid. The recorder, being of opinion that the accounts when amended showed that the co. had in point of fact earned enough to pay the prescribed maximum dividend & to have invested & kept invested the whole of the reserve fund, made an order reducing the price of gas 6d. per thousand cubic feet. He further ordered the prosecutors to pay £650, the expense of the proceedings before the accountant, & to pay to the petitioners £2,433 6s. 6d., "their costs of & incident to the petition." Upon an application for a writ of *certiorari* to quash the order as being made without jurisdiction:—*Held*: the order to reduce the price of gas was bad, the power of the recorder being absolutely restricted by above sect. to cases where the whole of the reserve fund has been invested & the prescribed dividend paid; & the recorder acted without jurisdiction in ordering the costs of the petitioners to be paid by the prosecutors.

The accountant & the recorder had jurisdiction to inquire into the accounts of past years for the purpose of ascertaining the actual condition of the concern; but *semble*, that they had no power to disallow & re-cast them, & by so doing vary the accounts of the year into which they were inquiring (*per CUR.*).—*R. v. HANLEY (RECORDER)* (1887), 19 Q. B. D. 481; 56 L. J. M. C. 125; 57 L. T. 414; 52 J. P. 100; 36 W. R. 222, D. C.

110. **Power to order reduction in price of gas.**—*R. v. HANLEY (RECORDER)*, No. 109, *ante*.

111. ————— **Costs of examination.**—*R. v. HANLEY (RECORDER)*, No. 109, *ante*.

action given to persons aggrieved, provision however being made for its accounts being audited by direction of the mayor of the corpor. with whose

assent the co. was originally established:—*Held*: no individual customer had a right of action against the co. for non-compliance with the

provisions of the Act.—*JOHNSTON & TORONTO TYPE FOUNDRY CO. v. CONSUMERS' GAS CO. OF TORONTO*, [1898] A. C. 447.—*CAN.*

Part VII.—Legal Procedure.

SECT. 1.—IN GENERAL.

Contents of summons on warrant.]—*See* Gasworks Clauses Act, 1871 (c. 41), ss. 42, 43.

Disqualification of justices.]—*See* Gasworks Clauses Act, 1871 (c. 41), s. 46.

Service of notices.]—*See* Gasworks Clauses Act, 1871 (c. 41), s. 45.

SECT. 2.—PENALTIES.

SUB-SECT. 1.—IN GENERAL.

Sec, generally, Gasworks Clauses Act, 1847 (c. 15); Gasworks Clauses Act, 1871 (c. 41); Railways Clauses Act, 1845 (c. 20), ss. 140–160, as amended by Summary Jurisdiction Acts, 1848 (c. 43); 1879 (c. 49); 1884 (c. 43).

Penalties for false evidence.]—*See, now,* Perjury Act, 1911 (c. 6), ss. 1, 17, Sched.

Penalties not cumulative.]—*See* Gasworks Clauses Act, 1871 (c. 41), s. 36.

In Metropolitan Police area.]—*See* Part VIII., Sect. 6, *post*.

SUB-SECT. 2.—PARTICULAR PENALTIES.

Failure to keep copies of special Act.]—*See* Gasworks Clauses Act, 1847 (c. 15), s. 46, & Part I., Sect. 4, *ante*.

Improper breaking up of streets.]—*See* Gasworks Clauses Act, 1847 (c. 15), ss. 11, 12, 40, & Part II., Sect. 2, sub-sect. 2 B., *ante*.

Failure to supply gas.]—*See* Gasworks Clauses Act, 1871 (c. 41), s. 36, & Part III., Sect. 2, sub-sect. 1, *ante*.

Meters—Prevention of inspection of.]—*See* Gasworks Clauses Act, 1871 (c. 41), s. 21, & Part III., Sect. 2, sub-sect. 2, *ante*.

Use of unstamped meters.]—*See* Sale of Gas Act, 1859 (c. 66), ss. 17, 18, & Part III., Sect. 5, sub-sect. 2, *ante*.

Improper stamping.]—*See* Sale of Gas Act, 1859 (c. 66), ss. 11, 14, 15, & Part III., Sect. 5, sub-sect. 2, *ante*.

Recovery of gas charges.]—*See* Gasworks Clauses Act, 1871 (c. 41), s. 40, & Part III., Sect. 2, sub-sect. 5, *ante*.

Testing quality & pressure of gas—Obstruction of facilities for.]—*See* Gasworks Clauses Act, 1871 (c. 41), s. 34, & Part III., Sect. 6, *ante*.

Waste of gas & damage to property.]—*See* Gasworks Clauses Act, 1847 (c. 15), ss. 18–20, & Part IV., Sects. 1, 2, *ante*.

Malevolent breach of contract—By employees of undertakers.]—*See* Conspiracy & Protection of Property Act, 1875 (c. 86), ss. 4, 5, & Part III., Sect. 7, *ante*.

Fouling water.]—*See* Gasworks Clauses Act, 1847 (c. 15), ss. 21–23, 24, 40; Lighting & Watching Act, 1883 (c. 90), ss. 50, 52, 63, & Part V., Sect. 2, *ante*.

Escape of gas.]—*See* Gasworks Clauses Act, 1847 (c. 15), ss. 24, 40; Lighting & Watching Act, 1883 (c. 90), s. 48, & Part V., Sect. 1, sub-sect. 2, *ante*.

Refusal to produce books—By undertakers.]—*See* Gasworks Clauses Act, 1847 (c. 15) s. 37, & Part VI., Sect. 2, *ante*.

Failure to keep annual accounts.]—*See* Gasworks Clauses Act, 1847 (c. 15), s. 38; Gasworks Clauses Act, 1871 (c. 41), s. 38, & Part VI., Sect. 2, *ante*.

PART VII. SECT. 2, SUB-SECT. 1.

t. *Omission to post up certificate of testing.]—*The penalties provided for by Gas Inspection Act, R. S. C., 1906 (c. 87), ss. 59, 60, for failure to

procure & post up the certificates of tests required by sect. 44 & for selling gas before connections have been made with the testing place, etc., are not incurred when sect. 44 has not become

operative by notification to the undertaker of the prescribing of a testing place.—*CARBERRY GAS CO. v. HALLETT* (1908), 8 W. L. R. 119; 17 Man. L. R. 525.—*CAN.*

Part VIII.—Gas Supply in the Metropolis.

SECT. 1.—IN GENERAL.

See Metropolis Management Act, 1855 (c. 120); Metropolis Gas Act, 1860 (c. 125); Metropolis Gas Act, 1861 (c. 79); Gasworks Clauses Act, 1847 (c. 15); Gasworks Clauses Act, 1871 (c. 41); London Gas Act, 1868 (c. cxxy); Gaslight & Coke & other Gas Companies Acts Amendment Act, 1880 (c. clxxxi); Metropolis Gas (Prepayment Meter) Act, 1900 (c. cclxxii); London Gas Act, 1905 (c. clv).

112. Obligation to light streets—Parish vestry—Metropolis Management Act, 1855 (c. 120).]—A co. built Vauxhall Bridge under a local Act by which they were empowered to make, amongst others, a road leading to the bridge in the parish of Lambeth & county of Surrey, & they were required to put up lamp-posts & lamps on the road & bridge, & to keep the road & bridge lighted under pain of being indicted if in default; half the bridge was to be deemed to be in the parish of Lambeth & county of Surrey, but not to be deemed a county bridge as to subject the county or parish to the repairs of the bridge or road. By a subsequent local Act certain comrs. were empowered to cause, amongst others, the road to the middle of Vauxhall Bridge to be kept properly lighted, & it was lawful for them to keep lighted such streets as they might think proper; & the “present lamps & posts in the streets within their jurisdiction, & which shall or may hereafter be erected or fixed,” were vested in the comrs. :—*Held*: the obligation to light the road & half the bridge & the property in the lamps were transferred from the co. to the comrs., & from them to the vestry of the parish of Lambeth by Metropolis Management Act, 1855 (c. 120), ss. 90, 130, 250.

Qu.: whether, if the obligation & property had not been transferred from the co. to the comrs., they would not have been transferred to the vestry from the co. under sect. 90.—*It. v. LAMBETH VESTRY* (1862), 3 B. & S. 1; 31 L. J. Q. B. 252; 6 L. T. 644; 26 J. P. 597; 9 Jur. N. S. 48; 122 E. R. 1.

113. Restriction on public supply companies—Metropolis Gas Act, 1860 (c. 125).—Supply not to public—Railway companies & railway hotels.]—The purport of sect. 54 of above Act, is to protect the rights of such cos. or persons who, previously to the passing of above Act, manufactured & supplied gas to others than the “public.”

Semble: railway cos. & hotels in connection with them, do not constitute the “public” within the sect.—*IMPERIAL GASLIGHT & COKE CO. v. WEST LONDON JUNCTION GAS CO.* (1866), 15 L. T. 66; 14 W. R. 1019; *affd.* (1867), 56 L. J. Ch. 862, n. L. JJ.

Annotations:—*N.F. Gas Light & Coke Co. v. South Metropolitan Gas Co.* (1889), 62 L. J. Ch. 123. *Refd.* *Pudsey Coal Gas Co. v. Bradford Corp.* (1873), 21 W. R. 282.

114. ——— Supply meter on customer's property.]—Upon the true construction of sect. 6 of above Act, a gas co. is prohibited from furnishing to a customer a supply of gas for the purpose of consumption by him within a district assigned

to another co., notwithstanding that the meter through which the supply passes is on a part of the customer's property which is within the district.—*GAS LIGHT & COKE CO. v. SOUTH METROPOLITAN GAS CO.* (1889), 62 L. J. Ch. 123; 62 L. T. 126; 54 J. P. 373; 5 T. L. R. 731, H. L.

Annotations:—*Consd.* *A.-G. v. West Gloucestershire Water Co.*, [1909] 1 Ch. 636. *Mentd.* *A.-G. v. Metropolitan Electric Supply Co.* (1905), 74 L. J. Ch. 384.

Gasworks Clauses Acts, 1847 (c. 15), & 1871 (c. 41).—Construed as one Act—Effect on Metropolis Gas Act, 1860 (c. 125).]—See Nos. 4, 7, *ante*.

SECT. 2.—LAYING OF PIPES.

See Gasworks Clauses Act, 1847 (c. 15), s. 47; Metropolitan Paving Act, 1817 (c. xxix), ss. 13–15, 18, 19, 22; Metropolis Management Act, 1855 (c. 120), ss. 109–115, 247; Metropolis Management Amendment Act, 1862 (c. 102), s. 82; Metropolis Gas Act, 1860 (c. 125), ss. 46, 49, 50, 54; Metropolis Gas Act, 1861 (c. 79); London Government Act, 1899 (c. 14), & generally, Part II., Sect. 2, sub-sect. 2, B., *ante*.

115. Reinstatement of street—Liability of gas company—Reinstatement undertaken by local authority—Work negligently done.]—*CRESSY v. SOUTH METROPOLITAN GAS CO.*, No. 78, *ante*.

116. ——— Liability for additional expense.]—*COMMERCIAL GAS CO. v. POPLAR BOROUGH COUNCIL*, No. 25, *ante*.

117. Resolution by local authority.]—By Gasworks Clauses Act, 1847 (c. 15), s. 10, a gas co. which breaks open the surface of a street is bound to reinstate it. By Metropolis Management Act, 1855 (c. 120), s. 114, a local authority may do work of reinstatement themselves instead of permitting the gas co. to do it. A borough council in the metropolis, purporting to act under that sect., passed a resolution that they would in all cases where any pavement was opened by a gas co. in their borough do the work of reinstatement themselves. Subsequently a gas co. having opened the pavement of a street & finished laying their pipes, gave notice to the council that reinstatement was necessary :—*Held*: the resolution did not, upon the mere expiry of a reasonable time after receipt of the notice, *ipso facto* release the co. from the duty imposed by Gasworks Clauses Act, 1847 (c. 15). To effect such a release it was necessary that the council should dismiss the co. from the control of the reinstatement & in fact take charge of the work themselves.—*BRAME v. COMMERCIAL GAS CO.*, [1914] 3 K. B. 1181; 84 L. J. K. B. 570; 12 L. G. R. 1270; *sub nom.* *BRAINE v. COMMERCIAL GAS CO.*, 111 L. T. 1099; 79 J. P. 55, D. O.

Annotation:—*Refd.* *Thompson v. Bradford Corp.* & *Tinley* (1915), 79 J. P. 864.

—*See, generally*, Part II., Sect. 2, sect. 2, B. (b), iv., *ante*.

SECT. 3.—NUISANCES AND CONTAMINATION OF WATER SUPPLY.

See Gasworks Clauses Act, 1847 (c. 15), ss. 21-20; Metropolis Gas Act, 1860 (c. 125), ss. 45-52, 55; Gasworks Clauses Act, 1871 (c. 41), s. 9; Public Health (London) Act, 1891 (c. 70), ss. 52, 53; Metropolis Water Act, 1902 (c. 41), s. 3; & generally, Part V., Sect. 2, *ante*.

118. Prohibition against nuisance—Requisite purity of gas unobtainable—Without commission of nuisance—Injunction.]—By an Act of Parliament reciting that under a former Act incorporating Gas Works Clauses Act, 1847 (c. 15), a gas co. was under obligation to supply gas, the co. was authorised to buy certain specified lands adapted for the purpose, the mode of supply was prescribed, & the gas was to be of a certain purity; but by this Act & Gas Works Clauses Act, 1847 (c. 15), it was provided that nothing in those Acts contained should prevent the co. from being liable to legal proceedings in consequence of making the gas:—*Held*: the co. was not justified in causing a nuisance even if the gas could not be made of the requisite purity without so doing; it was not shown that by greater care & expense the nuisance might be avoided.

Qu.: on the construction of the Acts, whether the co. was under an obligation to supply gas.—*A.-G. v. Gas Light & Coke Co.* (1877), 7 Ch. D. 217; 47 L. J. Ch. 534; 37 L. T. 746; 42 J. P. 391; 26 W. R. 125.

Annotations:—*Reid*, Hill v. Metropolitan Asylum District Managers (1879), 4 Q. B. D. 433; Harrison v. Southwark & Vauxhall Water Co., [1891] 2 Ch. 409; Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287; Jorden v. Sutton, Southcoates & Drypool Gas Co., [1898] 2 Ch. 614.

SECT. 4.—SUPPLY OF GAS.

See Metropolis Gas Act, 1860 (c. 125), ss. 14-23, 39; Gasworks Clauses Act, 1847 (c. 15), ss. 15, 16; Gasworks Clauses Act, 1871 (c. 41), ss. 11, 13-27, 39-41, & generally, Part III., *ante*.

119. Price of gas—Provisions in private Act—& Metropolis Gas Act, 1860 (c. 125)—Inconsistent provisions.]—A clause in a private Act of Parliament which is quite inconsistent with a clause in a subsequent public Act dealing with the same subject is thereby repealed. A gas co. were by their act of incorporation restricted to a charge of 4s. per thousand cubic feet. By a subsequent public Act, Metropolis Gas Act, 1860 (c. 125), for the supply of gas to the metropolis, an increased standard of purity & illuminating power was required from the cos. electing "to adopt the provisions of that Act as to price, purity, & illuminating power," & an increased charge allowed to be made by them:—*Held*: the co. were no longer subject to the restriction as to price contained in the private Act.—*GREAT CENTRAL GAS CONSUMERS Co. v. CLARKE* (1863), 13 C. B. N. S. 838; 32 L. J. O. P. 41; 11 W. R. 123; 143 E. R. 331; *sub nom.* CLARKE v. GREAT CENTRAL GAS CONSUMERS Co., 1 New Rep. 127, Ex. Ch.

Annotation:—*Mentid*, Thorpe v. Adams (1870), 40 L. J. M. C. 52.

120. *]*—Pltfs. were one of the gas cos. included in Metropolis Gas Act, 1860

(c. 125), & under sect. 36, they had elected to adopt its provisions. In 1868, City of London Gas Act, 1868 (c. cxxv), & Gaslight & Coke Companies' Act, 1868 (c. cvi), two local Acts, received the royal assent on the same day. By the former of these two Acts, certain provisions in the Act of 1860, concerning the purity & illuminating power of gas, were repealed, & others were enacted in their stead. By the latter of these two Acts, which was an Act promoted by pltfs., it was enacted that pltfs.' co. should be & continue subject to the powers & provisions of Metropolis Gas Act, 1860 (c. 125), as if this Act were not passed, so far as the same were not varied by this Act; & that nothing in this Act contained should exempt pltfs.' co. or their gasworks from the provisions of Metropolis Gas Act, 1860 (c. 125). It was also enacted that if the former of these two Acts should pass into law in that session, then pltfs.' co. & their undertaking should be subject to the provisions of City of London Gas Act, 1868 (c. cxxv):—*Held*: in an action to recover the price of gas supplied to defts., the amount of which depended upon whether pltfs. were bound by the provisions of Metropolis Gas Act, 1860 (c. 125), repealed by City of London Gas Act, 1868 (c. cxxv), pltfs. were, by the terms of their Act of 1868, subject to all restrictions imposed upon them for the benefit of the public by both Metropolis Gas Act, 1860 (c. 125), & City of London Gas Act, 1868 (c. cxxv).—*GAS LIGHT & COKE Co. v. ST. GEORGE, MANOVER SQUARE VESTRY* (1873), 42 L. J. Q. B. 50; 28 L. T. 281, Ex. Ch.

121. Refusal of supply.]—*COMMERCIAL GAS Co. v. SCOTT*, No. 4, *ante*.

122. Notice requesting supply—Length of notice required.]—*SOUTH METROPOLITAN GAS LIGHT & COKE Co. v. NOAKES*, No. 7, *ante*.

SECT. 5.—PRESSURE. ILLUMINATING POWER AND PURITY.

See Metropolis Gas Act, 1860 (c. 125), s. 24; Gas Reputation Act, 1920 (c. 28), ss. 1-10, 18, & generally, Part III., Sect. 6, *ante*.

123. Chief gas examiner—Appeal to—Discretion as to hearing counsel—Gas Companies Acts Amendment Act, 1880 (c. clxxxi), s. 12.]—The chief gas examiner of the metropolitan district has a discretion as to whether he will or will not hear counsel upon an appeal to him under above sect.—*R. v. WILLIAMSON* (1890), 59 L. J. Q. B. 493; 63 L. T. 276; 55 J. P. 101; 38 W. R. 769, D. C.
Annotation:—*Dbid*, It. v. St. Mary Abbott's, Kensington Assmt. Com. (1891), 64 L. T. 240.

124. Judicial jurisdiction—Reception of evidence—In absence of necessary parties.]—The report [of the chief gas examiner] is virtually a judgment. It is provided by statute that such report is final & is a basis for future proceeding. Being a judicial proceeding the rule that no evidence shall be received on behalf of one party in the absence of the other applies (*CAVE, J.*).—*R. v. LONDON COUNTY COUNCIL*, *Ex p. COMMERCIAL GAS Co.* (1895), 11 T. L. R. 337, D. C.

125. Testing gas—Provision for daily testing—"Daily" includes Sunday—Gas Companies Amendment Act, 1880 (c. clxxxi), s. 7.]—By the South Metropolitan Gas Co.'s special Acts of 1869 &

1876 provision was made for the public testing of the quality of the gas supplied by them to their customers. The mode of testing & the situation & number of the testing places, which were to be provided by the co. & to be under the control of the Metropolitan Board of Works, whose powers subsequently became vested in plths., the London County Council, were to be prescribed by gas referees appointed by the Board of Trade, & "daily" testings were to be made by gas examiners appointed by the Metropolitan Board. Similar provisions were contained in the special Acts of the other metropolitan gas cos. By *an* Act passed in 1880, which was applicable to all the metropolitan gas cos., the provisions as to "daily" testings were substantially re-enacted by a sect. which provided that a gas examiner should, at each testing place, "make daily" such number of tests as the gas referees should prescribe. Other sects. gave the Metropolitan Board, as "the controlling authority," the control & management of the testing places. There was also a provision in the Act of 1869, which was to be read with the Act of 1880, defining "day" as twenty-four hours, beginning at nine o'clock in the forenoon of one day & ending at nine o'clock in the forenoon of the next. The practice under these Acts until 1902 had been to test on week-days only:—*Held*: (1) the word "daily" in the Act of 1880 must be construed literally, as including Sundays,

& the previous practice under that & the earlier Acts was not sufficient to justify the ct. in departing from that literal construction; &, accordingly, the gas examiners appointed by the London County Council were entitled to test on Sundays the gas supplied by the co.; (2) the London County Council, as the body entrusted by Parliament with the control & management of the testing places provided by the co., were proper plths. in an action for an injunction to restrain the co. from preventing the gas examiners from making tests on Sundays; &, therefore, it was not necessary that the action should be brought by the Attorney-General.—*LONDON COUNTY COUNCIL v. SOUTH METROPOLITAN GAS CO.*, [1904] 1 Ch. 76; 73 L. J. Ch. 136; 89 L. T. 618; 68 J. P. 5; 52 W. R. 161; 20 T. L. R. 83; 48 Sol. Jo. 99; 2 L. G. R. 161, C. A.

126. — Prevention of test—Proceedings to restrain—Proper person to commence.—*LONDON COUNTY COUNCIL v. SOUTH METROPOLITAN GAS CO.*, No. 125, *ante*.

SECT. 6.—PENALTIES.

See Metropolis Gas Act, 1860 (c. 125), ss. 40, 47, 53; Metropolitan Police Courts Act, 1839 (c. 71).

Part IX.—Disposal of Undertaking.

See Public Health Act, 1875 (c. 55), ss. 161, 162; Lands Clauses Consolidation Act, 1845 (c. 18); Lands Clauses Consolidation Act, 1869 (c. 18); Arbitration Act, 1889 (c. 49); Cos. Act, 1908 (c. 69).

127. Agreement for sale—Whether goodwill included.—It appears to us as it did to the cts. below, that the terms of the agreement are conclusive against applts.' claim to receive compensation for the franchise & goodwill. The general word "property" on which applts.' argument turned is limited, as are the other substantives with which it is coupled, viz., "works," "plant," & "appliances," by the words which follow, "used for light, heat, & power purposes." It is impossible to suppose that the ideas of franchise & goodwill were meant to be included in that description, which is one of physical objects. But the matter is made still clearer by what follows. Art. 15 of the agreement shows the true position which the franchise held in the conception of the parties, for under it, in the event of the corpn. taking over the works, under the agreement, "all their . . . franchises" were to be surrendered to the corpn. (*LORD MACNAGHTEN*).

PART IX.

a. Compulsory acquisition—Purchase as going concern.—On the true construction of Perth Gas Co.'s Act, 1886, s. 50, in the absence of an express provision to the contrary, the transaction which it contemplates is the sale & transfer with the consent of the incumbancers to resps. of applts.' commercial undertaking as a going concern; not only of the physical apparatus by which they carry on their business, but also of their statutory powers; & that the whole must be included in the calculation of the purchase-money.—*PERTH GAS CO., LTD. v. PERTH CORPN.*, [1911] A. C. 506.—*AUS.*

b. — — — — —.—On the true construction of New Zealand Hamilton Gas Works Act, 1895, s. 46, the price to be paid for the gas-works & plant should be the commercial value thereof as a going concern, & not merely their structural value.—*HAMILTON GAS CO., LTD. v. HAMILTON CORPN.*, [1910] A. C. 300.—*N.Z.*

c. Agreement for sale—Non-inclusion in deed—Of reservation in

See Metropolis Gas Act, 1860 (c. 125), ss. 40, 47, 53; Metropolitan Police Courts Act, 1839 (c. 71).

district of the urban council for the purpose of supplying gas within the district of the urban council, which by reason of the sale would be rendered useless to the co. By a second agreement, terminable upon twelve months' notice, it was agreed that the council should take a supply of gas in bulk from the co.:—*Held*: (1) the purchase-money was to be assessed on the basis that the sale was a sale of a part of the gas co.'s undertaking as a going concern, including goodwill; (2) the arbitrator should take into consideration the contingency of the district council not continuing to take a supply of gas from the co., & should assess compensation in respect of the mains & pipes outside the district of the council provided by the co. for supplying gas within such district upon that basis.—*Re HUCKNALL-UNDER-HUTHWAITE URBAN DISTRICT COUNCIL & SOUTH NORMANTON, BLACKWELL & HUCKNALL-UNDER-HUTHWAITE GAS CO., LTD.* (1905), 69 J. P. 329; 3 L. G. R. 704, C. A.

129. Compensation—Mains & pipes—No longer put to original use.]—*Re HUCKNALL-UNDER-HUTHWAITE URBAN DISTRICT COUNCIL & SOUTH NORMANTON, BLACKWELL & HUCKNALL-UNDER-HUTHWAITE GAS CO., LTD., No. 128, ante.*

130. Arbitration—Scale of costs—Jurisdiction to review taxation.]—By an agreement, confirmed by a private Act, a district council agreed to purchase the undertaking of a gas co. at a price to be fixed by arbitration, & it was provided that the agreement should be "deemed a 'submission' within the meaning of Arbitration Act, 1899 (c. 49)." The council also agreed to pay "all the costs, charges, & expenses of the co. preliminary & incidental to the negotiation for the sale & the arbitration, the same to be taxed in case the parties differ." An award was made which did not deal with costs. The costs were taxed by a master, who allowed costs upon a scale lower than the scale as between solicitor & client. A judge at chambers ordered a review of taxation:—*Held*: there was jurisdiction to review the taxation of the master; & the co. was entitled to costs as between solicitor & client.—*MALVERN*

URBAN DISTRICT COUNCIL v. MALVERN LINK GAS CO. (1900), 83 L. T. 326, C. A.

131. Compulsory acquisition—Compensation—Severance of mains, pipes & works.]—The predecessors of the B. Corpn. purchased a gas undertaking under the powers of a special Act of 1877, which provided that the limits of the Act should include (*inter alia*) the township of W., provided that nothing in the Act should prejudice any application by any sanitary authority formed for or to include that township for parliamentary powers to supply the township with gas, & that if such powers were granted, the predecessors of the Corpn. should sell, & the sanitary authority should purchase all mains, pipes, & other works within the township at the price to be fixed in default of agreement by arbitration. By a special Act of 1906, the W. Urban District Council were empowered to supply gas in their district. Sect. 9 (1) of the Act provided, that the Corpn. should sell, & the Council should purchase all the mains, pipes, & other works within the district, & that upon the completion of the purchase all rights of the Corporation to supply gas within the district should cease. By Sect. 9 (2), it was provided that the sale should be for such "price & consideration" as should be agreed upon, or, failing agreement, as should be determined by arbitration in accordance with the provisions of the Lands Clauses Acts with reference to the taking of lands otherwise than by agreement & that in the construction of the provisions, the expression "lands" should mean the mains, pipes, & other works aforesaid:—*Held*: the Corpn. were not entitled to compensation (a) for severance of the mines, pipes, & works; (b) for loss of revenue caused by the cessation of their power to supply gas within the district.—*Re WOLSTANTON UNITED URBAN DISTRICT COUNCIL & BURSLEM CORPN.* (1907), 72 J. P. 28; 6 L. G. R. 523.

132. ——— Loss of revenue.]—*Re WOLSTANTON UNITED URBAN DISTRICT COUNCIL & BURSLEM CORPN., No. 131, ante.*

———*See, generally, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 122 et seq.*

*agreement.]—*C., by agreement of Apr. 5, 1891, agreed to sell to the E. Co., all his gas grants, leases, etc., the co. agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On Apr. 20, a deed was executed & delivered to the co. transferring all the

leases & property specified in the agreement, but containing no reservation in favour of C. such as was contained therein. The E. Co. in 1894, assigned the property transferred by the deed to the P. Co., who immediately cut off from the works of C. the supply of gas, & an action was brought to prevent such interference:—*Held*: as

the contract between the parties was embodied in the deed subsequently executed the rights of the parties were to be determined by the latter instrument, & as it contained no reservation in favour of C. his action could not be maintained.—*CARROLL v. PROVINCIAL NATURAL GAS & FUEL CO.* (1896), 29 S. C. R. 181.—CAN.

Part X.—Undertakings without Statutory Powers.

133. Interference with streets or highways—Indictable nuisance.]—A joint stock co. established by deed for the purpose of supplying a town with gas cannot justify the breaking up of the public streets for the purpose of laying down their main pipes on the ground that they have obtained the permission of the surveyor of highways, or of the local comrs. for lighting the town, or on the ground that the act is necessary for the more convenient enjoyment of the adjoining houses; & they are liable to an indictment for the nuisance.

—*R. v. SHEFFIELD GAS CONSUMERS CO.* (1853), 1 C. L. R. 916; 21 L. T. O. S. 153; 18 Jur. 146, n.; 17 J. P. Jo. 371.

*Annotations:—***Refd.** *Ellis v. Sheffield Gas Consumers Co.* (1853), 22 L. T. O. S. 84; *R. v. Longton Gas Co.* (1860), 6 Jur. N. S. 601; *Preston Corpn. v. Fullwood L. B.* (1885), 53 L. T. 718.

134. ———.]—It is an indictable nuisance to obstruct or to employ others to obstruct a public highway or footway, by placing earth & bricks thereon, taking up the pavement & opening trenches for the purpose of laying down service pipes for the supply of gas from public mains to private houses, unless those who do or authorise such acts have parliamentary powers for the purpose. Such acts cannot be justified by the occupiers of the houses as an exercise of the right of every householder, to make such a temporary obstruction of a highway or footway as may be necessarily incident to the enjoyment of his property.—*R. v. LONGTON GAS CO.* (1860), 2 E. & E. 651; 29 L. J. M. C. 118; 2 L. T. 14; 24 J. P. 214; 6 Jur. N. S. 601; 8 Cox, C. C. 317; 121 E. R. 244; *sub nom.* *R. v. KNIGHT*, 8 W. R. 293.

*Annotations:—***Consd.** *A.-G. v. Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71. **Refd.** *R. v. Train* (1862), 2 B. & S. 640; *Preston Corpn. v. Fullwood L. B.* (1885), 53 L. T. 718.

135. — Injunction to restrain.]—A co. was incorporated by Act of Parliament for supplying the town of S. with gas. Afterwards a joint stock co., registered under 7 & 8 Vict. c. 110, was formed for the same purpose, & with the permission of the board of surveyors of highways of S. commenced to break up the streets for the purpose of laying down their pipes. Upon information & bill by the former co. against the joint stock co., charging a public nuisance & private damage, the ct. refused to restrain the latter co. from proceeding with their works, upon the ground that the damage was trivial & temporary.

Qu.: whether the legislature, by not placing gas cos. within the exception of 7 & 8 Vict. c. 110, s. 2, contemplated that gas cos., incorporated under the provisions of that Act, might lawfully, with the permission of the board of surveyors of highways, & other local authorities, break up streets & highways, for the purpose of laying down their pipes.—*A.-G. v. SHEFFIELD GAS CONSUMERS CO.* (1853), 3 De G. M. & G. 304; 22 L. J. Ch. 811; 21 L. T. O. S. 49; 17 Jur. 677; 1 W. R. 185; 43 E. R. 119; *sub nom.* *SHEFFIELD UNITED GAS CO. v. SHEFFIELD GAS CONSUMERS CO.*, *A.-G. v. SHEFFIELD GAS CONSUMERS CO.*, 7 Ry. & Can. Cas. 650, L. C. & L. JJ.

*Annotations:—***Fold.** *A.-G. v. Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71. **Refd.** *Broadbent v. Imperial Gas Co.* (1857), 7 De G. M. & G. 436; *Preston Corpn.*

v. Fullwood L. B. (1885), 53 L. T. 718. **Mentd.** *Drake v. West* (1853), 22 L. J. Ch. 375; *Freud v. Dennett* (1861), 5 L. T. 73; *Biddulph v. St. George's Vestry* (1863), 3 De G. J. & Sm. 493; *Swaine v. G. N. Ry.* (1864), 4 De G. J. & Sm. 211; *A.-G. v. Kingston-on-Thames Corpn.* (1865), 34 L. J. Ch. 481; *Pentney v. Lynn Paving Comrs.* (1865), 12 L. T. 818; *Sutton v. S. E. Ry.* (1865), L. R. 1 Exch. 32; *Goldsmid v. Tunbridge Wells Improvement Comrs.* (1866), 1 Ch. App. 349; *Cooke v. Forbes* (1867), L. R. 5 Eq. 166; *Lillywhite v. Trimmer* (1867), 36 L. J. Ch. 525; *Luscombe v. Steer* (1867), 13 L. T. 229; *A.-G. v. Lonsdale* (1868), L. R. 7 Eq. 377; *A.-G. v. Gee* (1870), L. R. 10 Eq. 131; *Pudsey Coal Gas Co. v. Bradford Corpn.* (1873), 21 W. R. 286; *A.-G. & Dommes v. Basingstoke Corpn.* (1876), 45 L. J. Ch. 726; *Smith v. Mid. Ry. & L. & Y. Ry.* (1877), 37 L. T. 224; *Fritz v. Hobson* (1880), 14 Ch. D. 642; *Fanshawe v. London & Provincial Dairy Co.* (1888), 4 T. L. R. 694; *Reinhardt v. Mentasti* (1889), 42 Ch. D. 685; *A.-G. v. Preston Corpn.* (1896), 13 T. L. R. 14; *Garton v. Guildford, Godalming & Woking Joint Hospital Board* (1899), 43 Sol. Jo. 205; *St. Mary, Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31; *A.-G. v. Brighton & Hove Co.-Op. Assocn.*, [1900] 1 Ch. 276; *A.-G. v. Wimbledon House Estate Co.*, [1904] 2 Ch. 34; *A.-G. v. Scott*, [1905] 2 K. B. 160; *A.-G. v. Grand Junction Canal Co.*, [1909] 2 Ch. 505.

136. ———.]—The disturbance of the pavement of a town by an unincorporated gas co., without lawful authority, for the purpose of laying down gas pipes, is not a nuisance so serious & important that a ct. of equity will interfere by injunction to prevent it.

They are [non-statutory undertakers] subject to the rights of the owners of the soil through which their pipes are laid; & although, they may obtain the authority of the persons in whom the pavement is vested, still they are at any time subject to the rights of the owners of the soil to interfere with their pipes unless they have obtained parliamentary sanction (*SELWYN, L.J.*).—*A.-G. v. CAMBRIDGE CONSUMERS GAS CO.* (1868), 4 Ch. App. 71; 38 L. J. Ch. 94; 19 L. T. 508; 33 J. P. 147; 17 W. R. 145, L. JJ.

*Annotations:—***Refd.** *Preston Corpn. v. Fullwood L. B.* (1885), 53 L. T. 718. **Mentd.** *Pudsey Coal Gas Co. v. Bradford Corpn.* (1873), L. R. 15 Eq. 167; *A.-G. v. Preston Corpn.* (1896), 13 T. L. R. 14; *St. Mary, Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31.

137. Liability for injury—To passer-by—Caused by servant of contractor of company.]—Where a person is employed to do an unlawful act by which an injury is occasioned to a third person, the employer is liable to an action for such injury, though the party employed be a contractor, & the act that of his servants. *Defts.*, a registered joint stock co., contracted with *W.* for the laying of their main gas pipes in the streets of Sheffield, having no special powers for that purpose. The servants of *W.* left a heap of earth & stones which had been thrown out of the trenches dug for receiving the pipes in one of the streets, & *pltf.* in passing along the street tumbled over it & was injured.—*Held*: *defts.* were liable to an action for the injury occasioned to *pltf.*—*ELLIS v. SHEFFIELD GAS CONSUMERS' CO.* (1853), 2 E. & B. 767; 2 C. L. R. 249; 23 L. J. Q. B. 42; 22 L. T. O. S. 84; 17 J. P. 823; 18 Jur. 146; 2 W. R. 19; 118 E. R. 955.

*Annotations:—***Refd.** *R. v. Longton Gas Co.* (1860), 6 Jur. N. S. 601. **Mentd.** *Sadler v. Henlock* (1855), 4 E. & B. 570; *Hole v. Sittingbourne & Sheerness Ry.* (1861), 6 H. & N. 488; *Pickard v. Smith* (1861), 10 C. B. N. S. 470; *Butler v. Hunter* (1862), 7 H. & N. 826; *Blake v. Thirst* (1863), 2 H. & C. 20; *Gray v. Pullen* (1864), 5 B. & S. 970; *Sérandat v. Salses* (1866), L. R. 1 P. C.

152; *Bower v. Peate* (1876), 1 Q. B. D. 321; *Belvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind.*, *Coope v. Same*, [1920] 2 K. B. 487.

138. — **Subject to rights of owners of soil.**—*A.-G. v. CAMBRIDGE CONSUMERS GAS CO.*, No. 136. *ante*.

139. — **Liability to penalty—Highway Act, 1835 (c. 50), s. 72.**—A gas co. not established by any statute, obtained the consent of the local board acting under 11 & 12 Vict. c. 63, to take up the streets to lay pipes to supply the inhabitants with gas. The manager was proceeded against under Highway Act (c. 50), s. 72, for causing injury & damage to the highway:—*Held*: deft. was liable to a penalty, as this was not work authorised by the local board under 11 & 12 Vict. c. 63, s. 68. —*HAWKINS v. ROBINSON* (1872), 37 J. P. 662.

— **Companies with statutory powers.**—*See* Part II., Sect. 2, sub-sect. 2, B., *ante*.

140. **Obligation to supply gas.**—There is no obligation upon a gas co. registered under 10 & 20 Vict. c. 47, to continue to supply a customer with gas for any particular period: nor does the circumstance of quarterly payments, or the hiring of a meter by the year, or of the co. being the only one in the neighbourhood, afford any ground for implying a contract to that effect.—*HODDESDON GAS CO. v. HASELWOOD* (1859), 6 C. B. N. S. 239; 28 L. J. C. P. 268; 33 L. T. O. S. 184; 23 J. P. 438; 5 Jur. N. S. 1013; 7 W. R. 415; 141 E. R. 447. *Annotations*:—*Reld. Clegg, Parkinson v. Early Gas Co.* (1896), 65 L. J. Q. B. 339. *Mentl. Whiting v. East London Waterworks Co.* (1884), Cab & El. 331.

— **Companies with statutory powers.**—*See* Part III., *ante*.

GAS EXAMINERS.

See GAS.

GAVELKIND.

See DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL.

GAZETTE (LONDON).

See EVIDENCE.

GENERAL AVERAGE.

See SHIPPING AND NAVIGATION.

GENERAL COUNCIL OF THE BAR.

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GIFTS.

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<i>Choses in Action</i>	CHOSSES IN ACTION.	<i>Legacies</i>	See EXECUTORS ; WILLS.
<i>Contract</i>	CONTRACT.	<i>Legacy Duty</i>	„ ESTATE AND OTHER DEATH DUTIES.
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<i>Fraud</i>	MISREPRESENTATION AND FRAUD, AND TITLES <i>passim</i> .	<i>Undue Influence</i>	„ CONTRACT ; EQUITY ; FRAUDULENT AND VOIDABLE CONVEYANCES ; INFANTS ; MISREPRESENTATION AND FRAUD.
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Part I.—In General.

SECT. 1.—NATURE OF GIFT.

1. Definition of gift.]—*OOCHRANE v. MOORE*, No. 47, *post*.

2. Essentials of gift—Transfer of property—Intention alone insufficient.]—*HOOPER v. GOODWIN*, No. 196, *post*.

3. ——— By instrument in writing or delivery.]—(1) By the law of England, in order to transfer property by gift, there must either be a deed, or instrument of gift, or there must be an actual delivery of the thing to the donee (*ABBOT, C.J.*).

(2) It is a well established rule of law that a *donatio mortis causa* does not transfer the property without an actual delivery (*ABBOT, C.J.*).—*IRONS v. SMALLPIECE* (1819), 2 B. & Ald. 551; 106 E. R. 467.

Annotations:—*As to (1)* *Dbbd. Ward v. Audland* (1847), 16 M. & W. 862. *N.F. lte Harcourt, Danby v. Tucker* (1883), 31 W. R. 578. *Fold. Cochran v. Moore* (1890), 25 Q. B. D. 57. *Refd. Reeves v. Capper* (1838), 5 Bing. N. C. 136; *Langton v. Horton* (1842), 1 Hare, 549; *Gale v. Burnell* (1845), 7 Q. B. 850; *Lunn v. Thornton* (1845), 1 C. B. 379; *Normansel v. Cremp* (1847), 8 L. T. O. S. 339; *Doe d. Seebkristo v. East India Co.* (1856), 10 Moo. P. C. C. 140; *Barton v. Galner* (1858), 31 L. T. O. S. 237; *Douglas v. Douglas* (1869), 22 L. T. 127; *Re Ridgway, Ex p. Ridgway* (1885), 15 Q. B. D. 447; *Kilpin v. Ratley*, [1892] 1 Q. B. 582; *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

4. ——— Knowledge & intention of donor.]—A., being desirous of founding a charity, & of endowing it with lands, in which she might nevertheless reserve to herself a life interest, in 1842 executed a deed, by which she was informed & believed that these purposes would be attained. The deed was prepared by the advice of a land-agent, & drawn by a conveyancer; &, after enrolment, was delivered into A.'s possession. It accurately described the nature of the intended charity, but did not reserve the life interest to A.; her advisers informing her that the deed might remain in her possession & be inoperative until after her death. No intimation was given to the trustees of the execution of the deed until 1850, when, at their suggestion, two further deeds were executed, confirmatory of the former, & purporting to convey other property in aid of the charity:—*Held*: independently of the provisions of the Statutes of Mortmain, the deeds were invalid, on the ground of the grantor's imperfect knowledge of the effect of the instruments, & of such effect being contrary to her intention.

Mere donations were not looked upon with peculiar favour by cts. either of law or equity; & although in cases of contract for valuable consideration the ct. would endeavour to effectuate the contract, yet cts. of equity had always abstained from lending their assistance to perfect a gift which was in itself incomplete. For a gift to be valid, there must be perfect knowledge of the nature & effect of the transaction in the mind of the person who intended to bestow the gift—perfect knowledge of the extent of the benefit

which she was conferring, & of the amount of the beneficial interest proposed to be divested from her in making the gift (*STUART, V.-C.*).—*HOWARD v. FINGALL* (1853), 22 L. T. O. S. 12; 1 W. R. 515.

5. ——— Certainty of objects of bounty.]—Where a son had in his possession moneys belonging to his mother, & she, in her last illness, drew an order upon the son in favour of his wife & retained it in her custody, but subsequently handed it to him & directed him to invest the amount for the benefit of his wife & children. & the son, after the mother's death, made the investment in the joint names of himself & his wife:—*Held*: in consequence of the uncertainty of the objects of bounty, neither a complete gift had been made nor a valid declaration of trust created.—*ROBERTS v. ROBERTS* (1865), 13 L. T. 492; 11 Jur. N. S. 992; 14 W. R. 123; *reversd.* on other grounds, 15 L. T. 260, L. JJ.

See, further, Part III., Sect. 1, *post*.

Gifts *inter vivos*.]—*See* Part III., *post*

Gifts *mortis causa*.]—*See* Part V., *post*.

Gifts by will.]—*See* WILLS.

SECT. 2.—CONTRACT OR AGREEMENT TO GIVE.

6. Promise without consideration—No contract.]—A. verbally promised to give £20,000 to the Jubilee Fund of the Congregational Union, & also filled up & signed a blank form of promise, not addressed to any one, but headed "Congregational Union of England & Wales—Jubilee Fund," whereby he promised to give £20,000 in five equal annual instalments of £4,000 each for liquidation of chapel debts. A. paid £12,000 to the fund within three years after giving the promise, & then died, leaving the last two instalments of £4,000 each unpaid & unprovided for. The Congregational Union claimed the £8,000 from A.'s exors. alleging that they had been led by A.'s promise to contribute larger sums to churches than they would otherwise have done, that money had been given & promised by other persons in consequence of A.'s promises, that grants from the Jubilee Fund had been promised to cases recommended by A., & that churches to which promises had been made by the committee, the committee themselves, had incurred liabilities in consequence of A.'s promise:—*Held*: there was no enforceable contract, on the ground, first, that there was no consideration; secondly, that there was no sufficient memorandum in writing to satisfy Stat. Frauds.—*Re HUDSON, CREED v. HENDERSON* (1885), 54 L. J. Ch. 811; 33 W. R. 819; 1 T. L. R. 447.

7. ———.]—At the death of testator certain promises by him of donations to various institutions remained unredeemed:—*Held*: these promises created no contractual obligation between the parties, &, therefore, there was no legal debt

PART I. SECT. 1.

4 i. Essentials of gift—Knowledge & intention of donor.]—Where a person, to his own advantage, but to the prejudice of the giver, obtains by donation some substantial benefit, he is bound to prove clearly, not only

that the gift was made, but that it was the voluntary, deliberate, well-understood act of the donor, & that the donor was capable of fully appreciating & did fully appreciate its effect, nature & consequence.—*KINSELLA v. PASK* (1913), 28 O. L. R. 393; 4 O. W. N. 964; 12 D. L. J. R. 522.

4 ii. ———.]—Where a person obtains by voluntary donation a benefit from another, if the transaction is questioned, he must prove that it was righteous & that the donor voluntarily & deliberately did the act knowing its nature & effect.—*DOYLE v. DOYLE* (1920), 46 N. B. R. 45.—*CAN.*

Sect. 2.—Contract or agreement to give. Sects. 3 & 5. Part II. Sects. 1, 2, 3 & 4.]

due from testator's estate to the institutions.—*Re CORY, KINNAIRD v. CORY* (1912), 29 T. L. R. 18.

8. — Partially performed.—Whether contract or imperfect gift.]—Testator by his will in 1901 gave all his coins to a university to be held as a permanent collection, & £200, for the provision of suitable receptacles, directing that his trustees should obtain an undertaking that they should be kept as an entire & permanent collection, & except with the agreement of the principal no duplicate should be sold or given away. In Jan. 1912, he wrote a letter offering the collection to the university upon the condition that the collection should be kept intact & not sold, or any part of it exchanged; & on Feb. 7, 1912 the university passed a resolution accepting the offer, acceding to the conditions. On Feb. 22, no delivery of the coins having then been made, testator made a codicil, which, after reciting the bequest by his will, revoked it, & declared that he had during his lifetime handed over all the coins which he intended to leave to the university by his will, & revoked the bequest of the £200, & gave his collection of English & Roman coins to a museum. In Aug. 1912, eleven cabinets of coins were handed over, which contained a number of British & Roman coins, but not the whole collection of foreign coins. On his death in 1914 Roman & British coins & foreign coins, both of considerable value, beyond those which had been handed over, were found at his house, which the university claimed:—*Held*: the offer subject to conditions, & the formal acceptance of that offer & conditions, was an imperfect gift, & not a partially fulfilled contract which could be sued upon, as the intention of the parties was an act of bounty & not the creation of an obligation.—*Re CHURCHILL, TAYLOR v. MANCHESTER UNIVERSITY*, [1917] 1 Ch. 206; 86 L. J. Ch. 209; 115 L. T. 769; 61 Sol. Jo. 131.

9. Donation to charity—On undertaking to have knighthood conferred—Public policy.]—If a contract which is illegal as being contrary to public policy has any element of turpitude in it the parties to the contract are in *pari delicto*, & if one of the parties to the contract has been defrauded, no action for damages can be maintained by the party defrauded, even though the contract is not of a criminal nature. The secretary of a charity fraudulently represented to P. that he or the charity was in a position to undertake that P. would receive a knighthood if P. made a large donation to the funds of the charity, & undertook that the title would be conferred if the donation was made. P. relying upon those representations & in the belief that the secretary was authorised by the charity to give the undertaking, made a large donation to the funds of the charity. As P. did not receive the knighthood he brought an action against the charity & its secretary to recover back the money he had paid as money had & received or as damages for deceit or breach of contract:—*Held*: a contract for the purchase of a title, however the money is to be expended, is an improper & illegal contract, as being against public policy, & as P. knew that he was entering into an improper & illegal contract he could not recover back the money he had paid from the charity as money had & received nor recover damages from the charity or its secretary nor claim to repudiate the contract as being still

executory & recover back the money paid.—*PARKINSON v. COLLEGE OF AMBULANCE, LTD. & HARRISON*, [1925] 2 K. B. 1; 93 L. J. K. B. 1066; 133 L. T. 135; 40 T. L. R. 886; 69 Sol. Jo. 107.

10. Promise to servant of corporation—For past services—Revocation as to part.]—Certain trustees were created, by a local Act, a body corporate, for the management of the navigation of a river, with a common seal & perpetual succession. Pltf., who had been their clerk, removable at their will & pleasure, for forty years, having in 1865 resigned, owing to ill-health, the trustees duly passed a resolution, not sealed, that his resignation "be accepted, & that a retiring pension of £300 *per annum*, free of income tax, be granted to him during the remainder of his life." The pension was duly paid quarterly for some years, until defts., who had meanwhile been substituted by statute for the trustees, with all their powers, & subject to all their liabilities, duly passed a resolution to reduce the pension to £150 *per annum*, to be paid during their pleasure, & made the first quarterly payment on the reduced scale:—*Held*: the resolution of 1865 was revocable & pltf. could not recover.—*MARCHANT v. LEE CONSERVANCY BOARD* (1874), L. R. 9 Exch. 60; 43 L. J. Ex. 44; 30 L. T. 367, Ex. Ch.

Annotation:—*Mentd. R. v. St. George's, Southwark, Vestry* (1887), 19 Q. B. D. 533.

—*See, further, COMPANIES*, Vol. IX., pp. 464, 537, Nos. 3021, 3535; Vol. X., pp. 1020, 1164, Nos. 7082, 8243.

Promises in consideration of services—By client to solicitor.]—See SOLICITORS.

—**By patient to physician.]—See CONTRACT**, Vol. XII., pp. 107, 108, Nos. 665–672, & compare *CONTRACT*, Vol. XII., pp. 108, 109, Nos. 676 *et seq.*

Covenants to settle property.]—See TRUSTS & TRUSTEES; SETTLEMENTS.

SECT. 3.—CONDITIONAL GIFT.

Gifts inter vivos.]—See Part III., Sect. 6, post.

Gifts mortis causa.]—See Part V., post.

Gifts by will.]—See WILLS.

SECT. 4.—LIMITED GIFT.

11. Gift of chattel—Limitation as to time—Ineffectual.]—A gift of a chattel for an hour, is for ever, & the donee may give, sell, & dispose it, & the remainder depending on it is void.—*ANON.* (*temp.* 1509–46), Bro. N. C. 61; 73 E. R. 874.

12. Effect of absolute gift—No power of limitation.]—The general principle of law is that no one can make an absolute gift to a person & then take away that gift unless he do so in some clear & legal way (*HALL, V.-C.*).—*HUNT-FOULSTON v. FURBER* (1876), 3 Ch. D. 285; 24 W. R. 756.

Annotation:—*Held. Re Mabbett, Pitman v. Holbrow*, [1881] 1 Ch. 707.

See, further, Part III., Sect. 5, post.

Limitation of successive interests.]—See WILLS; SETTLEMENTS.

Statutory grant of real estate—For distinguished services—Restraint on alienation.]—See REAL PROPERTY.

SECT. 5.—ACCRETION TO GIFT.

13. Follows original gift.]—FOWKES v. PASCOE, No. 128, *post*.

Part II.—Capacity to Give and to Receive Gifts.

SECT. 1.—IN GENERAL.

14. Competency to give—General rule.]—KEKEWICH v. MANNING, No. 203, *post*.

SECT. 2.—ALIENS.

15. Gift of ship by alien enemy—To son as advancement.]—The voluntary transfer of a ship by a father, an enemy, to his son a neutral, as an advance of a portion of his inheritance is valid if made *bonâ fide*.—THE BENEDICT (1855), Spinks, 314; 4 W. R. 165; 164 E. R. 456.

Competency to give.]—See ALIENS, Vol. II., pp. 133, 138, Nos. 86, 129.

Competency to receive.]—See ALIENS, Vol. II., pp. 132 *et seq*.

SECT. 3.—BANKRUPTS.

Property retained by bankrupt.]—See BANKRUPTCY, Vol. V., pp. 723 *et seq*, Nos. 6282 *et seq*.

SECT. 4.—COMPANIES.

16. Competency to give—Extent to which limited—Governed by purposes of incorporation.]—It must therefore be now considered as a well-settled doctrine that a co. incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorised by the terms of its incorporation, however desirable such an application may appear to be (LORD CRANWORTH, L.C.).—EASTERN COUNTIES RY. CO. v. HAWKES (1855), 5 H. L. Cas. 331; 24 L. J. Ch. 601; 25 L. T. O. S. 318; 3 W. R. 609; 10 E. R. 928, H. L.; *affg*. S. C. *sub nom*. HAWKES v. EASTERN COUNTIES RY. CO. (1852), 1 De G. M. & G. 737, L. C.

Annotations:—*Reid*. South Yorkshire Ry. & River Dun Co. G. N. Ry. (1853), 9 Exch. 55; Preston v. Liverpool, Manchester, etc. Ry. (1856), 5 H. L. Cas. 605; Ashbury Ry. Carriage & Iron Co. v. Riche (1875), L. R. 7 H. L. 653; A.-G. v. G. E. Ry. (1879), 11 Ch. D. 449. *Mentd*. Stuart v. L. & N. W. Ry. (1852), 15 Beav. 513; Ffooks v. S. W. Ry. (1853), 1 Sm. & G. 142; Lindsey v. G. N. Ry. (1853), 10 Hare, 661; Shrewsbury & Birmingham Ry. v. L. & N. W. Ry. (1853), 16 Beav. 441; Norwich Corp. v. Norfolk Ry. (1855), 4 E. & B. 397; Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees (1856), 27 L. T. O. S. 241; Bateman v. Ashton-under-Lyne Corp. (1858), 3 H. & N. 323; Haynes v. Haynes (1861), 1 Drew. & Sm. 426; Bedford & Cambridge Ry. v. Stanley (1862), 2 John. & H. 746; Maunsell v. Mid. G. W. Ry. (of Ireland) & G. N. & W. (of Ireland) Ry. (1867), 3 L. T. 347; Steele v. North Metropolitan Ry. (1867), 2 Ch. App. 238, n.; Taylor v. Chichester & Midhurst Ry. (1870), L. R. 11 H. L. 628; Sun Bldg. Soc. v. Western Suburban & Harrow Road Bldg. Soc., [1920] 2 Ch. 144; Sun Bldg. Soc. v. Western Suburban & Harrow Road Bldg. Soc., [1921] 2 Ch. 438.

Compare No. 20, *post*.

PART II. SECT. 1.

a. Mere possession of immovable property.]—A person whose title to immovable property rests upon mere

possession is competent to deal with such property as if he were the owner, & his acts will be good as against all persons other than the true owner. If such a possessor executes a registered

17. Gratuity to policy holder—Loss not covered by policy.]—Directors of an insurance co. offered to pay losses caused by a gunpowder explosion, although their policies contained an express exception of such losses, at the same time not admitting any liability to do so. On a bill by a shareholder to restrain the payments, it appearing that it was usual & advantageous for cos. to make such payments, although not bound to do so:—*Held*: this was a mode of carrying on the business with which the ct. could not interfere.

It is said that the payment is a mere gratuity. Let it be so called. It does not follow that it is beyond the power of the co., if, to give such gratuity be the generally received method of conducting such a business. Even the case put of subscribing to a school would, in my opinion, be a legitimate application of money, if it were proved to be the received method of carrying on a particular business (PAGE-WOOD, V.-C.).—TAUNTON v. ROYAL INSURANCE CO. (1864), 2 Hem. & M. 135; 33 L. J. Ch. 406; 10 L. T. 156; 28 J. P. 374; 10 Jur. N. S. 291; 12 W. R. 549; 71 E. R. 413.

Annotations:—*Consd*. Hampson v. Price's Patent Candle Co. (1876), 45 L. J. Ch. 437; Tomkinson v. S. E. Ry. (1887), 35 Ch. D. 675; Henderson v. Bank of Australasia (1888), 40 Ch. D. 170; Cyclists' Touring Club v. Hopkinson, [1910] 1 Ch. 179. *Reid*. Hutton v. West Cork Ry. (1883), 23 Ch. D. 654; Breay v. Royal British Nurses' Assocn., [1897] 2 Ch. 272. *Mentd*. Joint Stock Discount Co. v. Brown (1866), L. R. 3 Eq. 139; A.-G. v. G. E. Ry. (1879), 11 Ch. D. 449; Rayner v. Preston (1881), 18 Ch. D. 1; Studdert v. Grosvenor (1886), 33 Ch. D. 528; A.-G. v. Mersey Ry. (1906), 76 L. J. Ch. 121.

18. Gratuity to employees or officers—Out of money paid as compensation—By Metropolitan Water Board—Void.]—*Held*: a scheme prepared by a water co. under Metropolis Water Act, 1902, for the application & distribution of the compensation moneys payable upon the purchase of the Co.'s undertaking by the Metropolitan Water Board did not empower the co. to pay a certain sum, part of the compensation moneys, as gratuities to those servants who had been for a certain number of years in the service of the co.—WARREN v. LAMBETH WATERWORKS (1905), 21 T. L. R. 685.

19. For past services—Construction of memorandum of association.]—The C. T. C. was registered as an assocn. not for profit by licence of the Board of Trade under Cos. Act, 1867, s. 23, now replaced by Cos. (Consolidation) Act, 1908 (c. 69), s. 20. Clause 4 of the memorandum of assocn., a clause required by the Board of Trade as a condition of granting a licence, provided as follows: "The income & property of the club, whencesoever derived, shall be applied solely towards the promotion of the objects of the club as set forth in this memorandum of assocn.; & no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus, or otherwise, howsoever by way of profit to the members of the club. Provided that nothing herein contained shall prevent the payment in

deed of gift of the property, he is subject to the rule that no one can derogate from his own grant.—PAHLWAN SINGH v. RAM BHAROSE (1905), 1 L. R. 27 All. 169.—*IND*.

Sect. 4.—Companies. Sects. 5-18. Part III.
Sect. 1: Sub-sect. 1.]

good faith of remuneration to any officers or servants of the club, or to any member of the club or other person in return for any services rendered to the club":—*Held*: on the construction of this memorandum, the grant of a pension by way of gratuity to a retired secretary was *intra vires*.

In my opinion, the payment to a retired servant of the club by way of annuity, or by way of pension, or by way of gratuity, is within the powers of the club as being a payment in furtherance of the best objects of the club. The fact that the payment is made by way of gratuity & not under any legal liability does not make it a payment outside the objects of the club. Without expressing any opinion at all upon the merits, which are not before me, I am of opinion that it would be too narrow a construction of the memorandum to say that payment for services actually rendered are limited to payments legally due under legal contracts. Under the head of a payment for services actually rendered a gratuity in respect of past long & faithful services may be awarded (*SWINFEN EADY, J.*).—*CYCLISTS' TOURING CLUB v. HOPKINSON*, [1910] 1 Ch. 179; 79 L. J. Ch. 82; 101 L. T. 848; 26 T. L. R. 117; 54 Sol. Jo. 131; 17 Mans. 11.

—*See COMPANIES*, Vol. IX., pp. 464, 537, Nos. 3021, 3535, 3536; Vol. X., pp. 1020, 1164, Nos. 7082, 8243.

Gifts for scientific purposes.]—See COMPANIES, Vol. IX., p. 612, No. 4073; Vol. X., p. 1163, No. 8239.

Companies in liquidation.]—See COMPANIES, Vol. IX., p. 463, No. 3006; Vol. X., p. 1149, No. 8129.

SECT. 5.—CONVICTS.

See Forfeiture Act, 1870 (c. 23), ss. 8, 18, 30.

SECT. 6.—CORPORATIONS.

20. Competency to give—How limited—If incorporated by charter.]—At common law a corp'n. created by the King's charter has, *primâ facie*, the power to do with its property all such acts as an ordinary person can do . . . But to say that [a statutory corp'n.] has got everything which it would have at common law unless the statute takes it away is, I think, to travel on a wrong line of thought . . . The corp'n. cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature (*BOWEN, L.J.*).—*WENLOCK (BARONESS) v. RIVER DEE CO.* (1883), 36 Ch. D. 675, n.; 57 L. T. 402, n., C. A.; *affd.* (1885), 10 App. Cas. 354, II. L.

Annotations.—*Reid*, British South Africa Co. v. De Beers Consolidated Mines, [1910] 1 Ch. 354; *Jenkin v. Pharmaceutical Soc. of Great Britain*, [1921] 1 Ch. 392. *Mentâ*, General Auction Estate & Monetary Co. v. Smith, [1891] 3 Ch. 432; *Putney Overseers v. L. & S. W. Ry.*, [1891] 1 Q. B. 440; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396; *A.-G. v. L. C. C.*, [1901] 1 Ch. 781; *A.-G. v. De Winton*, [1906] 2 Ch. 108; *Corbett v. S. E. & C. Ry. Co.'s Managing Committee*, [1906] 2 Ch. 12; *Amalgamated Soc. of Railway Servants v. Osborne*, [1910] A. C. 87; *Re Home & Foreign Investment & Agency Co.*, [1912] 1 Ch. 72; *Sinclair v. Brougham*, [1914] A. C. 398; *Re Woking U. D. C. (Basingstoke*

Canal) Act, 1911, [1914] 1 Ch. 300; *A.-G. v. Liverpool Corp'n.*, [1922] 1 Ch. 211; *Re Jubilee Cotton Mills*, [1923] 1 Ch. 1; *Deuchar v. Gas Light & Coke Co.*, [1924] 2 Ch. 426.

21. ——— If incorporated by statute.]—WENLOCK (BARONESS) v. RIVER DEE CO., No. 20, *ante*.

Compare Nos. 10, 16, *ante*

Competency to receive.]—See CORPORATIONS, Vol. XIII., pp. 371 *et seq.*, Nos. 1025 *et seq.*

Powers of corporation generally.]—See CORPORATIONS, Vol. XIII., pp. 349 *et seq.*, Nos. 880 *et seq.*

SECT. 7.—CHARITIES.

Competency to receive.]—See CHARITIES, Vol. VIII., pp. 241 *et seq.*, Nos. 1 *et seq.*, pp. 265 *et seq.*, Nos. 273 *et seq.*

SECT. 8.—ECCLESIASTICAL BODIES.

Endowments.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 496.

Gifts to churches, etc.]—See CHARITIES, Vol. VIII., pp. 248 *et seq.*, Nos. 74 *et seq.*

—**Exemptions from restrictions on assurances.]—See CHARITIES**, Vol. VIII., pp. 284 *et seq.*, Nos. 595 *et seq.*

—**Bequests of pure personality.]—See CHARITIES**, Vol. VIII., pp. 275, 277, 278, Nos. 429-431, 466, 467, 473, 492, 493, 497.

—**Assurance inter vivos.]—See, generally, CHARITIES**, Vol. VIII., pp. 279 *et seq.*, Nos. 502 *et seq.*

Gifts & bequests to Jewish religious purposes.]—See CHARITIES, Vol. VIII., pp. 244, 253, 265, Nos. 30, 141-146, 271.

SECT. 9.—INFANTS.

See INFANTS.

SECT. 10.—ILLEGITIMATE CHILDREN.

Competency to receive—Under wills.]—See BASTARDY, Vol. III., pp. 377 *et seq.*, Nos. 174 *et seq.* & *generally, WILLS*.

—**Under instruments other than wills.]—See BASTARDY**, Vol. III., pp. 378 *et seq.*, Nos. 181 *et seq.*

—**Under settlements.]—See SETTLEMENTS.**

SECT. 11.—INTOXICATED PERSONS.

Competency to give.]—Compare CONTRACT, Vol. XII., pp. 40-42, Nos. 109-217.

SECT. 12.—LOCAL GOVERNMENT AUTHORITIES.

See LOCAL GOVERNMENT.

SECT. 13.—LUNATICS.

See LUNATICS.

SECT. 14.—MARRIED WOMEN.

See HUSBAND & WIFE.

SECT. 15.—OFFICERS OF FRIENDLY SOCIETIES.

See FRIENDLY SOCIETIES; INDUSTRIAL, ETC. SOCIETIES; & TRADE & TRADE UNIONS.

SECT. 16.—PERSONS IN FIDUCIARY CAPACITY.

22. Competency to give—Payment by trustee of voluntary school rate—Obviating heavier compulsory rate.—A payment of a mere voluntary subscription by a trustee cannot be allowed in his account, but where such payment, although in one sense voluntary, is made reasonably & in the honest belief that it will benefit the estate, either as saving a future compulsory payment of larger amount or as being fairly & reasonably necessary in the circumstances of the estate, it may be allowed.—*How v. WINTERTON (EARL)* (1902), 51 W. R. 262; 47 Sol. Jo. 146.

Competency to receive—Trustee from cestui que trust.—See TRUSTS & TRUSTEES.

— **Director of company from promoter.**—See COMPANIES, Vol. IX., p. 491, No. 3218.

— **Solicitor & client.**—See SOLICITORS.

Principal & agent.—See AGENCY, Vol. I., p. 475, Nos. 1570, 1571.

SECT. 17.—PERSONS DEAD AT DATE OF GIFT.

23. Right of donee's representative to take—Gift by deed—No proof of death before date of deed—Onus of proof.—By deed, dated in 1866, trusts of personality were declared, after the death of the settlor, in favour of a person by name. The

named person had not been heard of since 1861. There was no evidence as to the date of his death, & on the death of the settlor her representatives claimed the money, contending that there was a resulting trust in her favour:—*Held*: where a trust was declared by deed in favour of a named person, such person must, until the contrary was shown, be taken to have been in existence at the date of the deed; the onus of proving his death before that date lay on the representatives of the settlor, & as it had not been discharged by them, there was no resulting trust, & the money must be paid to the representatives of the named person.—*Re CORBISHLEY'S TRUSTS* (1880), 14 Ch. D. 846; 49 L. J. Ch. 266; 28 W. R. 536.

Annotation:—*Fold. Re Tilt, Lampet v. Kennedy* (1896), 74 L. T. 163.

24.

Proof of death before deed.—T., who was contingently entitled to a prospective share in certain property, voluntarily assigned it, in 1880, to trustees upon trust, among other trusts, to pay a sum of £500 to one K., & as to the residue upon other trusts. T. became entitled to her share in the property in 1894. & by a letter in 1895, directed that a portion of it should be transferred to the trustees of the voluntary assignment of 1880. K. died in 1888, intestate, & the question now arose as to his £500, which was claimed (a) by his personal representative, (b) by those entitled to residue, & (c) by the settlor as upon a resulting trust:—*Held*: (1) a person dead at the date of the execution of a deed could take no benefit under it, & the confirmation of the deed by the letter in 1895, only set up such trusts as were then subsisting, & had no retrospective effect; (2) the failure of the gift to K. did not make it fall into residue, & the donees of the residue could only take an *aliquot* portion; (3) the £500 belonged to T., the settlor, by way of resulting trust.—*Re TILT, LAMPET v. KENNEDY* (1896), 74 L. T. 163; 12 T. L. R. 162; 40 Sol. Jo. 224.

Annotation:—*Reid. Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697.

SECT. 18.—TENANTS FOR LIFE.

Competency to give.]—See SETTLEMENTS.

Part III.—Gifts inter vivos.

SECT. 1.—HOW MADE.

SUB-SECT. 1.—GIFT OF REAL ESTATE AND CHATELS REAL.

25. Effect of voluntary deed.—There are, no doubt, various circumstances which may be connected with a voluntary deed which will induce this ct. either to set the deed aside, or to refuse to execute the trusts contained in it. There are also statutory enactments which may defeat a voluntary deed, which would be otherwise valid; but assuming a voluntary deed to be complete, *bonâ fide*, & valid, & to be unaffected by any

statutory disability, I know of no distinction between such a deed & one executed for valuable consideration. The estates & limitations created in such a deed have the same operation & effect as in a deed executed for value, & must be construed in the same manner, & it carries with it all the same incidents & rights attached to the property conveyed as are carried by a deed executed for value, & the grantee, in this respect, stands exactly in the same situation as if he had paid value for the property conveyed (*ROMILLY, M.R.*).—*DICKINSON v. BURRELL, DICKINSON v. BURRELL, STOURTON v. BURRELL* (1866), L. R. 1 Eq. 337;

PART III. SECT. 1, SUB-SECT. 1.

b. *Effect of voluntary gift.*—Where gives land to another by

parol, & donee enters, he is in under the donor, & the donee is in possession simply by permission of the donor, &

the title does not pass by such gift.—*DOE d. VINCENT v. MURRAY* (1874), 15 N. B. R. (2 Pug.) 375.—CAN.

Sect. 1.—How made: Sub-sects. 1 & 2, A & B. (a) & (b).]

35 Beav. 257; 35 L. J. Ch. 371; 13 L. T. 660; 12 Jur. N. S. 199; 14 W. R. 412; 55 E. R. 894.

Annotations:—*Conad. Ellis v. Torrington*, [1920] 1 K. B. 399. *Reid. Dawson v. Great Northern & City Ry.*, [1905] 1 K. B. 360; *Defries v. Milne*, [1913] 1 Ch. 98; *Bruty v. Edmundson* (1915), 113 L. T. 1197.

26. Conveyance of legal estate—By covenant to stand seised.]—Natural love & affection is very sufficient to create a use, & will amount to a covenant to stand seised, though no other consideration appear.

Here is a consideration expressed of natural affection to two persons, who are not disputed to be very nearly related to the grantor, & here is likewise the consideration of ten shillings, but there is no manner of doubt the estate would have passed even without the last pecuniary consideration under the Statute of Uses (LORD HARDWICKE, C.).—*LLOYD & JOBSON v. SPILLET* (1741), 2 Atk. 148; *Barn. Ch. 384*; 26 E. R. 493, L. C.; *previous proceedings* (1734), 3 P. Wms. 344, L. C.

Annotations:—*Reid. Cook v. Duckenfield* (1743), 2 Atk. 562; *Addington v. Cann* (1744), 3 Atk. 141; *Boson v. Statham* (1760), 1 Cox. Rq. Cas. 16; *Benbow v. Townsend* (1833), 1 My. & K. 506.

— — —.]—*See, further, TRUSTS & TRUSTEES.*

Conveyance of legal estate.]—*See* DEEDS, Vol. XVII., pp. 192 *et seq.*, Nos. 26 *et seq.*, & generally, REAL PROPERTY; SALE OF LAND, & now, Law of Property Act, 1925 (c. 20).

Transfer of equitable estate.]—*See, generally, TRUSTS & TRUSTEES, & Law of Property Act, 1925 (c. 20), ss. 53, 55.*

— **Completion of incomplete transfer.]—***See* Part IV., *post*.

Assignment of leasehold property.]—*See* LANDLORD & TENANT; PERSONAL PROPERTY.

Legal estate in copyhold.]—*See* COPYHOLDS, Vol. XIII., p. 49, Nos. 573–580; pp. 125 *et seq.*, Nos. 1561 *et seq.*, & *see, now, Law of Property Act, 1922 (c. 16), s. 128.*

SUB-SECT. 2.—GIFT OF CHATTELS.

A. Deed or Instrument in Writing.

27. Necessity for deed or writing—Where no delivery.]—*IRONS v. SMALLPIECE*, No. 3, *ante*.

28. Desire for transfer of gift by letter—Effect of no delivery.]—In 1850 G. quitted England for Australia, leaving behind him, in the charge & custody of his wife, deft., a sword which had come into his possession & ownership on the death of his father, a general in the army, to whom it had been originally presented by the officers of his regiment. G.'s only son having died, G. wrote a letter, from Australia, to his brother H., pltf., in England, dated Sept. 14, 1863, expressing a desire for him to have possession of the sword, in the following

terms: "You only anticipate my wish that you should have charge of our father's sword which, of course, you will keep in our family if I should not have a son to inherit, which does not seem very probable. I have enclosed an order unsealed to Mary," deft., G.'s wife, "to hand it over to you." This order was as follows: "On receipt of this letter you will be so good as to deliver our father's sword to my brother Henry"; & in a subsequent letter to pltf. of Sept. 28, 1863, G. said "I shall expect a long letter in reply from you. Tell me how the old sword looks." These letters & order were communicated to deft., & applications were made to her by pltf. for delivery of the sword to him, but without success. G. died in Australia in Dec. 1865, having made a will there in 1864, of which he appointed another brother, W., exor., who proved the same in that country & who, in a letter to pltf., announcing the death of their brother G., said, with regard to the possession of the sword by deft., "She is not the proper custodian of our father's sword." Deft. still declined to part with the sword, claiming to keep it for her daughter as a memento of G., her father; & in detinue by pltf. to recover the sword or its value, & damages for its detention:—*Held*: the words of the letter of Sept. 14, 1863, were not words of gift at all, but amounted merely to a desire by G. that pltf. should have charge of the sword, a charge which was revocable at G.'s pleasure, & did not constitute an out & out gift, or pass any property in the sword to pltf.—*DOUGLAS v. DOUGLAS* (1869), 22 L. T. 127. **Annotation:—***Reid. Cochrane v. Moore* (1890), 25 Q. B. D. 57.

B. Delivery.

(a) In General.

29. Transfer by deed or writing—Delivery unnecessary.]—*IRONS v. SMALLPIECE*, No. 3, *ante*.

30. Effect of delivery—Donee absolutely entitled.]—Under a settlement certain jewels were assigned upon trust for such person as G., a married woman, should by writing direct or appoint, & in default of such appointment, upon trust for her during her life for her separate use, & to be at her absolute disposal, & her receipt, or that of the person to whom she should direct the jewels to be delivered, to be a good discharge. G., without any direction in writing, delivered the jewels as an absolute gift to V., who retained them in her possession. After the death of G., the question arose as to the validity of the gift to V.:—*Held*: G. had power to dispose of her whole interest in the jewels without any direction in writing, & under the gift & manual delivery V. was absolutely entitled to them.—*FARRINGTON v. PARKER* (1867), L. R. 4 Eq. 116; 15 W. R. 685; *sub nom. FARRINGTON v. PARKER*, 16 L. T. 258.

31. Effect of no delivery—Transfer of gift by letter.]—*DOUGLAS v. DOUGLAS*, No. 28, *ante*.

32. Change in possession—Whether assent of donee essential.]—*STANDING v. BOWRING*, No. 133, *post*.

PART III. SECT. 1, SUB-SECT. 2.— B. (a).

c. General rule.]—To make a valid gift of personal property it is not necessary that there should be an actual delivery & change of possession, it is sufficient to complete such gift that the conduct of the parties should show that the ownership of the chattel

has been changed.—*R. v. CARTER* (1863), 13 C. P. 611.—*CAN.*

d. —.]—*VIET v. VIET* (1873), 34 U. C. R. 104.—*CAN.*

e. —.]—Pltf. had performed services for P. in his lifetime, & he, intending to make some recognition thereof, told her that a certain

promissory note payable to himself or bearer, which he produced, was hers, saying: "Here is your note, take it when you want it." Pltf. told him to keep it for her, as she had no place in which to keep it herself, & he did so:—*Held*: this constituted a complete gift, there being a gift, & an acceptance of it by the donee, & actual delivery not being necessary.—*WATSON v.*

33. Delivery in donatio mortis causa—Distinguished from delivery in gift inter vivos.]—The delivery necessary in the case of a *donatio mortis causa* is different from that which is required in order to constitute a valid gift *inter vivos*. There are many cases in which a good *donatio mortis causa* is conferred, though no absolute property passed, but only an equitable interest which could be enforced against the exor. (KEKEWICH, J.).

There is no rule of law that such a claim could not be admitted without corroborative evidence (KEKEWICH, J.).—WILDISH v. FOWLER (1888), 5 T. L. R. 113; *on appeal* (1890), 6 T. L. R. 422, O. A.; (1892), 8 T. L. R. 457, II. L.

34. ———.]—*Re* WASSERBERG, UNION OF LONDON & SMITHS BANK, LTD. v. WASSERBERG, No. 378, *post*.

—.]—*See* Part V., Sect. 3, sub-sect. 3, *post*.

35. Control restored to donor—Effect.]—JAMES v. JAMES, No. 190, *post*.

(b) *Necessity for Delivery.*

Alienation of chattels generally, *see* PERSONAL PROPERTY.

36. Parol gift.]—ANON. (1458), Y. B. 37 Hen. 6, fo. 13, pl. 3; Jenk. 109; 145 E. R. 76.

*Annotation:—*Reid. Cochrane v. Moore (1890), 25 Q. B. D. 57.

37. ———.]—WORTES v. CLIFTON (1614), 1 Roll. Rep. 61; 81 E. R. 328.

*Annotations:—*Reid. Irons v. Smallpiece (1819), 2 B. & Ald. 551; Cochrane v. Moore (1890), 25 Q. B. D. 57.

38. ———.]—A deed of gift made of personal chattels is not good against creditors, if the donor continue in possession; but if, while they are so in his possession, they are taken in execution, & redeemed for, & on account of the donor, they thereby become his absolute property again, & notwithstanding the deed of gift, will pass to a legatee under a bequest of "all his personal estate," etc.—WINCHELSEA (COUNTESS) v. MAIDSTONE (LADY) (1691), 4 Mod. Rep. 51; 87 E. R. 257.

39. ———.]—A parol gift [of chattels] without some act of delivery will not alter the property.—SMITH v. SMITH (1733), 2 Stra. 955; 93 E. R. 905, N. P.

*Annotations:—*Consd. Bunn v. Markham (1816), 2 Marsh. 532. *Mentd.* Johnson v. Stear (1863), 33 L. J. C. P. 130.

40. ———.]—IRONS v. SMALLPIECE, No. 3, *ante*.

41. ———.]—If a man give money as a gratuity it cannot be recovered back, because the gift is complete; yet a man who promises to give money cannot be sued on such promise (LORD ABINGER,

C.B.).—EASTON v. PRATCHETT (1835), 1 Cr. M. & R. 798; 6 O. & P. 736; 3 Dowl. 472; 1 Gale, 30; 4 Tyr. 472; 4 L. J. Ex. 73; 149 E. R. 1302; *on appeal*, 2 Cr. M. & R. 542, Ex. Oh.

*Annotations:—**Mentd.* Mills v. Oddy (1835), 2 Cr. M. & R. 103; Noel v. Kitch (1835), 5 Tyr. 632; Stoughton v. Kilmorey (1835), 2 Cr. M. & R. 72; Woodgate v. Field (1842), 2 Hare, 211.

42. ———.]—A verbal gift of a chattel does not pass the property in it without delivery (TINDAL, C.J.).—REEVES v. CAPPER (1838), 5 Bing. N. C. 136; 1 Arn. 427; 6 Scott, 877; 8 L. J. C. P. 44; 2 Jur. 1067; 132 E. R. 1057.

*Annotations:—*Consd. Hilton v. Tucker (1888), 39 Ch. D. 669. *Reid.* Flory v. Denny (1852), 7 Exch. 581; Meyerstein v. Barber (1866), L. R. 2 C. P. 38; Burdick v. Sewell (1883), 10 Q. B. D. 363; Cochrane v. Moore (1890), 25 Q. B. D. 57; Dublin City Distillery v. Doherty, [1914] A. C. 823. *Mentd.* Walker v. Clyde (1861), 10 C. B. N. S. 381; Langton v. Waring (1865), 18 C. B. N. S. 315; Donald v. Suckling (1866), L. R. 1 Q. B. 585; Young v. Lambert (1870), L. R. 3 P. C. 142; Mills v. Charlesworth (1890), 25 Q. B. D. 421; Morris v. Delobel Filpo (1892), 66 L. T. 320.

43. ———.]—SHOWER v. PILCK, No. 55, *post*.

44. ———.]—A mere parol gift of a chattel, unaccompanied by delivery of possession, passes no property therein.—BOURNE v. FOSBROOKE (1805), 18 C. B. N. S. 515; 5 New Rep. 375; 34 L. J. C. P. 164; 11 Jur. N. S. 202; 13 W. R. 497; 144 E. R. 545.

*Annotations:—*Reid. Cochrane v. Moore (1890), 25 Q. B. D. 57. *Mentd.* Fell v. Whitaker (1871), 41 L. J. Q. B. 78.

44a. ———.]—It is clear law that in order to pass property in chattels by way of gift, mere words are not sufficient, but there must be delivery (LORD ESHER, M.R.).—BASHALL v. BASHALL (1894), 11 T. L. R. 152, C. A.

*Annotation:—*Mentd. Larner v. Larner (1905), 74 L. J. K. B. 797.

45. ———.]—Whether intention alone sufficient.]—A clear intention on the part of the donor to give, acted upon by the donee, constitutes a valid gift *inter vivos* without actual delivery.—*Re* HARCOURT, DANBY v. TUCKER (1883), 31 W. R. 578.

*Annotations:—*Dbtd. Cochrane v. Moore (1890), 25 Q. B. D. 57. *Reid.* *Re* Ridgway, *Ex p.* Ridgway (1885), 15 Q. B. D. 447; Kilpin v. Halsey, [1892] 1 Q. B. 582; *Re* Stoneham, Stoneham v. Stoneham, [1919] 1 Ch. 149.

46. ———.]—In 1866 A., soon after the birth of his son T., purchased a pipe of wine for his son, & had it bottled, & laid down in his cellar, & from that time it remained intact in the cellar & was known in the family & amongst their friends as T.'s wine. In 1885 A. became bkpt. :—*Held*: there was not sufficient evidence of an intention to make an immediate present gift of the wine to T., & it passed to the trustee in bkpcy.

BRADSHAW (1881), 6 A. R. 666.—CAN.

1. ———.]—A gift is not invalid for the mere reason that the donor has not delivered possession.—KALIDAS MULLICK v. KANHAYA LAL PUNDIT (1884), 1 L. R. 11 Calc. 121; L. R. 11 Ind. App. 218.—IND.

PART III. SECT. 1, SUB-SECT. 2.—B. (b).

36 I. Parol gift.]—An oral gift of personal chattels does not confer any property on the donee, if there be no actual delivery to him.—TRAVIS v. TRAVIS (1886), 12 A. R. 438.—CAN.

36 II. ———.]—Pltf.'s father in his lifetime purchased a piano which, after delivery at his home, he gave to pltf., then living with him. She accepted the gift, & it was afterwards treated

as her property :—*Held*: the title to the piano was complete in pltf.—TELLIER v. DUJARDIN (1906), 16 Man. L. R. 423.—CAN.

36 III. ———.]—Actual delivery of the thing is a necessary ingredient of a valid parol gift.—HARDY v. ATKINSON (1908), 18 Man. L. R. 351; 9 W. L. R. 564.—CAN.

36 IV. ———.]—In order to transfer a chattel by a verbal gift only, there must be an actual delivery of the thing to the donee.—HUGGARD v. BENNETTO (1912), 20 W. L. R. 233; 1 D. L. R. 305; 1 W. W. R. 837.—CAN.

36 V. ———.]—Packets of sovereigns were found in a box of testator outside the property he had bequeathed under his will to certain of his children. These moneys were claimed by the wife

of one of testator's sons as hers, & as trustee for certain of her children, & that it was a gift *inter vivos*. One of the next of kin disputed this position, & claimed the money should be regarded as belonging to the general estate of testator. The evidence in support of the son's wife & her children for the position set up, was that testator had said, pointing to the packets of money, before he died, "It is all for you & the children." There were other facts adduced pointing to the same intention :—*Held*: there was not the clear & unequivocal terms of present donation, accompanied by a change of ownership, which is essential to constitute a binding & concluded gift *inter vivos*.—*Re* FITZGERALD (1893), 7 Nfld. L. R. 714.—NFLD.

g. Endorsement on promissory note

Sect. 1.—How made: Sub-sect. 2, B. (b), (c), (d)

It is contended for the trustee that change of possession from the donor to the donee must be shown, & that no property passes so long as the subject of the gift remains in the possession of the donor. I am of opinion that it is going too far to say that retention of possession by the donor is conclusive proof that there is no immediate present gift; although, undoubtedly, unless explained or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention (CAVE, J.).—*Re RIDGWAY, Ex p. RIDGWAY* (1885), 15 Q. B. D. 447; 54 L. J. Q. B. 570; 34 W. R. 80; 2 Morr. 248.

Annotations:—Dtd. Cochrane v. Moore (1890), 25 Q. B. D. 57. *Reid. Kilpin v. Hatley*, [1892] 1 Q. B. 582; *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

47. —.]—A gift of a chattel capable of delivery, made *per verba de presenti* by a donor to a donee, & assented to by the donee, whose assent is communicated to the donor, does not pass the property in the chattel without delivery.

In ordinary English language & in legal effect there cannot be a "gift" without a giving & a taking, the giving & taking are the two contemporaneous reciprocal acts which constitute a gift. They are a necessary part of the proposition that there has been a "gift." They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift (LORD ESHER, M.L.).—*COCHRANE v. MOORE* (1890), 25 Q. B. D. 57; 59 L. J. Q. B. 377; 63 L. T. 153; 54 J. P. 804; 38 W. R. 588; 6 T. L. R. 296, C. A.

Annotations:—Consd. Re Alderson, Alderson v. Peel (1891), 64 L. T. 645. *Expld. Kilpin v. Hatley*, [1892] 1 Q. B. 582. *Consd. Vallier v. Wright & Bull* (1917), 33 T. L. R. 366. *Expld. Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149. *Reid. Rawlinson v. Mort* (1905), 93 L. T. 555; *Re Wasserberg, Union of London & Smiths Bank v. Wasserberg*, [1915] 1 Ch. 195. *Mentd. Re Patrick, Bills v. Tatham* (1890), 60 L. J. Ch. 111; *Darlow v. Bland*, [1897] 1 Q. B. 125.

48. —.]—*Re OGG (LADY), MACDONALD v. GOLDSMITH* (1899), 15 T. L. R. 486.

49. —.]—*Actual or constructive delivery.*—Pltf.'s husband, who taught motor-car driving, gave her a car, which afterwards continued to be on the husband's premises & to be used for the business. Pltf. & her husband subsequently

separated & pltf. took the car & placed it in defts.' garage. The car was still registered in the husband's name & defts. gave it up to him on demand. In an action by pltf. against defts. for the return of the car or its value:—*Held*: after the gift no change had taken place in the custody of the car, & there had been no valid gift because there had been no actual or constructive delivery, & therefore the action failed.—*VALIER v. WRIGHT & BULL, LTD.* (1917), 33 T. L. R. 366.

50. —.]—*Gift in futuro insufficient.*—*Re RIDGWAY, Ex p. RIDGWAY*, No. 46, *ante*.

(c) *Possession Retained by Donor.*

51. *Whether immediate gift intended.*—*Re RIDGWAY, Ex p. RIDGWAY*, No. 46, *ante*.

52. *Retention of insurance policy.*—*Re RICHARDSON, WESTON v. RICHARDSON*, No. 114, *post*.

53. —.]—*HATLEY v. LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY*, No. 115, *post*.

(d) *Where Donee Already in Possession.*

54. *Whether new delivery necessary.*—*FLOWER'S CASE* (1597), Noy, 67; 74 E. R. 1035.

Annotations:—Expld. Douglas v. Douglas (1869), 22 L. T. 127. *Consd. Cochrane v. Moore* (1890), 25 Q. B. D. 57; *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

55. —.]—A mere verbal gift of a chattel to a person in whose possession it is, does not pass any property to the donee.

To pass the property there must be both a gift & a delivery (ALDERSON, B.).—*SHOWER v. PILCK* (1849), 4 Exch. 478; 154 E. R. 1301; *sub nom. SHARR v. PILCH*, 19 L. J. Ex. 113; 14 L. T. O. S. 135.

Annotations:—Dtd. Winter v. Winter (1861), 4 L. T. 639. *Consd. Kilpin v. Hatley*, [1892] 1 Q. B. 582. *Reid. Forrest v. Forrest* (1865), 5 New Rep. 299; *Re Ridgway, Ex p. Ridgway* (1885), 15 Q. B. D. 447; *Cochrane v. Moore* (1890), 25 Q. B. D. 57; *Re Alderson, Alderson v. Peel* (1891), 64 L. T. 645; *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

56. —.]—A barge, while in possession of the donee, & worked by him as servant to the owner, was given to him by the owner; afterwards the donee worked it, & paid the wages of the crew on his own account until the donor's death:—*Held*: the property thereby became vested in the

—*Whether sufficient to constitute gift*
—*Without delivery.*—Where the only evidence of a gift of a promissory note is its endorsement to the alleged donee without delivery, the title does not pass.—*CLARK v. CLARK* (1909), 4 N. B. Eq. Rep. 237.—*CAN.*

PART III. SECT. 1, SUB-SECT. 2.— B. (c).

h. *Gift of colt—Subsequent incursion of colt in bill of sale.*—P. gave a young colt to H., who lived in his family, but there was no evidence of any delivery to H., or of any possession or use of the colt by him. On the other hand, P. continued to feed & use the colt as his own until his death; previously to which he gave a bill of sale of it, among other things, to pltf. Some time after the death of P., H. sold to deft., against whom pltf. brought trover:—*Held*: the facts mentioned were not sufficient to constitute a gift *inter vivos*.—*McFARLANE v. FLINN* (1870), 8 N. S. R. 141.—*CAN.*

i. *Retention of promissory note.*—*RUPERT v. JOHNSTON* (1876), 40 U. C. R. 11.—*CAN.*

k. *Gift to child living at home.*—A cow which was called pltf.'s daughter's, while the daughter was unmarried & living at home:—*Held*: not sufficient to support an alleged gift in the absence of evidence, of any point of time when it could be said that there was a gift, or of any transmutation of possession.—*RHODENHIZER v. BOLLIVAR* (1898), 31 N. S. R. 236.—*CAN.*

l. *Subsequent delivery of gift—Whether gift valid.*—Where there is a gift of a chattel by words of present gift, subsequent delivery is effective to perfect the gift.—*STANDARD TRUST CO. v. HILL*, [1922] 2 W. W. R. 1003; 68 D. L. R. 722.—*CAN.*

m. *Retention of deed assigning chose in action.*—*UNICKE v. GILES* (1828), 2 Mol. 257; 2 Ir. L. Rec. 1st ser. 161.—*IR.*

PART III. SECT. 1, SUB-SECT. 2.— B. (d).

54 i. *Whether new delivery necessary.*

—A wife who possessed four separate fixed deposits at a bank for £300 each, by word of mouth gave them to her husband & signed an order on the bank authorising him to draw the money due to her. The wife at the time of making the gift was in hospital, & the deposit receipts were in her house. Some few days before her death a bank officer called to see the wife & asked whether she wished her overdue deposits placed in her husband's name, & she replied "Yes." The woman was of sound mind & knew what she was doing when she made the gift of the deposit receipts; & when the bank officer interviewed her:—*Held*: there had been a verbal gift of the four deposit receipts, which was complete, since the documents were in the possession of the intended donee at the time the gift was made, & no further act of delivery or change of possession was necessary.—*ELDER'S TRUSTEES & EXECUTORS CO., LTD. v. GIBBS*, [1922] N. Z. L. R. 21.—*N.Z.*

donee.—*WINTER v. WINTER* (1861), 4 L. T. 639; 9 W. R. 747.

Annotations.—*Consd.* *Re Alderson, Alderson v. Peel* (1891), 84 L. T. 645. *Foll.* *Kilpin v. Ratley*, [1892] 1 Q. B. 582. *Consd.* *Cain v. Moon*, [1896] 2 Q. B. 283; *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149. *Reid.* *Re Ridgway, Ex p. Ridgway* (1885), 15 Q. B. D. 447; *Cochrane v. Moore* (1890), 25 Q. B. D. 57; *Valier v. Wright & Bull* (1917), 33 T. L. R. 366.

57. —.]—Delivery first & gift afterwards of a chattel capable of delivery is as effectual as gift first & delivery afterwards.—*Re ALDERSON, ALDERSON v. PEEL* (1891), 64 L. T. 645; 7 T. L. R. 418.

Annotation.—*Foll.* *Kilpin v. Ratley*, [1892] 1 Q. B. 582.

58. —.]—Household furniture which was the property of claimant's father was in the possession of claimant's husband, & was in a house where the husband resided with his wife, claimant. The father, being at the time with claimant in a room where some of the furniture was, verbally gave the furniture to claimant by words of present gift. The father then went away from the house leaving claimant in the room. There was no manual delivery of the furniture to claimant, & after the gift the furniture still remained in the house where claimant & her husband continued to live.—*Held*: manual delivery of the furniture was not necessary to complete the verbal gift, & there had been such a change of possession from claimant's husband to claimant, consequent upon the gift, as was sufficient to effectuate it.—*KILPIN v. RATLEY*, [1892] 1 Q. B. 582; 66 L. T. 797; 56 J. P. 565; 40 W. R. 479; 8 T. L. R. 290.

Annotations.—*Foll.* *Rawlinson v. Mort* (1905), 93 L. T. 555. *Reid.* *Valier v. Wright & Bull* (1917), 33 T. L. R. 366; *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

59. —.]—When chattels capable of delivery are in the possession of the intended donee a parol gift of them by the donor passes the property in the chattels & completes the gift, no further act of delivery or change of possession being necessary. The principle is the same whether the chattels are delivered to the donee before the gift or concurrently with or subsequently to the gift. The principle applies where the chattels have been delivered to the donee before the gift as bailee or in any other capacity so long as they are in his actual possession at the time of the gift to the knowledge of the donor.

Where a gift of chattels is made *inter vivos per verba de presenti* & the chattels are in the possession of the donee as bailee or in any other capacity, no further delivery is necessary to complete the gift. Even if such a gift were incomplete, confirmation of it by will & appointment of the donee as exor. would complete the gift.—*Re STONEHAM, STONEHAM v. STONEHAM*, [1919] 1 Ch. 149; 88 L. J. Ch. 77; 120 L. T. 341; 63 Sol. Jo. 192.

(e) Constructive Delivery.

60. Delivery of key—Of chest—Gift of contents of chest.—*M.* in her last illness requested of her husband that her wearing apparel, gold watch, pearl necklace, rings, etc., in her possession, & used by her might be given to her daughter, & put into a friend's hand for her daughter's use, which the husband promised. After his wife's

death, he gave the things to his daughter, & made an inventory, & locked them up in a strong chest, & gave the key to his wife's friend, & sent the things therein to her for his daughter's use. Though the husband afterwards took some of the things into his possession again, that was not sufficient to invalidate the gift, which was perfect by the former act.—*LUCAS v. LUCAS* (1738), *West temp.* Hard. 456; 1 Atk. 270; 25 E. R. 1030, L. C.

Annotations.—*Reid.* *Graham v. Londonderry* (1746), 3 Atk. 393; *Walter v. Hodge* (1818), 2 Swan. 92; *Mews v. Mews* (1852), 15 Beav. 529; *Hoyes v. Kindersley* (1854), 2 Sm. & G. 195.

61. —.]—Pltf. had received from his father a present of plate, which, after being produced for pltf. to see, was put into a chest having the father's name upon it. The key was given to pltf. & although the chest was left in the father's house when pltf. went away from home to join the regiment to which he belonged, the plate was not used except during his visits to his father. Whilst the chest was in charge of the father's bankers, to whom it had been sent for safe custody, the father consented to the bankers having a lien upon it for the amount of his overdrawn account; soon afterwards the father of pltf. executed a deed of assignment to trustees under Bkpcy. Act, 1861 (c. 134), s. 192.—*Held*: in an action by the son against his father's trustees to recover possession of this chest of plate, which they claimed under the deed, the delivery of the key to pltf. & the circumstances of the gift were sufficient to pass the property.—*WEBB v. WHINNEY* (1868), 18 L. T. 523; 16 W. R. 973.

Annotations.—*Reid.* *Re Symons* (1869), 17 W. R. 1040. *Mentd.* *Lincoln Waggon & Engine Co. v. Mumford* (1879), 41 L. T. 655.

62. — Of warehouse.—Pawnees of goods, etc., permitting bkpts. to continue in possession, or in the order & disposition of them, have no specific lien on them against the assignees.

A delivery of the key of a warehouse is a delivery of those goods, which are bulky, being the only immediate delivery the things are capable of (*BURNET, J.*).—*RYALL v. ROWLES* (1750), 9 Bl. N. S. 377; 1 Ves. Sen. 318; 1 Atk. 165; 1 Wils. 260; 27 E. R. 1074.

Annotations.—*Consd.* *West v. Sklp* (1750), 1 Ves. Sen. 239; *Re Body, Ex p. Staner* (1859), 33 L. T. O. S. 244. *Reid.* *Ward v. Turner* (1752), 2 Ves. Sen. 431; *Atkinson v. Maling* (1788), 2 Term Rep. 462; *Dearle v. Hall, Loveridge v. Cooper* (1828), 3 Russ. 1; *Reeves v. Capper* (1838), 1 Arn. 427; *Cooke v. Hemming* (1868), L. R. 3. C. P. 334; *Ward v. Duncombe*, [1893] A. C. 369. *Mentd.* *Doddington v. Hallet* (1750), 1 Ves. Sen. 497; *Itow v. Dawson* (1750), 1 Ves. Sen. 331; *Ex p. Dumas* (1754), 2 Ves. Sen. 582; *Ex p. Shank* (1754), 1 Atk. 254; *Worsley v. Demattos & Slader* (1758), 1 Burr. 67; *Wilson v. Day* (1759), 2 Burr. 827; *Mason v. Vere* (1779), 2 W. R. Bl. 1309; *Falkener v. Case* (1781), 1 Bro. C. C. 125; *Plumb v. Flutt* (1791), 2 Anst. 432; *Gordon v. East India Co.* (1797), 7 Term Rep. 228; *Lingham v. Biggs* (1797), 1 Bos. & P. 82; *Evans v. Bicknell* (1801), 6 Ves. 174; *Jones v. Gibbons* (1804), 9 Ves. 407; *Horn v. Baker* (1808), 9 East, 215; *Taylor v. Plummer* (1815), 3 M. & S. 562; *Re Frazer, Ex p. Munro* (1819), Buck, 300; *Hartley v. Smith* (1819), Buck, 368; *Storer v. Hunter* (1821), 3 B. & C. 368; *Hubbard v. Bagshaw* (1831), 4 Sh. 326; *Re Severn, Ex p. Tennyson* (1832), Mont. & B. 67; *Buck v. Lee* (1834), 1 Ad. & El. 804; *Le Ogden, Ex p. Lloyd* (1834), 1 Mont. & A. 494; *Gardner v. Luchlan* (1838), 4 My. & Cr. 129; *Re Gye & Hughes, Ex p. Heynal* (1841), 2 Mont. D. & De G. 443; *Belcher v. Capper* (1842), 4 Man. & G. 502; *Eddy v. Bridges* (1843), 2 Y. & C. Ch. Cas. 486; *Belcher v. Bellamy* (1848), 2 Exch. 303; *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Bartlett v. Bartlett*

PART III. SECT. 1, SUB-SECT. 2.— B. (e).

n. Delivery of document—Evidencing title to chattels.—Deft. with

whom a servant lived for a great number of years, her knowledge in her name a sum of money, receiving a name. The book

was delivered to the servant on the day of deposit, & retained by her for three years, though nothing was drawn on it. At the end of that time she gave it back to deft. for safe keeping

**Sect. 1.—How made: Sub-sect. 2, B. (e) & (f),
sub-sect. 3. Sects. 2 & 3: Sub-sects. 1 & 2, A.]**

(1857), 1 De G. & J. 127; *Re Brooke, Ex p. Scott* (1857), 29 L. T. O. S. 314; *Re Selby, Ex p. Probyn* (1857), 28 L. T. O. S. 258; *Re Buller, Ex p. Wornald* (1860), 2 L. T. 544; *North v. Gurney* (1861), 1 John. & H. 509; *Grainge v. Warner, Re Grainge* (1865), 6 New Rep. 219; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Re Bainbridge, Ex p. Fletcher* (1878), 8 Ch. D. 218; *Re West of England & South Wales District Bank, Ex p. Dale* (1879), 11 Ch. D. 772; *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; *Colonial Bank v. Whinnery* (1886), 11 App. Cas. 426; *Re Patrick, Hills v. Tatham* (1890), 63 L. T. 752; *Re Richards, Humber v. Richards* (1890), 45 Ch. D. 589; *Thomas v. Searles*, [1891] 2 Q. B. 408; *English & Scottish Mercantile Investment Trust v. Brunton*, [1892] 2 Q. B. 1; *Re Wyatt, White v. Ellis*, [1892] 1 Ch. 188; *Sharman v. Mason*, [1899] 2 Q. B. 679; *Hose v. Buckett*, [1901] 2 K. B. 449; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334.

63. Of box containing securities—Receipt in capacity as custodian.]—Upon the death of testator ten Austrian bonds were found, among other securities, in a box at his house, with the following indorsement "The first five numbers of these Austrian bonds belong to & are D.'s property," signed by testator. D. was testator's housekeeper, & the key of the box was given into her custody:—*Held*: as there had been no actual transfer or delivery of the bonds to D. they still remained part of testator's assets.—*TRIMMER v. DANBY* (1856), 25 L. J. Ch. 424; 4 W. R. 390.

64. — For limited purposes.]—*Re WASSERBERG, UNION OF LONDON & SMITHS BANK, LTD. v. WASSERBERG*, No. 378, *post*.

65. Delivery of chair—As symbolic of furniture.]—H., by word of mouth, coupled with symbolical delivery of a chair, gave all his furniture to his wife, & at the same time executed a deed poll, with an inventory attached, reciting such gift:—*Held*: the deed was not necessary to perfect a title to the furniture & was not a bill of sale requiring registration.—*LOCK v. HEATH* (1892), 8 T. L. R. 295, D. C.

66. Delivery of documents—Evidencing title to chattel—Church organ.]—A mission church in a parish was vested in trustees upon trust that it should be used under the direction of the vicar of the parish for public worship. A parishioner bought an organ & lent it to the church, & it was erected there, the property in the organ remaining in him. The then vicar of the parish gave to the parishioner a letter evidencing the fact that the organ was only lent. Pltf. was the organist at the church, & the owner of the organ told him at his rooms that he wished to give him the organ, & thereupon handed to him the vicar's letter & the receipts for the purchase money of the organ as *indicia* of title; & subsequently when in the church he placed his hand upon the organ & said to a third person in pltf.'s presence either that he had given or that he gave the organ to pltf. The organ remained in the church. Pltf. subsequently claimed the organ, & the vicar disputed his title to it. Pltf. brought an action against the vicar & churchwardens for a declaration of his title to the organ:—*Held*: the delivery of the *indicia* of title to pltf. constituted a complete & valid gift of the organ to him; even if it was not then a complete gift, it was completed sub-

sequently at the church; & the action was properly brought against the vicar for a declaration of title.—*RAWLINSON v. MORT* (1905), 93 L. T. 555; 21 T. L. R. 774.

(f) Joint Possession.

Apparent possession.]—*See* **BILLS OF SALE**, Vol. VII., pp. 110 *et seq.*

— By husband & wife jointly.]—*See* **BANKRUPTCY**, Vol. V., p. 852, No. 7160; **BILLS OF SALE**, Vol. VII., p. 115, Nos. 672–674.

See, also, **HUSBAND & WIFE**.

C. Declaration of Trust.

See **TRUSTS & TRUSTEES**.

SUB-SECT. 3.—GIFT OF CHOSSES IN ACTION.

Mode of assignment.]—*See* **CHOSSES IN ACTION**, Vol. VIII., pp. 424, 425, Nos. 35–46.

What may be assigned.]—*See* **CHOSSES IN ACTION**, Vol. VIII., pp. 426 *et seq.*

Acts amounting to assignment.]—*See* **CHOSSES IN ACTION**, Vol. VIII., pp. 442 *et seq.*

Enforcement of voluntary assignment.]—*See* **CHOSSES IN ACTION**, Vol. VIII., pp. 496 *et seq.*

**SECT. 2.—PRESUMPTION AGAINST GIFT—
RESULTING TRUST.**

See **TRUSTS & TRUSTEES**.

Property purchased in name of or transferred to another.]—*See* **TRUSTS & TRUSTEES**.

Property purchased in joint names.]—*See* **TRUSTS & TRUSTEES**.

**SECT. 3.—PRESUMPTION IN FAVOUR OF GIFT—
ADVANCEMENT.**

SUB-SECT. 1.—IN GENERAL.

What constitutes advancement.]—*See* **EQUITY**, Vol. XX., pp. 458 *et seq.*, Nos. 1823 *et seq.*; **TRUSTS & TRUSTEES**.

**SUB-SECT. 2.—BETWEEN WHAT PERSONS
ARISING.**

A. Father and Child.

See, generally, **TRUSTS & TRUSTEES**.

67. Purchase by father in child's name—Presumption of advancement—Natural son.]—*BECKFORD v. BECKFORD* (1774), Lofft, 490; 98 E. R. 763, L. C.

*Annotations:—**Expld.* *Tucker v. Burrow* (1865), 6 New Rep. 139. *Refd.* *Soar v. Foster* (1858), 4 K. & J. 152.

68. — — —.]—Where the father joins the son with him in the purchase it shall not be presumed a trust in the son, unless it be expressly

& was retained by him until her decease, which happened some short time after. It was contended that the giving back of the book revested the money in the donor:—*Held*: there was a good gift *inter vivos*.—*MOORE v. POWER* (1890), 7 Nfld. L. R. 460.—**NFLD.**

PART III. SECT. 3, SUB-SECT. 2.—A.

a. Purchase by father in child's name—Presumed an advancement.]—Pltf.'s father purchased land & on getting transfer caused the transfer to be made out to pltf., explaining to

the vendor that his son was "coming up from the States." The father retained the duplicate certificate of title & the transfer unregistered, & they were found among his papers after his death. He never told pltf., who did not come to Alberta, anything

declared.—**SCROOPE v. SCROOPE** (1663), 1 Cas. in Ch. 27; *Freem. Ch.* 171; 22 E. R. 677.

Annotation :—**Refd.** *Grey v. Grey* (1677), 2 Swan. 594.

69. ———.]—**BENION v. STONE** (1663), 3 Rep. Ch. 9; 21 E. R. 712.

70. ———.] **Effect of previous advancement.]**

—I take this difference between a son formerly married & provided for, & between a son unprovided for. In the latter case, if the father purchase land in the name of a son, & pay for it, or convey land to his son, it shall be taken not to be a trust, but to be an advancement or provision for the son, because the father is under an obligation of duty & conscience to provide for his child in such case; but after he has provided for him, he is under no further obligation to provide more than for a stranger, & else no father could trust his child (**LORD NOTTINGHAM, C.**).—**ELLIOT v. ELLIOT** (1677), 2 Cas. in Ch. 231; 22 E. R. 922, L. C.

Annotations :—**Consd.** *Hepworth v. Hepworth* (1870), L. R. 11 Eq. 10. **Refd.** *Loyd v. Read* (1719), 1 P. Wms. 607.

71. ———.]—Purchase by a father in the name of his son, an advancement.—**GREY (LORD) v. GREY (LADY)** (1677), 1 Cas. in Ch. 296; 2 Swan. 594; *Cas. temp. Finch*, 338; 22 E. R. 809, L. C.

Annotations :—**Consd.** *Soar v. Foster* (1858), 4 K. & J. 152. **Apld.** *Williams v. Williams* (1863), 32 Beav. 370. **Consd.** *Sayre v. Hughes* (1868), L. R. 5 Eq. 376. **Refd.** *Woodman v. Morrel* (1678), *Freem. Ch.* 32; *Loyd v. Read* (1719), 1 P. Wms. 607; *Burgess v. Wheate, A-G. v. Wheate* (1759), 1 Eden, 177; *Gopeekrist Gosain v. Gungapersaud Gosain* (1854), 6 Moo. Ind. App. 53; *Dummer v. Dummer* (1862), 3 Giff. 583; *Tucker v. Burrow* (1865), 2 Hem. & M. 515; *Nicholson v. Mulligan* (1869), 17 W. R. 659; *Stamp Duties Commrs. v. Byrnes*, [1911] A. C. 386.

72. ———.]—**WOODMAN v. MORREL [MORIN]** (1678), *Freem. Ch.* 32; 22 E. R. 1040; *on appeal*, *Freem. Ch.* 34, n., L. C.

73. ———.]—A purchase by the father in the name of his infant son, decreed to be an advancement, & not a trust.—**MUMMA v. MUMMA** (1687), 2 Vern. 19; 23 E. R. 622, L. C.

Annotation :—**Foldd.** *Taylor v. Taylor* (1737), 1 Atk. 386.

74. ———.]—A. purchased lands in his eldest son's name, & put him into possession, & the son having fallen sick, took a declaration of trust from him, & after the son's recovery, he was permitted to continue in possession. The son married & died, & the father obtained a conveyance from his younger son :—**Held** : the eldest son's wife should have dower in these lands.—**BATEMAN v. BATEMAN** (1702), 2 Vern. 436; 1 Eq. Cas. Abr. 218, 382; 23 E. R. 880.

Annotation :—**Mentd.** *Jones v. Meredith* (1739), 2 Com. 661.

75. ———.]—Father buys an estate in the name of his younger son & of a trustee, it shall be taken as an advancement; so though a reversion be settled on the younger son, expectant on the mother's death.—**LAMPLUGH v. LAMPLUGH** (1709), 1 P. Wms. 111; 2 Eq. Cas. Abr. 415; 24 E. R. 316, L. C.

Annotations :—**Refd.** *Crabb v. Crabb* (1831), 1 My. & K. 511. **Mentd.** *Rogers v. Earl* (1757), 1 Dick. 295.

76. ———.]—A father purchases lands in his son's name, his son being then eighteen years of age, the father continued in possession

till his death: this shall be considered as an advancement for the son, & not a trust for the father.—**TAYLOR v. TAYLOR** (1737), *West temp. Hard.* 111; 1 Atk. 386; 26 E. R. 247, L. C.

Annotations :—**Refd.** *Crabb v. Crabb* (1834), 1 My. & K. 511; *Gopeekrist Gosain v. Gungapersaud Gosain* (1854), 6 Moo. Ind. App. 53. **Mentd.** *Chapman v. Gibson* (1781), 3 Bro. C. C. 229.

77. ———.]—The reason why a purchase in the son's name, though the possession continued in the father, has been held an advancement of the son, is because the father was his natural guardian during his minority. Though the father pays the whole consideration, yet, if the purchase is made in the name of a younger son, the heir cannot maintain it is a trust for the father.—**STILEMAN v. ASHDOWN** (1742), 2 Atk. 477; 26 E. R. 688, L. C.

Annotations :—**Refd.** *Dummer v. Pitcher* (1833), 2 My. & K. 262; *Crabb v. Crabb* (1834), 1 My. & K. 511; *Mackay v. Douglas* (1872), L. R. 14 Eq. 106. **Mentd.** *Taylor v. Jones* (1743), 2 Atk. 600; *Burroughs v. Elton* (1805), 11 Ves. 29; *Bott v. Smith* (1856), 21 Beav. 511.

78. ———.]—Copyhold granted to A. & B. his wife, & C. his younger son, to take in succession for their lives & the life of the survivors. The purchase-money was all paid by A. C. is not a trustee of his life interest for A. but takes it beneficially as an advancement from his father.—**DYER v. DYER** (1788), 2 Cox, Eq. Cas. 92; 30 E. R. 42.

Annotations :—**Consd.** *Finch v. Finch* (1808), 15 Ves. 43; *Skeats v. Skeats* (1842), 2 Y. & C. Ch. Cas. 9. **Distd.** *Keats v. Hewer* (1864), 11 L. T. 290. **Consd.** *Sayre v. Hughes* (1868), L. R. 5 Eq. 376. **Distd.** *Re Whitehouse, Whitehouse v. Edwards* (1887), 37 Ch. D. 683. **Refd.** *Wray v. Steele* (1814), 2 Ves. & B. 388; *Murless v. Franklin* (1818), 1 Swan. 13; *Crabb v. Crabb* (1834), 1 My. & K. 511; *Lewis v. Lane* (1834), 2 My. & K. 449; *Sharpe v. Sharpe* (1841), 10 L. J. Ex. Eq. 2; *Gopeekrist Gosain v. Gungapersaud Gosain* (1854), 6 Moo. Ind. App. 53; *Jeans v. Cocke* (1857), 27 L. J. Ch. 202; *Dummer v. Dummer* (1862), 3 Giff. 583; *Tucker v. Burrow* (1865), 2 Hem. & M. 515; *Crow v. Pettingill* (1869), 38 L. J. Ch. 186; *Re Policy No. 6402 of Scottish Equitable Life Assoc. Soc.*, [1902] 1 Ch. 282; *Mercier v. Mercier*, [1903] 2 Ch. 98; *The Venture*, [1908] P. 218; *Hatley v. Liverpool Victoria Legal Friendly Soc.* (1918), 88 L. J. K. B. 237; *Re Engelbach's Estate, Tibbets v. Engelbach*, [1924] 2 Ch. 318.

79. ———.]—Purchase in the name of another a trust for the party, who pays the consideration; except by a parent in the name of his child; which is presumed an advancement. The presumption is capable of being rebutted; but does not give way to slight circumstances.—**PINCH v. PINCH** (1808), 15 Ves. 43; 33 E. R. 671, L. C.

Annotations :—**Refd.** *Crabb v. Crabb* (1834), 1 My. & K. 511; *Sharpe v. Sharpe* (1841), 10 L. J. Ex. Eq. 2; *Skeats v. Skeats* (1842), 12 L. J. Ch. 22; *Tucker v. Burrow* (1865), 2 Hem. & M. 515.

80. ———.]—A father having purchased in the names of his sons a copyhold estate, which he afterwards demised by licence obtained subsequently to the purchase; the sons take the estate successively, as an advancement. To repel the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase. The presumption arising from the circumstances of the purchase of one estate cannot be qualified by transactions relative to other estates.

REDINGTON (1794), 3 Ridg. Parl. Rep. 106.—**IR.**

q. ———.]—A father who had Govt. stock standing in his own name, in the year 1838, transferred all except a small portion, into the joint

about this land, & during the seven years between the time of the transfer & the father's death the latter did breaking on the land, leased it & took the rent & paid the taxes. Two tenants testified that he refused to sell the land stating that it belonged to his

son :—**Held** : there was a presumption that a gift was intended from father to son & there was a completed gift of the land.—**ELDRIDGE v. ROYAL TRUST CO.**, [1923] 2 D. L. R. 689; 2 W. W. R. 67.—**CAN.**

p. ———.]—**REDINGTON v.**

Sect. 3.—Presumption in favour of gift—advancement: Sub-sect. 2, A., B., C. & D.]

It is settled that though, in general cases, if A. purchases with his own money, & the conveyance is taken in the name of B., an implied trust in favour of A. arises from the payment of the purchase-money; yet that doctrine has exceptions. One exception is, that if a man purchases in the name of his son, & no act is done to manifest an intention that the son shall take as trustee, that intention will not be implied from the payment of the purchase-money by the father, but the purchase is *primâ facie* an advancement (LORD ELDON, C.).—MURLESS v. FRANKLIN (1818), 1 Swan. 13; 36 E. R. 278, L. C.

Annotations:—Consd. Stock v. M'Avoy (1872), 42 L. J. Ch. 230. **Refd.** Scawin v. Scawin (1811), 1 Y. & C. Ch. Cas. 65; Sharpe v. Sharpe (1841), 10 L. J. Ex. Eq. 2; Skeats v. Skeats (1842), 12 L. J. Ch. 22; Gopekrist Gosain v. Gungapersaud Gosain (1854), 6 Moo. Ind. App. 53.

81. ——[—] CRABB v. CRABB (1834), 1 My. & K. 511; 3 L. J. Ch. 181; 39 E. R. 774, L. C.

Annotation:—**Refd.** Gopekrist Gosain v. Gungapersaud Gosain (1854), 6 Moo. Ind. App. 53.

82. ——[—] (1) When a property is purchased by a parent in the name of his child, it is, *primâ facie*, an advancement; the implied trust in favour of the person paying the money does not in such case arise. This presumption may, however, be rebutted by evidence, manifesting an intention that the child shall take as trustee.

(2) Where a purchase is made by a parent in the name of a child, the contemporaneous acts & declarations of the parent are evidence to show that the child shall take as trustee only; but the subsequent acts & declarations of the parent are inadmissible for that purpose.

(3) Moneys were invested in the funds by a father, in the name of his son, the dividends of which were received by the father during his life, under a power of attorney from the son:—**Held:** after his death, this was an advancement, & the funds belonged to the son.—SIDMOUTH v. SIDMOUTH (1840), 2 Beav. 447; 9 L. J. Ch. 282; 48 E. R. 1254.

Annotations:—As to (1) **Refd.** Skeats v. Skeats (1812), 12 L. J. Ch. 22; Williams v. Williams (1863), 32 Beav. 370. As to (2) **Refd.** Gopekrist Gosain v. Gungapersaud Gosain (1854), 6 Moo. Ind. App. 53; Forrest v. Forrest (1865), 34 L. J. Ch. 428. As to (3) **Refd.** Bone v. Pollard (1857), 24 Beav. 283; Hepworth v. Hepworth (1870), L. R. 11 Eq. 10.

83. ——[—]—The purchase by a father, of shares in a joint-stock bank, in the name of his son, held, under the circumstances, not to be an advancement for the son.

It is settled that a purchase by a father in the name of his son is, *primâ facie*, an advancement of the son. The presumption is so, but of course this presumption may be rebutted. The father may certainly, even in cases where the doctrine of advancement is held to take place, receive the title deeds & the dividends; but although those circumstances may exist in such cases, yet they are circumstances in favour of the father, especially where the son is adult (KNIGHT BRUCE, V.-C.).—SCAWIN v. SCAWIN (1841), 1 Y. & C. Ch. Cas. 65; 62 E. R. 792.

names of himself & his son. He also, in the year 1856, deposited moneys in a bank, in their joint names. Small purchases of stock in their joint names were made at intervals to 1851; & the joint deposits were made at

intervals, to the father's death in 1862. These investments constituted the bulk of the father's property. By the practice of the bank, on every occasion of drawing the interest, new deposit receipts were issued. On the first

84. ——[—]—A. being the heir at law & expectant devisee of B., paid off a mtge. upon B.'s estate:—**Held:** a presumption arose that the payment was made by A. for his own benefit; & in the absence of evidence to rebut such presumption, A. was entitled to a charge upon the estate.

When a father makes a purchase in the name of his son, a presumption arises that it is intended as a benefit to the son. No such presumption arises if such a purchase is made in the name of a stranger. This presumption arises from the relation of the father to the son, & the duty of the father to make a provision for his son. In all cases the question is whether there is evidence sufficient to rebut the resulting trust in favour of the person who pays the money, & evidence is admissible to support the resulting trust as well as to rebut it (STUART, V.-C.).—CROW v. PETTINGILL (1869), 38 L. J. Ch. 186; 20 L. T. 7; 17 W. R. 364; *reversd.* on other grounds, 20 L. T. 342, L. J.

85. — Child already fully advanced.]—On a transfer by a father into a son's name:—**Held:** the presumption was that an advancement was intended, notwithstanding the fact that the son was already fully advanced, & that the father had by a previous will manifested an intention to provide for the son's children.—HEPWORTH v. HEPWORTH (1870), L. R. 11 Eq. 10; 40 L. J. Ch. 111; 23 L. T. 388; 19 W. R. 46.

86. Lease to daughter — Subsequent sale by donor—Purchaser with notice.]—Lord of a west country manor, his tenants refused to renew, made a lease of the premises to his daughter for ninety-nine years & afterwards sold the manor to J., who had notice of the lease but had security that the daughter when at age would surrender. Daughter decreed to have the benefit of the lease.

This lease does not appear to be a trust for the father; but I take it to be an advancement for his child (LORD JEFFRIES, C.).—JENNINGS v. SELLECK (1687), 1 Vern. 467; 1 Eq. Cas. Abr. 381; 23 E. R. 593, L. C.

87. Small sums given occasionally — No advancement.]—With regard to the advancement of a child it has been determined, that small inconsiderable sums occasionally given to a child cannot be deemed an advancement or part thereof; thus maintenance money, or an allowance made by a freeman to his son at the university, or in travelling, etc., is not to be taken as any part of his advancement, this being only his education; & it would create charge & uncertainty to inquire minutely into such matters. So putting out a child apprentice is no part of his advancement, for it is only procuring the master to keep him seven years instead of the parent.—HENDER v. ROSE (1718), 2 Eq. Cas. Abr. 265; 22 E. R. 224.

88. Deed of gift—Depriving father of all possessions.]—A deed of gift by father to son, whereby the father purports to deprive himself of everything he has in the world, cannot be supported as an advancement. A deed purporting to be a sale cannot be supported as an advancement. A deed which, on the face of it, does not show a fair & reasonable consideration cannot be supported

on occasion of the joint lodgment, it was explained to the father by the bank manager, that the effect would be to enable the son to draw the money after his death. The father then, & on a subsequent occasion, intimated that

in equity. An inadequate money consideration cannot be combined with a consideration of "natural love & affection" for the purpose of supporting a deed.—*HUGHES v. SEANOR* (1869), 18 W. R. 108; *on appeal* (1870), 18 W. R. 1122, L. C.

B. Mother and Child.

89. Whether presumption arises.]—A married lady, living apart from her husband, purchased out of the savings of her separate estate stock in the names of her son & daughter. The lady died, appointing the daughter extrix. of her will. The son became lunatic. The daughter petitioned for a transfer of the stock to her as extrix. The Lords Justices ordered the transfer without requiring a bill to be filed. *Semble*: the doctrine that a purchase in the name of a child will, in the absence of evidence to the contrary, be presumed to be an advancement, does not apply where the purchase is made by a mother.—*Re DE VISMÉ* (1863), 2 De G. J. & Sm. 17; 33 L. J. Ch. 332; 9 L. T. 688; 12 W. R. 140; 46 E. R. 280.

Annotations:—*Consd.* Sayre v. Hughes (1868), L. R. 5 378; *Bennet v. Bennet* (1879), 10 Ch. D. 474. *Crow v. Pettingill* (1869), 38 L. J. Ch. 186.

90. —.]—A widowed mother, after making her will in favour of her two daughters, transferred East India stock, which had stood in her own name, into the names of herself & the unmarried daughter, & died:—*Held*: there was a presumption of intended benefit to the unmarried daughter which was rebutted, & the stock belonged absolutely to her.—*SAYRE v. HUGHES* (1868), L. R. 5 Eq. 376; 37 L. J. Ch. 401; 18 L. T. 347; 16 W. R. 662.

Annotations:—*Consd.* *Bennet v. Bennet* (1879), 10 Ch. D. 474. *Reid*. *Hepworth v. Hepworth* (1870), L. R. 11 Eq. 10; *Re Orme, Evans v. Maxwell* (1883), 50 L. T. 51.

91. Intention to advance—Question of fact.]—There is no such obligation, according to the rules of equity, on a mother to advance or make a provision for her child, as in the case of a father; & therefore, when a mother makes a purchase or investment in the name of her child, or in the joint names of herself & her child, that does not of itself afford the presumption of advancement; in such a case the intention to advance is a question of evidence:—*Held*: a sum of money borrowed by a widowed mother for her son's benefit, upon the evidence to be, not a gift, but a loan from the mother to the son, provable by her against his estate on his death.—*BENNET v. BENNET* (1879), 10 Ch. D. 474; 40 L. T. 378; 27 W. R. 573.

Annotation:—*Reid*. *Re Orme, Evans v. Maxwell* (1883), 50 L. T. 51.

92. — Mother in loco parentis.]—Stock which had been acquired by a lady as the survivor of her husband, who had transferred it into their joint names, was transferred by her into the names of herself, her daughter, who had recently married, & her daughter's husband; & the dividends of the stock were employed by the transferor during her life. The daughter predeceased her mother, & the son-in-law survived them both:—*Held*: there was no resulting trust, & the son-in-law was entitled to the fund.

he intended he should do so without expense:—*Held*: there was an advancement for A., to the extent of the joint investments & deposits.—*Fox v. Fox* (1863), 15 L. Ch. R. 89.—*IR.*

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If it be true that a resulting trust only arises where there is no other explanation of the transaction, here you have a reasonable explanation of the transaction in the fact that there was a daughter to be endowed & that she could only be endowed by this form of transfer. Whatever presumption there is in favour of an unmarried daughter in the case of a transfer to her, the same presumption arises in this case, where the transfer was to a married daughter & her husband. Then, if the object of the donor at the time when the transfer is made is ascertained, it can make no difference whether the daughter & her husband survived the mother, or, as in this case, the husband only survived the mother (*LORD CAIRNS, L.C.*).—*BATSTONE v. SALTER* (1875), 10 Ch. App. 431; 44 L. J. Ch. 760; 33 L. T. 4; 23 W. R. 816, L. C. & L. J.

Annotation:—*Reid*. *Crichton v. Crichton* (1895), 13 R. 770

93. — Payment for child's necessities.]—An action was brought by creditors for the administration of the estate of an intestate, a widow, against the administrator, who was her eldest son, & who was acting under letters of administration granted to him previously.

Deft. had joined, as surety, with the intestate in giving a security for certain loans which had been procured by her for her own purposes, & he claimed to retain out of the assets of the intestate, in, or coming to his hands as administrator, a sum sufficient to repay these loans with interest. He had not in fact repaid them, although he was personally liable to do so.

Deft. was at one period engaged in farming, & the intestate from time to time made him small advances when he was in want of money to assist him in carrying on his business, or for his maintenance. The intestate never attempted to recover these moneys, & she took no acknowledgment for them. Pltfs sought to charge deft. with the moneys so received by him:—*Held*: the moneys advanced to deft. by the intestate, who was in loco parentis at the time, to provide for his necessities, were presumably gifts to him, & accordingly pltf.'s set-off could not be allowed.—*Re ORME, EVANS v. MAXWELL* (1883), 50 L. T. 51.

Annotations:—*Mentd.* *Re Giles, Jones v. Pennetfather*, [1896] 1 Ch. 956; *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905; *Re Beavan, Davies, Banks v. Beavan*, [1913] 2 Ch. 595.

C. Husband and Wife.

See HUSBAND & WIFE.

D. Other Persons.

94. Donor in loco parentis—Grandfather.]—There is difference in the case, where the father is dead & where he is alive; for when the father is dead, the grandchildren are in the immediate care of the grandfather; & if he take bonds in their names, or make leases to them, it shall not be judged trusts, but provision for the grandchild, unless it be otherwise declared at the same time (*LORD NOTTINGHAM, C.*).—*EBRAND v. DANCER* (1680), 2 Cas. in Ch. 26; 22 E. R. 829, L. C.

Annotations:—*Reid*. *Curran v. Jago* (1844), 1 Coll. 261; *Soar v. Foster* (1858), 4 K. & J. 152; *Tucker v. Burrow* (1865), 2 Hem. & M. 515; *Re Polley No. 6402 of Scottish Equitable Life Assce. Soc.*, [1902] 1 Ch. 283.

PART III. SECT. 3, SUB-SECT. 2.—D.

r. Donor in loco parentis—Aunt.]
—*Testatrix* in 1910 placed £400 in a bank on deposit for two years in the names of her two infant nephews, for

whom she had frequently expressed the intention of making provision, although she was not in loco parentis towards them. She was informed by the bank manager at the time of the deposit that she could withdraw the money at

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Sect. 3.—Presumption in favour of gift—advancement; sub-sect. 3.]

95. — [Copyholds for life were purchased by A., who renewed them in the names of his son, & afterwards of his daughter, & afterwards of his daughter's illegitimate child, whose father was living:—*Held*: the fact that the purchaser had to some extent stood *in loco parentis* towards the grandchild was not sufficient to raise a presumption of advancement, in the absence of any evidence of intention to make a gift.—*TUCKER v. BURROW* (1865), 2 Hem. & M. 515; 6 New Rep. 139; 34 L. J. Ch. 478; 12 L. T. 485; 11 Jur. N. S. 525; 18 W. R. 771; 71 E. R. 563.

Annotation.—*Reid. Re Hamlet, Stephen v. Cunningham* (1888), 38 Ch. D. 183.

96. — *Grandmother.*]—Grandmother bought an annuity in £14 per cents. for £100 in the grandchild's name. Child's father gave the grandmother a bond to repay the £100 if the child died before the grandmother, who received the income & kept the talley, the grandchild making no claim:—*Held*: no trust for the grandchild.

What prevailed with the father to give such bond, was the chance of the grandmother's giving the annuity to the grandchild, or at least not giving it from him; & that probably, if the grandmother had not given it from him, this would have been taken as a conditional gift to the grandchild after the grandmother's death; the case might have been different, if the grandmother, or parent had made such a purchase in a grandchild's or child's name, & taken the profits during the infancy only of the child, for that would have been no evidence of a trust for the parent. *Secus* if the parent had taken the profits after the child's coming of age & when of discretion to claim his right (per CUR.).—*LOYD v. READ* (1719), 1 P. Wms. 607; 24 E. R. 537, L. C.

97. — *Release from debt.*]—Testator wrote in his account book, opposite an entry of two debts owing to him by his brother, one being due upon mtge., & the other upon a promissory note, the words "Not to be enforced"; but he received interest upon both debts for several years after the date of the entry, & up to the time of his death. The document which contained the words referred to was not propounded as testamentary:—*Held*: (1) this memorandum of the testator did not amount to a discharge of either of the debts.

Semble: (2) the cases in which the ct. has held a debtor liberated from his obligation to pay a debt which once existed, & from which he has not been discharged by any testamentary instrument are (a) where the act or declaration relied on creates an immediate discharge, which the debtor

might plead as a release or by way of accord & satisfaction at law, or which he might enforce in equity as against the creditor; (b) where the discharge, though not immediate & absolute, but conditional, becomes perfect by the condition having, in the event, been performed; (c) where the creditor intended to discharge the obligation at his death, & communicated that intention to those who would, under his own disposition, take or represent his interest upon his death, & relied upon their fulfilment of his intention; & (d) in strictness belonging to another class of cases, where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one *in loco parentis*, or is part of a family arrangement.—*PEACE v. HAINS* (1853), 11 Hare, 151; 17 Jur. 1091; 68 E. R. 1226.

Annotation.—*As to (1) Reid. Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534.

98. — *Father-in-law.*]—The delivery of money by a person to another to whom the former has placed himself *in loco parentis* is presumed to be a gift, & the burden of proof lies upon any party who contends that it is a loan. W. T. encouraged J. B. who was engaged to be married to W. T.'s daughter, to leave his place as clerk in a bank, & make him an allowance of about £400 a year. On Jan. 1, 1865, W. T. handed over to J. B. £5,000 for the purpose of purchasing a share in a business & entering a partnership, which J. B. accordingly did:—*Held*: in these circumstances W. T. had placed himself *in loco parentis* to J. B.; & the £5,000 was accordingly a gift, in default of satisfactory evidence to the contrary.—*COX v. BENNETT* (1870), 18 W. R. 519.

99. *Uncle & nephew.*]—A person invested certain moneys in a savings bank & in a private bank in the name of his wife's nephew:—*Held*: under the circumstances of the case, the moneys were intended for the advancement of the nephew; & upon the death of the nephew intestate during his minority, the moneys so invested were decreed to be paid to his administrator.—*CURRENT v. JAGO* (1844), 1 Coll. 261; 3 L. T. O. S. 240; 8 Jur. 610; 63 E. R. 410.

Annotations.—*Conrad. Soar v. Foster* (1858), 4 K. & J. 152. *Reid. Tucker v. Burrow* (1865), 2 Hem. & M. 515.

SUB-SECT. 3.—HOW REBUTTED.

100. *Contrary intention of donor—Contemporaneous declaration.*]—*WOODMAN v. MORRELL* [MORIN] (1878), Freem. Ch. 32; 22 E. R. 1040; on appeal, Freem. Ch. 34, n., L. C.

maturity. She always retained the deposit receipt, which was marked "Not transferable." In 1911, after having made a will in which she provided for the nephews, she expressed a desire to have the deposit receipt cancelled, & to have a fresh one issued in her own name, & she indorsed the deposit receipt, & signed an application for a fresh one. She was then informed by the bank — or that this course could not be adopted without the signatures to the deposit receipt of the two nephews. She died without having altered her will or taken any further steps, although advised to make a codicil to her will. She did not at any time inform the nephews or their parents of the deposit:—*Held*: there was a completed gift of the £400 in favour of the two nephews.—*Re*

HAMILTON (DECEASED), [1913] V. L. R. 460, 463.—*AUS.*

s. — *Uncle.*]—An uncle having kept no regular vouchers of advances made for behoof of his niece, whom a child, & who was possessed of no property, but had a claim in dependence for a landed estate:—*Held*: not entitled to claim repayment as a debt, on her being found entitled to possession of the estate.—*WILSON v. PATERSON* (1898), 4 Sh. (Ch. of Sess.) 817.—*SCOT.*

t. — [—]—An uncle having advanced money for the education & outfit of his nephew during his minority, & who was in poor circumstances, & having entered it in his books, but having died without requiring payment,

or taking any document of debt:—*Held*: it was to be presumed that the advances had been made *crucio domandi*, & his trustees were not entitled, after his death, to insist on repayment.—*CAMPBELL v. MACALESTER* (1837), 5 Sh. (Ch. of Sess.) 219; 2 Fac. Coll. 137.—*SCOT.*

b. *Advancement to brother by brother.*]—A. advanced money to B., his brother. No acknowledgment was taken; but B. on two occasions sent a state to his brother specifying the money advanced, & deducting payments made on his brother's account:—*Held*: the money advanced was a debt & not a donation.—*MURRAY v. MURRAY* (1843), 6 Durl. (Ch. of Sess.) 176; 18 Sc. Jur. 127.—*SCOT.*

101. — [.]—MURLESS v. FRANKLIN, No. 80, *ante*.

102. — [.]—A person transferred \$8,000 3 per cent. consols & \$4,500 South Sea stock into the names of his illegitimate daughter & her husband, & their two eldest children, & by parol declarations, confirmed by an entry in a memorandum book, declared the investment to be for the benefit of all his daughter's children who should attain twenty-one. He afterwards transferred \$900 long annuities into his own name, jointly with the names of his illegitimate daughter & her two eldest children, & made a parol declaration that he did not intend to part with the control over this stock, & he disposed of it by a codicil to his will:—*Held*: after the death of the daughter & her husband, & her two eldest children under twenty-one, two surviving children, who had attained twenty-one, were entitled to the consols & South Sea stock, & the long annuities passed by testator's codicil.—KILPIN v. KILPIN (1834), 1 My. & K. 520; 39 E. R. 777, L. O.

Annotation:—*Consd. Tucker v. Burrow* (1865), 2 Hem. & M. 615.

103. — [.]—SIDMOUTH v. SIDMOUTH, No. 82, *ante*.

104. — [.]—(1) A father purchased a copyhold, & was admitted thereto to hold during the lives of his three children, A., B. & C. successively. B., after the death of the father & A., got admitted, whereupon *pltf.*, who claimed under the father's will, instituted a suit to have B. declared a trustee for him. As an excuse for not proceeding at law, *pltf.* alleged a custom of the manor, by which the *cestui que vie* was entitled to be admitted; this was disputed:—*Held*: even assuming the custom, still, by the form of the grant, the father had made an advancement to his sons, who were therefore entitled beneficially, & not as trustees for their father.

(2) The evidence to rebut the presumption of an advancement, in the case of a purchase by a father in the name of a child, ought to be distinct & contemporaneous.—JEANS v. COOKE (1857), 24 Beav. 613; 27 L. J. Ch. 202; 30 L. T. O. S. 253; 4 Jur. N. S. 57; 6 W. R. 175; 53 E. R. 456.

105. — [.]—When a father purchases in the name of his child, his declarations of intention contemporaneous with the transaction itself are alone admissible to prove a trust. Parol evidence is admissible to prove that lands were purchased by a father in the name of his child not as an advancement, but as a trustee. Purchases & mtges. were taken by a father in the name of his child. The father received the rents & interest & paid them into a bank, but he allowed his son to draw for the sums he required. The son died first:—*Held*: the presumption of advancement was not rebutted.—WILLIAMS v. WILLIAMS (1863), 32 Beav. 370; 55 E. R. 145.

106. — Retention of title deeds not conclusive.]—SCAWIN v. SCAWIN, No. 83, *ante*.

107. — Contemporaneous act inconsistent with gift.]—A tenant in possession of copyholds, grantable for lives, procured, at his own expense, a grant of it to his son in remainder, & at the same time surrendered it to the use of his will:—*Held*: the son was not entitled to the estate so granted to him by way of advancement, but was a trustee for his father.—PRANKERD v. PRANKERD (1820), 1 Sim. & St. 1; 57 E. R. 1.

Annotation:—*Dtd. Beecher v. Major* (1865), 2 Drew. & Sm. 431.

108. — Subsequent declaration — Not permissible—Codicil.]—A father transferred a sum of stock from his own name into the joint names of his son & of a person whom both father & son employed as their banker to receive their dividends; & he told the banker to carry the dividends of the sum so transferred, as the same were received, to the son's account. Under this direction, the dividends were enjoyed by the son as long as the father lived:—*Held*: (1) on the father's death, the son was entitled to the stock absolutely; (2) a codicil to the father's will, executed two years after the transfer, could not be read to qualify or explain the effect of the transaction.—ORABB v. ORABB (1834), 1 My. & K. 511; 3 L. J. Ch. 181; 39 E. R. 774, L. C.

109. — [.]—SIDMOUTH v. SIDMOUTH, No. 82, *ante*.

110. — [.]—A., being seised to himself & heirs of certain copyhold hereditaments for the lives of himself & B. & the life of the longest liver of them, surrendered the hereditaments into the hands of the lord of the manor, & took a new grant of them, to hold same unto himself, B., & C. a son of A., then aged seven years, for the term of their lives & the life of the longest liver of them successively. A. was duly admitted tenant of the hereditaments, & continued in possession of them until his death. B. died during A.'s lifetime. A. by his will devised the hereditaments to trustees, upon trust to sell & divide the produce amongst his children & grandchildren, & inserted therein a special declaration that C. was nominated by him in the surrender & grant as a trustee for him, the testator. C. had during his father's lifetime obtained possession of the original copy of the grant:—*Held*: (1) the insertion of C.'s name by his father in the grant operated as an advancement to him, & he was beneficially entitled to the hereditaments in question; (2) no act of the father subsequent to the grant could be admitted as evidence of his intention.—SKEATS v. SKEATS (1842), 2 Y. & C. Ch. Cas. 9; 12 L. J. Ch. 22; 6 Jur. 942; 63 E. R. 4.

111. — Of mistake as to legal effect.]—The transfer, by a father, of stock into the joint names of himself, his wife & child, is presumed to be an advancement; but this presumption may be rebutted by the evidence upon oath of the transferor, that no trust was intended, but that the transfer was made under a misapprehension of its legal effect.—DEVROY v. DEVROY (1857), 3 Sm. & G. 403; 26 L. J. Ch. 290; 28 L. T. O. S. 336; 3 Jur. N. S. 79; 5 W. R. 222; 65 E. R. 713. *Annotations*:—*Consd. Stone v. Stone* (1857), 3 Jur. N. S. 708; *Dumper v. Dumper* (1862), 3 Giff. 583. *Reid. Forrest v. Forrest* (1865), 5 New Rep. 299.

112. — Purchase by wife in daughter's name—While living apart from husband.]—Money, which was standing in the funds in the name of a married woman, was claimed, after her decease & that of her husband, by her mother, as having been invested by her while separated from her husband in her daughter's name. The only evidence of the trust was the affidavit of the mother & proof that the dividends had been received by her with the assent of the daughter & her husband. The ct. held the claim of the mother established.—DOWN v. ELLIS (1865), 35 Beav. 578; 55 E. R. 1021.

113. — Investment in names of daughters—Power to revoke.]—A sum of consols, invested by a father in the names of his two daughters, held,

Sect. 3.—Presumption in favour of gift—advancement: Sub-sect. 3. Sect. 4.]

under the circumstances, to form part of his estate, & not to be an advancement to them.

I think that the father meant this as a mode of avoiding payment of legacy duty & that he intended the property to remain his own to deal with as he himself thought fit & that this was the understanding between himself & his daughters. Accordingly, if at any time before his own death he had come & insisted on this money being restored to him he would have been entitled to it (*ROMILLY, M.R.*).—*BONE v. POLLARD* (1857), 24 Beav. 283; 53 E. R. 367.

Annotations:—*Consd. Dumper v. Dumper* (1862), 6 L. T. 315. *Ex'p'd. Hepworth v. Hepworth* (1870), L. R. 11 Eq. 10. *Consd. Re Rowe, Jacobs v. Hind* (1889), 60 L. T. 596.

114. Retention of insurance policy—Policy in favour of child—Insufficient.]—Where a man effects an insurance on his own life, but in his daughter's name, & pays the premiums himself:—*Held*: though he retains the policy in his own possession, it is a complete gift to the daughter, & she is on his death entitled to the insurance moneys.

The only thing that could be relied on to rebut the presumption of advancement was the fact that the father kept the policy in his own hands. But that was not sufficient. The mere retention of the policy did not show that the beneficial interest also was not intended to pass to her. Thus the gift of the policy to the daughter was a complete one, for both the legal interest & the beneficial were vested in her (*KAY, J.*).—*Re RICHARDSON, WESTON v. RICHARDSON* (1882), 47 L. T. 514.

115. Insurance of child's life—To cover funeral expenses.]—A father in 1891 insured his infant son, then two years of age, in a friendly society in the name of the child. The father kept possession of the policy & paid the premiums, & died in 1915. On his death the society paid the policy moneys to another child of the father, who claimed to have been presented by him with the policy. The administratrix of the assured, who had died intestate in 1916, sued the society for the policy moneys as part of the estate of the assured:—*Held*: it was a question of evidence whether the father at the time he effected the policy intended it to be for his own benefit, or for the benefit of the son, & there was evidence, in the terms of the policy itself, & the circumstances of the case, that the father had taken out the policy in order to recover the possible expenses of the son's funeral, & therefore the policy enured for the father's own benefit by Assurance Cos. Act, 1909 (c. 49), s. 36, & that being so, any presumption that the policy was an advancement to benefit the son was rebutted by such evidence.—*HATLEY v. LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY* (1918), 88 L. J. K. B. 237; 118 L. T. 687, D. C.

116. — Purchase of shares in son's name—For qualification as director.]—A., the owner of estates in the Bedford Level, wishing to give his son a qualification as bailiff, for which, according to the Bedford Level Act, it is necessary to "have" four hundred acres in the level, wrote to the registrar of the level stating his wish, & asking him to find a qualification. The registrar thereupon, without any further instructions, selected out of A.'s land the smallest lot that exceeded four hundred acres, & sent to him a deed, by

which he purported to convey it to the son in fee, in consideration of natural love & affection. This deed was at once executed by A. & registered. The son died soon after without having ever heard of the transaction. It, clearly appeared that neither A. nor the registrar intended or considered the transaction to have the effect of making the son beneficial owner, nor intended any fraud or illegality. On a bill being filed by A. to establish his title to the land:—*Held*: on the ground of trust, or of mistake, or on both grounds, *pl'tf.* was entitled to the relief sought.—*CHILDERS v. CHILDERS* (1857), 1 De G. & J. 482; 26 L. J. Ch. 743; 30 L. T. O. S. 8; 3 Jur. N. S. 1277; 5 W. R. 859; 44 E. R. 810, L. J.J.

Annotations:—*Consd. Re Blakely Ordnance Co., Coates's Case* (1876), 46 L. J. Ch. 367. *Field. Re Gooch, Gooch v. Gooch* (1890), 62 L. T. 384. *Held. Haigh v. Kaye* (1872), 7 Ch. App. 469. *Mentd. Cooper v. Griffin* (1892), 40 W. R. 420; *Re Marlborough, Davis v. Whitehead* (1894), 63 L. J. Ch. 471; *Crichton v. Crichton* (1895), 65 L. J. Ch. 13.

117. — — — — —.]—C. transferred £1,000 stock of the L. co. into the name of his son without any consideration, & merely to qualify him as a director of that co.; to be transferred to C. on request; which was ultimately done. C. received the dividends on the stock. The son was a contributory to the B. co., to whom he owed £3,000. The official liquidator of that co. gave notice to the L. co. of his intention to move for an injunction to restrain the son as owner of the stock, & that co. from dealing with it. Thereupon, the official liquidator of the B. co. was informed of the true facts as to the ownership of the stock. The official liquidator of the B. co. immediately afterwards obtained a charging order against the £1,000 stock in the L. co.:—*Held*: that order must be discharged, not only on the ground of the notice, but also because the stock was not standing in the name of the son of C. "in his own right."—*Re BLAKELY ORDNANCE CO., LTD., COATES'S CASE* (1876), 46 L. J. Ch. 367; 35 L. T. 617; 25 W. R. 111.

Annotation:—*Consd. Cooper v. Griffin*, [1892] 1 Q. B. 740.

118. — — — — —.]—A father made his eldest son, who was living near him, & was married, a liberal annual allowance. Being desirous of providing his son with some occupation, he took, in the son's name, one hundred shares of £10 each in the A. co., that number of shares being the necessary qualification for a director; also fifty shares of £100 each in the B. co., ten shares "at least" being a director's qualification; & transferred from his own name into that of the son's five hundred shares in the C. co., a director's qualification being "at least" one hundred shares. The son thereupon became a director of these cos., & received the fees as director, but voluntarily transmitted the dividend warrants on the several shares to the father. Afterwards, at the father's suggestion, the certificates of the shares were handed to him for safe custody, & they were retained by him until his death. The three lots of shares were then found in three envelopes, each indorsed by the father with the number of certificates it contained, two of the envelopes bearing the words "belonging to me." The father by his will settled the bulk of his real & personal estate upon his eldest son for life, with remainder to his children:—*Held*: the shares were taken in the son's name merely for the purpose of qualifying him as a director; that being the purpose, the presumption of advancement which might otherwise have come under consideration was rebutted; & the son held the shares

as trustee.—*Re GOOCH, GOOCH v. GOOCH* (1890), 62 L. T. 384; 6 T. L. R. 224.

119. — Receipt of rents—Whether sufficient to rebut.—In 1904, 1905 & 1906 testator bought properties in the names of his two sons by way of advancement & subsequently received the rents & paid for rates & repairs. He died in 1909. On a claim made by the comr. of stamps against the exors. in respect of the properties it was contended on his behalf that testator made these gifts "with intent to avoid payment of duty" within New South Wales Stamp Duties Act, 1898, s. 52, & that there was an implied agreement between testator & his sons that he was to receive rents & profits during his lifetime:—*Held*: on the evidence the transactions were not colourable, but gifts out & out passing the properties to the sons to the exclusion of all interest in the father. The receipt by the father of the rents did not operate to convert a presumptive advancement in favour of the sons into a trust in favour of the father.—*STAMP DUTIES COMR. v. BYRNES*, [1911] A. C. 386; 80 L. J. P. C. 114; 104 L. T. 515; 27 T. L. R. 408, P. C.

120. Intention to make future gift.]—W., in 1859, advanced a sum of money on mtge., which, against the advice of his solr., he took in the name of his son. The evidence produced showed, that at the time of the transaction W. said, if he did not alter his mind before his death, he might give the mtge. money to his son, & that it was not his intention at that time to make a gift of the money to his son. A. said his father stated to him that the money was gift to him, but that the interest must be paid to him, the father, for his life. The ct. held that there was sufficient evidence to rebut the presumption of advancement, & ordered A. to assign the mtge. to his father; also that as W. in disregarding the advice of his solr., had occasioned the suit, he must pay all the costs.

If the intention of the father was to reserve a beneficial interest in the mtge. for himself, & his intention was to save the legacy duty, the effect of the deed as an absolute gift or advancement is reduced (SIR J. STUART, V.-C.).—*DUMPER v. DUMPER* (1862), 3 Giff. 583; 6 L. T. 315; 8 Jur. N. S. 503; 66 E. R. 540.

Annotation:—*Held*. *Stook v. M'Avoy* (1872), 42 L. J. Ch. 230.

121. —]—Railway shares were in 1853 bought by A., in the name of his younger brother, in regard to whom A. stood *in loco parentis*, & to whom A. gave on some occasions the dividends. The younger brother deposed that testator intended that the shares should pass ultimately to him:—*Held*: no advancement, there being no evidence of a present intention to benefit.

PART III. SECT. 4.

124 I. Right of donee—By survivorship.—*Def.*, having in her possession a large sum of money which her husband had given her, went with him to the bank to deposit it, & was about to do so when, on a question arising as to the power of withdrawing it in case of the wife's illness the money, at the bank agent's suggestion, was deposited in both their names subject to withdrawal by either of them, & it remained on deposit uninterfered with by the husband up to the time of his death, which occurred some months after:—*there was a good gift inter vivos*

124 II. —.—]—R., having made up his mind to give his father a sum of money, to come into his possession after R.'s death, placed the amount on deposit in a bank to the credit of a joint account in his own name & that of his father. The terms on which the joint account was opened were evidenced by a document addressed to the bank & signed by R. & his father, reading: "All moneys deposited or that may be deposited by us & each of us to the credit of this account are our joint property, but they may be withdrawn by cheques made by either of us or the survivor of us." It was understood between them that the father was not to draw the money during R.'s lifetime, & that R., if he needed the

Where sixty-four shares were purchased with the money of A. & registered in the name of B. but the dividends were received for many years by A., & B. stated that, upon the occasion of a visit to the house of A., A. gave him the shares & handed him the key of a box where they were kept, whereupon B. took out fourteen of the shares, & left the remaining fifty:—*Held*: there was a good gift of the fourteen shares, but not such a gift of the remaining fifty as a ct. of equity would enforce.—*FORREST v. FORREST* (1865), 5 New Rep. 299; 34 L. J. Ch. 428; 11 L. T. 763; 11 Jur. N. S. 317; 13 W. R. 380.

122. —.—]—A father purchased a copyhold cottage in the name of his son. Shortly after the purchase the father served notice to quit on an occupying tenant, but afterwards allowed her to remain at an increased rent, & during his life received the rents & paid the outgoings:—*Held*: notwithstanding evidence of declarations that the cottage was the son's after his father's death, the purchase was not an advancement.—*STOCK v. McAVOY* (1872), L. R. 15 Eq. 55; 42 L. J. Ch. 230; 27 L. T. 441; 21 W. R. 521.

123. Relationship of solicitor & client—Between mother & son.]—A son acted as his mother's solr., & with her consent, lent £2,500 belonging to her, with other money, upon a bond conditioned for payment to himself absolutely, of the amount thereby secured, without any declaration of trust, except a memorandum, whereby the son acknowledged that he held £2,500, & undertook to pay the interest thereof to the mother during life. The son died in his mother's lifetime, & his exors. claimed the principal sum, subject to a life interest in the mother, as a gift from her to the son:—*Held*: the relation of solr. & client, subsisting between the son & mother, excluded the ordinary presumption in favour of the transaction being a gift, & threw the burden of proof upon the exors., & the evidence being insufficient to establish their case, the son's exors. were merely trustees for the mother.—*GARRETT v. WILKINSON* (1848), 2 De G. & Sm. 244; 64 E. R. 110.

Annotations:—*Expld.* *Hepworth v. Hepworth* (1870), L. R. 11 Eq. 10. *Mentd.* *Lovesey v. Smith* (1880), 49 L. J. Ch. 809.

SECT. 4.—TRANSFER OF PROPERTY BY DONOR TO DONOR AND DONEE JOINTLY.

124. Right of donee—By survivorship.]—A. by her will gave all her estate to her sister; afterwards she transferred stock into their joint names as it appeared for the purpose of saving legacy duty. The will was void:—*Held*: the transfer was

money for himself, should be at liberty to withdraw what he required:—*Held*: there was a complete gift of the fund to the father.—*Re REID* (1921), 84 D. L. R. 598; 50 O. L. R. 595.—CAN.

124 III. —.—]—Securities were lodged in a bank by a father, in the joint names of himself & a daughter, who survived him; a memorandum was found among the papers of the father, dated & signed by him fifteen months after the lodgment, directing the securities to be applied to a different purpose:—*Held*: not admissible in evidence to rebut the presumption of advancement.—*O'BRIEN v. SHILL* (1873), 7 I. R. Eq. 255.—IR.

Sect. 4.—Transfer of property by donor to donor and donees jointly. Sect. 5.]

intended to vest the beneficial estate by survivorship in the sister & she took the stock to the exclusion of A.'s next of kin.—*DRACON v. COLOUGHOUN* (1853), 2 Drew. 21; 2 Eq. Rep. 319; 23 L. J. Ch. 16; 2 W. R. 67; 61 E. R. 626.

125. —. —. —.]—A. transferred into the joint names of himself & B. two bonds, secured on the credit of certain harbour & pier dues. Some years afterwards, he wrote several letters to B., expressing his wish that the interest, after his death, should be applied by B. in the manner which he mentioned, & partly in support of various charitable institutions. There was no undertaking or promise on the part of B. A. died, having made no testamentary disposition of the bonds:—*Held*: no trust or obligation had been created in respect of the bonds; B. had acquired an absolute interest in them.—*WHEELER v. SMITH* (1860), 1 Giff. 300; 29 L. J. Ch. 194; 1 L. T. 430; 6 Jur. N. S. 62; 8 W. R. 173; 65 E. R. 928.

126. —. —. —.]—Testator having first made a will in favour of the person with whom he was cohabiting, afterwards transferred stock into the joint names of himself & that person. Subsequently to this transfer, testator revoked his first will & made another in favour of a third person, a daughter of the original legatee, to whom by the second will nothing was given:—*Held*: upon the evidence as to the transfer, there was no resulting trust for testator in the stock, & the joint transferee was entitled by survivorship.—*TUMBRIDGE v. CARE* (1871), 25 L. T. 150; 19 W. R. 1047.

127. —. —. —.]—Where money is placed on deposit by a father in the joint names of himself & his daughter, & to be paid out to the survivor, the relationship of father & child, in the absence of special circumstances, rebuts the ordinary presumption of resulting trust for the owner, & raises the presumption that the child was meant to take beneficially if she survived her father.—*Re WARWICK, WARWICK v. CHRISP* (1912), 56 Sol. Jo. 253.

128. —. —. —. Resulting trust rebutted.]—Testatrix, both before & after she made her will, purchased sums of stock in the names of herself & the son of her daughter-in-law. By her will she gave the residue of her estate to her daughter-in-law for life, & after her death to the son & the daughter of the daughter-in-law:—*Held*: in the circumstances, the sums of stock so purchased were a gift to the son of the daughter-in-law.

124 iv. —. —. —.]—A man had for a series of years lodged money in two several banks on deposit receipts, some of which were in his own name & others in the joint names of himself & his wife, & he frequently changed deposits already made in his own name into their joint names. There was some evidence of statements made by him to his wife, but resting on her testimony, that he had acted thus with the object of enabling the survivor to take the principal. At his death there were in the two banks four deposit receipts in their joint names & one in his own name alone:—*Held*: the joint lodgments were advancements to the wife, who survived.—*TALBOT v. CODY* (1874), 10 I. R. Eq. 138.—IR.

124 v. —. —. —.]—A. placed on deposit receipt with his banker's £1,200, his own money, in the names

of himself, his wife, & his brother. By his will, made shortly afterwards, he left all his property to his wife & his brother for their lives, & after their deaths for charitable purposes. There was no evidence beyond the fact of the deposit to show A.'s intention in making it in the joint names:—*Held*: the presumption of advancement in favour of the wife was not affected by the insertion of the name of the brother in the receipt, & he was trustee of the fund for her.—*Re CONDRIN, COLOHAN v. CONDRIN*, [1914] 1 I. R. 89.—IR.

124 vi. —. —. —.]—A person taken a deposit receipt for £ her own name & that of another, "payable to either or survivor" kept it in her own possession till her death:—*Held*: no donation had been constituted *inter vivos* or *mortis causa*, & the contents of the deposit receipt formed

In such a case the evidence of the son & his wife was admissible, & could not be disregarded as rebutting the presumption of a resulting trust; & coupled with the circumstances in which the stock was purchased, it was sufficient to rebut the presumption.

The original purchase was gift & not a trust, it appears to follow that the subsequent additions must be of the same nature (*SIR W. M. JAMES, L.J.*).—*FOWKES v. PASCOE* (1875), 10 Ch. App. 843; 44 L. J. Ch. 367; 32 L. T. 545; 23 W. R. 588, L. J.J.

Annotations:—*Consd. Marshal v. Crutwell* (1875), L. R. 20 Eq. 328; *Re Orme, Evans v. Maxwell* (1883), 50 L. T. 51; *Re Scott, Langton v. Scott*, [1903] 1 Ch. 1. *Setd.* *Batstone v. Salter* (1874), 44 L. J. Ch. 309; *Re Erykn's Trusts* (1877), 6 Ch. D. 115; *Re Howes, Howes v. Platt* (1905), 21 T. L. R. 501. *Mentd.* *Re Heather, Pumphrey v. Fryer*, [1906] 3 Ch. 230; *Re Shields, Corbould-Ellis v. Dales*, [1913] 1 Ch. 591; *Hatley v. Liverpool Victoria Legal Friendly Soc.* (1918), 88 L. J. K. B. 237.

129. —. —. —.]—A transfer of stock of an intestate into the name of himself jointly with that of the husband of one of his two nieces, accompanied by proof of his having said in his lifetime that it was his intention to give the husband the stock at his death, in consideration of affection for him & his wife, & that he had transferred it for that purpose, if not repelled by counter testimony:—*Held*: a sufficient proof of a gift of such stock.

The ct. will not continue an injunction granted to restrain the husband, who had administered, from disposing of it. Such evidence is strong enough to destroy the otherwise equitable presumption, that the transferee is a mere trustee for the transferor, without the aid of a reference, or an issue; for however weak debts' equity may be in such a case, yet where *pltf.* does not show any, slight circumstances are sufficient to rebut the *prima facie* presumption.—*GEORGE v. BANK OF ENGLAND* (1819), 7 Price, 646; 146 E. R. 1089.

Annotations:—*Apld.* *Batstone v. Salter* (1874), L. R. 19 Eq. 250. *Setd.* *Dummer v. Pitcher* (1833), *Coop. temp. Brough*, 257; *Freeman v. Tatham* (1846), 15 L. J. Ch. 323. *Mentd.* *Re Rowe, Jacobs v. Hind* (1889), 60 L. T. 596.

Property purchased in joint names.]—*See TRUSTS & TRUSTEES.*

Transfers as resulting trusts.]—*See TRUSTS & TRUSTEES.*

SECT. 5.—ACCEPTANCE AND DISCLAIMER.

130. Acceptance not necessary—Presumed until disclaimer.]—(1) It has been agreed, & I think I

part of the executory estate of deceased.—*WATT'S TRUSTEES v. MACKENZIE* (1869), 7 Macph. (Ct. of Sess.) 930; 41 Sc. Jur. 626.—SCOT.

124 vii. —. —. —.]—A husband having taken a deposit receipt in name of himself & wife, & the survivor:—*Held*: the terms of the deposit receipt were not sufficient to constitute donation to the wife *inter vivos*, & in the absence of any extrinsic evidence of donation the sum contained in the deposit receipt formed part of the executory estate of the husband at his death.—*JAMESON v. McLEOD*

PART III. SECT. 5.

b. *Whether acceptance necessary.*—Where a person voluntarily, & without any obligation upon him to do so,

can make it plainly appear that conveyances at common law do immediately, upon the execution of them on the grantor's part, divest the estate out of him & put it in the party to whom the conveyance is made, though in his absence, or without his notice, till some disagreement to such estate appears. . . . The assent of the party that takes is implied in all conveyances & this is by intendment of law, which is as strong as the expression of the party till the contrary appears; *statit presumptio donec probetur in contrarium*.

The reasons why conveyances do divest the estate out of the grantor before any express assent, or perhaps notice, of the grantee I conceive to be these: because there is a strong intendment of law that for a man to take an estate is for his benefit, & no man can be supposed to be unwilling to that which is for his advantage. Where an act is done for a man's benefit an agreement is implied till there be a disagreement. This does not only hold in conveyances, but in the gift of goods. A grant of goods vests the property in the grantee before notice. So of things in action. . . . A second reason is because it would seem incongruous & absurd that when a conveyance is completely executed on the grantor's part, yet notwithstanding the estate should continue in him. There needs only a capacity to take, his will to take is intended (VENTRIS, J.).

(2) No doubt but an agreement is necessary, but the question is whether an agreement is not intended. . . . whether the law shall not suppose an assent till a disagreement appears. Indeed if he were present he must agree or disagree immediately & so it is in all conveyances. . . . for a man cannot have an estate put into him in spite of his teeth (VENTRIS, J.).—THOMPSON v. LEACH (1690), as reported in 2 Vent. 198; 86 E. R. 391; *on appeal* (1692), 2 Vent. 208, H. L.

Annotations.—As to (1) *Follid. Siggers v. Evans* (1855), 5 E. & B. 387; *Standing v. Bowring* (1855), 31 Ch. D. 59. *Reid. Taylor d. Atkyns v. Horde* (1757), 1 Burr. 617; *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517; *Xenos v. Wickham* (1862), 13 C. B. N. S. 381; *Peacock v. Eastland* (1870), L. R. 10 Eq. 17; *Mallott v. Wilson*, [1903] 2 Ch. 494. As to (2) *Follid. Townson v. Tickell* (1819), 3 B. & Ald. 31. *Generally, Reid. Wick (1718)*, 10 Mod. Rep. 431. *Mentid. Ashley v. Branwood* (1734), Kel. W. 303; *Yates v. Boen* (1738), 2 Stra. 1104; *Zouch d. Abbot & Hallet v. Parsons* (1765), 3 Burr. 1794; *Balme v. Hutton* (1831), 2 Tyr. 17; *Garland v. Carlisle* (1837), 4 Scott, 587; *Muller's Margarine v. I. R. Comrs.* (1899), 69 L. J. Q. B. 291.

131. —.]—If A. delivers a deed to B. to the use of the obligee, this is a good deed; but the obligee may refuse it *in pais* & thereby the bond loses its force & becomes no deed. So of a gift of goods & chattels.—BUTLER v. BAKER (1591), 3 Co. Rep. 25 a; 1 And. 348; 8 Leon. 271; Poph. 87; Moore, K. B. 254; 76 E. R. 684.

Annotations.—*Consd. Doe d. Garnons v. Knight* (1826), 5 B. & C. 871. *Follid. Siggers v. Evans* (1855), 5 E. & B. 387. *Consd. Xenos v. Wickham* (1867), L. R. 2 H. L. 396. *Follid. Standing v. Bowring* (1855), 31 Ch. D. 293. *Reid. Geary v. Bearcroft* (1666), O. Bridge. 484; *Thompson*

pays the debt of another person without his authority, knowledge or consent, the facts & circumstances surrounding the transaction may indicate that the payment was not a loan, but a gift, & the donee may successfully resist a claim by the administrator of the estate of the person who paid & who had since died.—KUGER v. PALM, [1928] 3 W. W. R. 109; 68 D. L. R. 482.—CAN.

a. —.]—Where a party dies intestate having moneys deposited in a savings bank in the names of different parties.—*Held*: there was a

clear gift to each of those named for whom the deposit was made & such amounts did not form part of estate as assets for distribution.—*Re DROVER* (1885), 7 Nfld. L. R. 45.—NFLD.

d. —.]—Where an intending donor paid money into the account of an intended donee at a savings bank without the knowledge of the latter & died before the intended donee assented to or accepted such intended gift.—*Held*: *prima facie* an intended gift, but the property in such money did not pass, the gift. *LEECH v. LEECH* (1903), 1

v. Leach (1690), 2 Vent. 198; *Wankford v. Wankford* (1699), 1 Salk. 399; *Atkin v. Berwick* (1718), 10 Mod. Rep. 431; *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517; *London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Re Arbib & Cies's Contract*, [1911] 1 Ch. 601; *Mallott v. Wilson*, [1903] 2 Ch. 494. *Mentid. Jennings v. Bragg* (1595), Cro. Eliz. 447; *Fitzwilliam's Case* (1604), 6 Co. Rep. 32 a; *Pexall's Case* (1609), 8 Co. Rep. 83 b; *Loxley's Case*, (1613), 10 Co. Rep. 78 a; *Court of Wards Case* (1636), Cro. Car. 33; *Sydowne v. Holme* (1635), Cro. Car. 432

Rob. 23; *Berry v. White* (1662), O. Bridge. 82; *Arthur v. Bokenham* (1707), 11 Mod. Rep. 148; *Brunker v. Cook* (1707), 11 Mod. Rep. 121; *Bunker v. Cooke* (1731), Fitz-G. 225; *R. v. Westbeer* (1739), 1 Leach, 12; *Windham v. Chetwynd* (1757), 1 Burr. 414; *Buckinghamshire v. Drury* (1762), Wilk. 177; *Brydges v. Chandos* (1794), 2 Ves. 417; *Goodtitle d. Holford v. Otway* (1798), 1 Bos. & P. 576; *Cave v. Holford* (1798), 3 Ves. 650; *Crowther v. Ramsbottom* (1798), 7 Term Rep. 654; *Goodright d. Fowler v. Forrester* (1807), 8 East, 552; *Doe d. Tofteld v. Tofteld* (1809), 11 East, 246; *Balme v. Hutton* (1831), 2 Tyr. 17; *Lucas v. Nockells* (1833), 10 Bing. 157; *Bramah v. Roberts* (1835), 1 Bing. N. C. 481; *Millis v. Oddy* (1835), 2 Cr. M. & R. 103; *Garland v. Carlisle* (1837), 4 Cl. & Fin. 693.

132. —.]—With respect to the necessity for showing the assent of the debtor [to the discharge of his debt by a third person], it is contrary to the well known principle of law by which a benefit conferred upon a man is presumed to be accepted by him until the contrary is proved (WILLIS, J.).—*COOK v. LISTER* (1863), 13 C. B. N. S. 543; 32 L. J. C. P. 121; 9 Jur. N. S. 823; 11 W. R. 869; 143 E. R. 215.

Annotations.—*Reid. Re Rowe, Ex p. Darenburg*, [1904] 2 K. B. 483. *Mentid. Re Overend, Gurney, Ex p. Swan* (1868), L. R. 6 Eq. 344; *Re Fox, Walker, Ex p. Bishop* (1880), 15 Ch. D. 400; *Solomon v. Davis* (1885), Cab. & El. 83; *Hirachand Punamchand v. Temple*, [1911] 2 K. B. 330.

133. —.]—(1) Pltf., a widow, in the year 1880, caused £6,000 Consols to be transferred into the joint names of herself & deft., who was her godson. She did so with the express intention that deft., in the event of his surviving her, should have the Consols for his own benefit, but that she should have the dividends during her life; & she had previously been warned that if she made the transfer she could not revoke it. The first notice deft. had of the transaction was a letter from pltf.'s solrs. about the end of 1882 claiming to have the fund re-transferred to pltf.—*Held*: the legal title of deft. as a joint tenant of the stock was complete, although he had not assented to the transfer until he was requested to join in re-transferring the stock, for that the legal title of a transferee of stock is complete without acceptance. A transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of the transfer.

You cannot make a man accept as a gift that which he does not desire to possess. It vests only subject to repudiation (LORD HALSBURY, C.).

(2) An incomplete gift can be revoked by the donor at any time. . . . When once the possession is changed it is too late to revoke; but

350.—N.Z.

e. —.]—The mere deposit by a grandfather of a sum of money with a bank in trust or in the name of his grandchildren who are still under the guardianship of their mother does not constitute a donation to such grandchildren, & if he dies before acceptance of the gift the transaction does not become a completed donation by acceptance after his death.—*De Kock v. VAN DE WALL'S EXECUTORS* (1899), 16 S. C. 463; 9 C. T. R. 496.—S. AF.

f. —.]—A donor executed a deed of donation in favour of his five

Sect. 5.—Acceptance and disclaimer. Sect. 6: Sub-sect. 1.]

whether possession is changed until the donee has assented to the change is not so clear. . . . Although a donee may dissent from & thereby render null a gift to him, yet a gift to him of property, whether real or personal, by deed vests the property in him subject to his dissent (LINDLEY, L.J.).—STANDING v. BOWRING (1885), 31 Ch. D. 282; 55 L. J. Ch. 218; 54 L. T. 191; 34 W. R. 204; 2 T. L. R. 202, C. A.

Annotations:—As to (1) *Reid*, London & County Banking Co. v. London & River Plate Bank (1888), 21 Q. B. D. 535; *Re Arbib & Co's Contract*, [1891] 1 Ch. 601; *Mallott v. Wilson*, [1903] 2 Ch. 494. *Generally*, *Mentl.* *Re Blake*, *Blake v. Power* (1889), 60 L. T. 663; *Re Weston*, *Davies v. Tagart*, [1900] 2 Ch. 164; *Re Howes*, *Howes v. Platt* (1905), 21 T. L. R. 501.

134. ———.]—Certain negotiable securities were stolen from defts. by their manager & came into the possession of pltf's. for value & without notice of any fraud. Subsequently the manager obtained the securities from pltf's. by fraud & restored them to defts. who did not know that the securities had been out of their possession. A portion of the restored securities were not the bonds actually stolen but bonds of a like kind & value:—*Held*: in the absence of evidence to the contrary, it should be presumed that defts. accepted the securities in discharge of their manager's obligation to restore them.

The acceptance of the bonds in discharge of W.'s obligation, which existed in truth although defts. did not know it, may, & ought to be presumed in the absence of evidence to the contrary. This presumption is warranted by authority, for although the exact point has not been decided, an analogous point has. It was settled as long ago as the time of Lord Coke that the acceptance of a gift by a donee is to be presumed until his dissent is signified, even though the donee is not aware of the gift (LINDLEY, L.J.).—LONDON & COUNTY BANKING CO., LTD. v. LONDON & RIVER PLATE BANK (1888), 21 Q. B. D. 535; 57 L. J. Q. B. 601; 61 L. T. 37; 37 W. R. 89; 4 T. L. R. 774, C. A.

Annotations:—*Reid*, *Simmons v. London Joint Stock Bank*, *Little v. London Joint Stock Bank*, [1891] 1 Ch. 270; *Mallott v. Wilson*, [1903] 2 Ch. 494. *Mentl.* *Williams v. Colonial Bank*, *Williams v. London Chartered Bank of Australia* (1888), 38 Ch. D. 368; *Venables v. Baring*, [1898] 3 Ch. 527; *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Nash v. De Preville*, [1900] 2 Q. B. 72; *Lloyds Bank v. Swiss Bankverein*, *Union of London & Smiths Bank v. Swiss Bankverein* (1915), 107 L. T. 309.

135. ——— Though onerous incidents attached.]—H. executed a deed of assignment conveying all his property to a creditor, S., in trust for S. & his other creditors. H. sent this deed to S., with whom he had not previously communicated on the subject. S. received the deed on the next day; & on that day, a judgment creditor of H. delivered a *fi. fa.* to the sheriff. On the next day, S. wrote to H., signifying his assent. On an issue

children which was duly accepted on their behalf & by which she purported to "give & present to them irrevocably by way of *donatio inter vivos*, or gift among the living," a certain portion of an inheritance specified in the deed. She then proceeded in effect to reserve to herself the usufruct over the property during her life, but renounced all further right & title therein, with the condition however that the donation should not take effect until after her death. One of the children having predeceased the donor:—*Held*: as

the donation was made irrevocably & completed by acceptance, it vested forthwith subject to the condition *in diem*.—DILLOX v. VON LUDWIG'S ESTATE (1909), 36 S. C. 498; 19 C. T. R.

136 l. Right of donee to disclaimer.]—A gift to a person without his knowledge if made in proper form vests the property in him at once, subject to his right to repudiate it when informed of it.—SHERREATT v. MERCHANTS BANK OF CANADA (1894), 21 A. R. 473.—CAN.

between S. & the judgment creditor, the jury found that the deed was honest & *bona fide*:—*Held*: S. was entitled to the property; the deed not being revocable by H., inasmuch as it was for the benefit, in part, of the trustee S.; & S.'s assent not being necessary to vest the property in himself, for the same reason.—SIGGERS v. EVANS (1855), 5 E. & B. 867; 3 C. L. R. 1209; 24 L. J. Q. B. 305; 25 L. T. O. S. 213; 1 Jur. N. S. 851; 119 E. R. 518.

Annotations:—*Fold*, *Hobson v. Thelluson* (1867), L. R. 2 Q. B. 642. *Consid.* *Johns v. James* (1876), 8 Ch. D. 744; *Ellis v. Cross*, [1915] 2 K. B. 654. *Reid*, *Graham v. Van Diemen's Land Co.* (1856), 26 L. J. Ex. 73; *Biron v. Mount* (1857), 24 Beav. 642; *Re Sanders' Trusts* (1878), 47 L. J. Ch. 687; *Standing v. Bowring* (1885), 31 Ch. D. 282; *London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Roberts v. Jones* (1892), 61 L. J. Q. B. 523; *Muller's Margarine v. I. R. Comrs.* (1899), 69 L. J. Q. B. 291; *Mallott v. Wilson*, [1903] 2 Ch. 494. *Mentl.* *Runtz v. Longbourne* (1892), 8 T. L. R. 568.

136. Right of donee to disclaimer.]—THOMPSON v. LEACH, No. 130, *ante*.

137. ——— Whether disclaimer by deed necessary—When gift made by deed.]—BUTLER v. BAKER, No. 131, *ante*.

138. Extends to gifts of all property.]—A tenant in tail of certain lands granted the lands to A. & B., & their heirs, to hold the same to A. & B. their heirs, & assigns, freed & discharged from all estates tail of him, the tenant in tail, to the use of A. & B. their heirs, & assigns, for ever upon trust for sale, etc. The deed was duly enrolled, but neither A. nor B. executed it, & they both disclaimed all estate & interest vested in them by virtue of the deed:—*Held*: the deed had no operation, in consequence of the disclaimer.

A man cannot, by grant at common law, confer upon another, against his will, & without his consent, any estate whatever in any property.—PEACOCK v. EASTLAND (1870), L. R. 10 Eq. 17; 39 L. J. Ch. 534; 22 L. T. 706; 18 W. R. 856.

Annotation:—*Mentl.* *Savill v. Bethell*, [1902] 2 Ch. 523.

139. ——— Property vested by deed.]—STANDING v. BOWRING, No. 135, *ante*.

140. Evidence of disclaimer—Promissory note given in return.]—W., the uncle of pltf.'s wife, was applied to by a friend of pltf. to advance £1000 to defray some expenses connected with pltf.'s election as Member of Parliament. W. declined to make the advance, but said he would give pltf. £500 & deduct it from the legacy he intended to leave to his wife. Shortly afterwards W. sent pltf. a cheque for £500. Pltf. wrote to thank W., saying that he would gladly repay it at an early opportunity, & hoped shortly to be able to do so. A few weeks afterwards, as pltf. deposed, a conversation took place between him & W., & it was agreed at pltf.'s instance that pltf. should pay banker's interest on the sum during W.'s life; & pltf., for the purpose, as he deposed, of effectuating this agreement, signed & gave to

g. Acceptance on behalf of minor donees.]—Where there is clear evidence of a donation on the part of a person who is in a position to accept for minor donees, & such donation puts it out of his power by his mere volition to resume the gift himself, acceptance of the donation on behalf of the minor donees will be implied.—*Ex p. VAN AARDT* (1911), T. P. D. 532.—S. AF.

h. Deed of donation—Acceptance not signed by donee.]—A deed of donation was duly signed & witnessed

W. a promissory note for £500, with interest at £1 per cent., on the understanding that payment of the principal was not to be enforced, but only payment of interest, during W.'s life. After W.'s death his exors. sued pltf. on the note for the £500:—*Held*: although, if there had been a complete gift of the £500, it could not afterwards have formed a consideration for a promissory note, the exors. were entitled to recover; for as pltf. had not before the giving of the promissory note, agreed to accept the £500 as a gift, it remained open whether it should be a gift or loan; & the giving the promissory note was conclusive evidence that the parties agreed upon its being a loan; & the ct. could not allow the documentary evidence to be rebutted by the parol evidence given by pltf. on his own behalf.—*HILL v. WILSON* (1873), 8 Ch. App. 888; 42 L. J. Ch. 817; 29 L. T. 288; 21 W. R. 757, L. J.J.

Annotations:—*Reid*. *Re Richardson, Shillito v. Hobson* (1885), 30 Ch. D. 396. *Meatd*. *Henry v. Smith* (1895), 39 Sol. Jo. 559.

Compare DEEDS, Vol. XVII., pp. 213, 214, 232, 233, Nos. 252–267, 457–479.

Disclaimer by one or more trustees.—*See TRUSTS & TRUSTEES*.

SECT. 6.—REVOCATION AND AVOIDANCE.

SUB-SECT. 1.—IN GENERAL.

141. *Gift revocable—Before delivery.*—*ANON.* (1458), Y. B. 37 Hen. 6 fo. 13, pl. 3; Jenk. 109; 145 E. R. 76.

Annotation:—*Reid*. *Cochrane v. Moore* (1890), 59 L. J. Q. B. 377.

142. — *Before completion.*—*STANDING v. BOWRING*, No. 133, *ante*.

143. *Gift irrevocable—Cannot be limited as to time.*—*ANON.* (*temp.* 1509–46), No. 11, *ante*.

144. — *When completed by delivery.*—A father gave his son a watch, some printed books, & several articles of wearing apparel:—*Held*: though the son was under age, the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son.—*HUNTER v. WESTBROOK* (1827), 2 C. & P. 578, N. P.

145. — — — *—*—If a father make to a son under age an absolute gift of an article of dress or ornament, e.g. a watch, he cannot afterwards, without that son's consent, reclaim the gift.—*SMITH v. SMITH* (1836), 7 C. & P. 401, N. P.; *subsequent proceedings*, 3 Bing. N. C. 29.

before a notary, but owing to the inadvertence of the latter, the donee did not sign the deed as accepting the donation, although she verbally signified her acceptance. The donor having died leaving no heirs in South Africa, the donee applied for leave to appear before the notary & complete the deed of donation by her written acceptance:—*Held*: the application should be granted. — *ESTATE*

PART III. SECT. 6, SUB-SECT. 1.

k. *Gift revocable—Whether by death donor—Before cashing of savings bank notes.*—Where a depositor in a Savings Bank sends in a notice of withdrawal with a direction to pay a person named, & on receipt

of the warrant for payment gives it, with an order for payment, & the depositor's book, to such person for his own benefit, the donor having done all she could, the gift is complete & the order for payment is not revoked by the death of the depositor before actual payment.—*CUBRAN v. KAVANAGH* (1881), 7 V. L. R. 21.—*AUS.*

l. — *No express provision as to revocation.*—Voluntary gifts not subject in express terms to a power of revocation, but not meant to be irrevocable, may be set aside or revoked by the donor.—*CLATTENBURG v. MORINE* (1895), 40 N. S. R. 193.—*CAN.*

143 l. *Gift irrevocable—Cannot be limited as to time.*—A parent was not

146. — — — *—*—A. in India, on his own responsibility, invested money belonging to his brother B. in England in indigo which he consigned to B. & he recommended him, in consideration of his, A., not charging commission, to settle £1000 on each of his two sisters, which he suggested should be invested in spelter & consigned to him for sale. B. acceded to this & A. sold the spelter & remitted the proceeds, nearly £4,000, to B. on account of his sisters. B. retained the money & gave his promissory notes to his sisters for the amount:—*Held*: the £4,000 belonged to the sisters, & the gift of it could not be recalled.—*MACKINTOSH v. STUART* (1864), 36 Beav. 21; 55 E. R. 1063.

147. — — — *—*—*HUNT-FOULSTON v. FURBER*, No. 12, *ante*.

148. — *In absence of mistake, fraud or fiduciary relationship.*—(1) Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish that they had not made them & would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor & donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery, or by deed, is binding on the donor (*LINDLEY, L.J.*).

(2) In the absence of all such circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him (*LINDLEY, L.J.*).—*OGILVIE v. LITTLEBOY* (1897), 13 T. L. R. 399, C. A.; *affd. sub nom.* *OGILVIE v. ALLEN* (1899), 15 T. L. R. 294, H. L.

149. *Gift of deed—Without power of revocation—Revocation by will inoperative.*—Voluntary settlement without power of revocation shall bind the party, & shall not be defeated by a subsequent will.—*VILLERS v. BEAUMONT* (1882), 1 Vern. 100; 1 Eq. Cas. Abr. 23; 23 E. R. 342, L. C.

Annotation:—*Reid*. *Bill v. Cureton* (1835), 2 My. & K. 503.

150. — — — *Meant to be revocable.*—(1) A person taking a benefit under a voluntary gift which is not subject to a power of revocation has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable.

(2) A voluntary gift not subject to a power of revocation, but not meant to be irrevocable may be set aside by the donor.—*WOOLLASTON v. TRIBE* (1869), L. R. 9 Eq. 44; 21 L. T. 449; *sub nom.* *WOOLLASTON v. TRIBE*, 18 W. R. 83.

Annotations:—*As to* (1) *Consd.* *Tucker v. Bennett* (1887),

permitted to recall a gift, which, in view of the marriage of one of her two sons, she had made verbally to the two, of certain arrears of an annuity which had accrued due from them while she lived with them; the attempt to recall the gift not having been made until after the marriage & death of the son.—*LONG v. LONG* (1870), 16 Gr. 239; 17 Gr. 251.—*CAN.*

144 l. — *When completed by delivery.*—A wife in the presence, & with the apparent assent, of her husband, gave a gold chain, which he had previously presented to her, to a third party, in trust for their child, an infant six years old:—*Held*: a valid gift *inter vivos* binding the husband.—*TANCRED v. O'MULLIN* (1866), 6 N. S. R. (2 Old.) 145.—*CAN.*

Sect. 6.—Revocation and avoidance: Sub-sects. 1 & 2, A., B., C., D., E., F. & G. Sect. 7: Sub-sect. 1.]

38 Ch. D. 1. *As to (2) Exptd. Phillips v. Mullings* (1871), 7 Ch. App. 244. *Consd. Paul v. Paul* (1880), 15 Ch. D. 580; *James v. Couchman* (1885), 29 Ch. D. 213. *Reid. Welman v. Welman* (1880), 15 Ch. D. 570.

151. Disclaimers by trustees of deed—Donor becomes trustee.]—By a voluntary settlement of 1866, real estate was granted unto & to the use of a trustee upon certain trusts; the settlement contained the usual covenant for further assurance, but no power of revocation by the settlor. In 1867, the trustee executed a deed of disclaimer & the settlor also purported to put an end to the settlement:—*Held*: the settlement was not thereby rendered inoperative, but the trust was imposed on the settlor, in whom, by operation of law, the estate had revested after the creation of the trust.—*MALLOTT v. WILSON*, [1903] 2 Ch. 494; 72 L. J. Ch. 664; 89 L. T. 522.

152. — With power of revocation — Inducement to donee by donor—Benefit to donor—Whether gift revocable.]—Where a niece was induced to reside with & continue valuable services to her uncle, a testator, who was in advanced years & ill-health, on the faith of his representation that by so doing she would become entitled to the benefit of property at his death, trusts of which in her favour had been created by a codicil to his will, & were read over & explained to her:—*Held*: testator was not at liberty to revoke such trusts.—*LOFFUS v. MAW* (1862), 3 Giff. 592; 32 L. J. Ch. 49; 6 L. T. 346; 8 Jur. N. S. 607; 10 W. R. 513; 66 E. R. 544.

Annotations:—Consd. Coles v. Pilkington (1874), L. R. 19 Eq. 174; *Maddison v. Alderson* (1883), 8 App. Cas. 467. *Mentd. Traill v. Baring* (1864), 3 New Rep. 362; *M'Askie v. M'Kay* (1868), 16 W. R. 1187.

153. — Requisites for valid revocation.]
—*ELLISON v. ELLISON*, No. 233, *post*.

154. — Deed kept by donor—Purported revocation by will.]—A voluntary deed kept by a person, & never cancelled, will not be set aside by a subsequent will.—*BOUGHTON v. BOUGHTON* (1739), 1 Atk. 625; 9 Mod. Rep. 212; 26 E. R. 393, L. C.

155. —.]—Testator, by a voluntary deed, covenanted with trustees that in case A. & B., his two natural sons, or either of them should survive him, his (testator's) exors. & administrators should within twelve months after his death pay to trustees named in the deed £60,000, upon trust for such of them, A. & B., as should attain twenty-one & be living at the time of his death; & if neither of them, having survived him, should attain twenty-one, then upon trust for him (testator) his exors. & administrators. Testator retained the deed in his own possession until his death, & did not communicate it either to the trustees or to A. & B. Testator, by his will, dated some years later than the deed, bequeathed all his property upon trust for the benefit of his wife, his said sons A. & B., & his legitimate children. After the death of testator, the deed of covenant was found amongst his papers. A. survived testator, & attained twenty-one:—*Held*: (1) although the deed of covenant was voluntary, it nevertheless created a trust for A., & the refusal of the trustee to sue at law upon the covenant did not prejudice the right of A. to recover the payment of the debt out of the assets of testator.

(2) The deed was not of a testamentary nature, there being no power of revocation reserved to the covenantor.

(3) The retention of the deed in the possession of the covenantor, & the absence of communication respecting it to the trustees & the *cestui que trust*, did not affect its validity.—*FLETCHER v. FLETCHER* (1844), 4 Hare, 67; 14 L. J. Ch. 66; 8 Jur. 1040; 67 E. R. 564.

Annotations:—As to (1) Consd. Scales v. Maude (1855), 6 De G. M. & G. 43; *Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish* (1887), 44 L. T. 414. *Reid. Bridge v. Bridge* (1852), 16 Beav. 315; *Beech v. Keep* (1854), 23 L. J. Ch. 539; *Woodford v. Charnley* (1860), 28 Beav. 96; *Patch v. Shore* (1862), 2 Drew. & Sm. 589; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82; *Re Plumtre's Marriage Settlement, Underhill v. Plumtre*, [1910] 1 Ch. 609; *Re Cavendish, Browne's Settlement, Trusts, Horner v. Rawle* (1916), 61 Sol. Jo. 27. *As to (3) Consd. Bonfield v. Hassell* (1863), 32 Beav. 217. *Reid. Alexander v. Brame* (1854), 19 Beav. 436; *Phillips v. Edwards* (1864), 33 Beav. 440.

See, generally, WILLS.

156. —.]—Where a party to any instrument seals it, & declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, & there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid & effectual deed; & delivery to the party who is to take by the deed, or to any person for his use, is not essential.

Delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.—*DOE d. GARNONS v. KNIGHT* (1826), 5 B. & O. 671; 8 Dow. & Ry. K. B. 348; 4 L. J. O. S. K. B. 161; 108 E. R. 250.

Annotations:—Consd. Xenos v. Wickham (1867), L. R. 2 H. L. 296. *Reid. Grangeon v. Gerrard* (1840), 4 Y. & C. Ex. 119; *Fletcher v. Fletcher* (1844), 4 Hare, 67; *Hall v. Palmer* (1844), 3 Hare 532; *Doe d. Richards v. Lewis, Richards v. Lewis* (1852), 11 C. B. 1035; *Jeffries v. Alexander* (1860), 8 H. L. Cas. 594; *Macedo v. Stroud*, [1922] 2 A. C. 330. *Mentd. Roberts v. Williams* (1841), 11 L. J. Ch. 65; *Grant v. Hunt* (1845), 1 C. B. 44; *Pattle v. Hornbrook*, [1897] 1 Ch. 25.

157. — Subsequent disposal of subject-matter—Liability to secure donee.]—*FORTESCUE v. BARNETT*, No. 217, *post*.

158. — Deed destroyed by donor—No notice to trustee of deed—Gift effectual.]—A *feme sole* made a voluntary assignment, by deed, of her reversionary interest in stock held under a settlement. The deed was irrevocable. It was duly executed by herself, & attested, but was not communicated either to the trustees of the paramount settlement, or to the trustees of the deed itself, or to any of the parties who were to take under it. The lady subsequently destroyed the deed, & made a different disposition of the stock by a codicil to her will:—*Held*: the assignor having done all that she could for transferring her interest, the assignment was complete & effectual, notwithstanding the absence of notice.—*Re WAY'S TRUSTS* (1864), 2 De G. J. & Sm. 365; 5 New Rep. 67; 34 L. J. Ch. 49; 11 L. T. 495; 10 Jur. N. S. 1166; 13 W. R. 149; 46 E. R. 416, L. J.

Annotations:—Consd. Re Patrick, Bills v. Tatham (1890), 63 L. T. 752. *Reid. Garnham v. Skipper* (1855), 2 T. L. R. 64; *Re Lucan, Harding v. Cobden* (1890), 45 Ch. D. 470; *R. v. Paulson*, [1931] 1 A. C. 371. *Mentd. Hall v. Hall, Hall v. Hall* (1879), L. R. 14 Eq. 365.

Avoidance of voluntary conveyance—To charities.]—See CHARITIES, Vol. VIII., pp. 281, 282, Nos. 557–559.

Avoidance of incomplete gift.]—See Part IV., Sect. 3, *post*.

SUB-SECT. 2.—WHEN REVOCABLE.

A. Donor under Disability.

Infants.]—See INFANTS.

Intoxicated persons.]—Compare CONTRACT, Vol. XII., pp. 40–42, Nos. 199–217.

Lunatics & persons of unsound mind.]—See LUNATICS.

B. Deeds in Favour of Creditors.

See BANKRUPTCY, Vol. V., pp. 1131 *et seq.*, Nos. 9189 *et seq.*; pp. 1179 *et seq.*, Nos. 9532 *et seq.*

C. Incomplete Gifts and Gifts mortis causa.

Incomplete gifts.]—See Part IV., *post*.

Gifts mortis causa—Revoked by recovery of donor from illness.]—See Part VI., Sect. 3, sub-sect. 2, *post*.

D. Settlements.

See SETTLEMENTS.

E. Misrepresentation and Mistake.

159. General rule—Mistake must be substantial — & induced by donee.]—OGILVIE v. LITTLEBOY, No. 148, *ante*.

160. Innocent mistake — Whether ground for avoidance.]—A voluntary gift founded in a common mistake cannot be recovered (JAMES, L.J.). —WILSON v. THORNBURY (1875), 10 Ch. App. 239; 44 L. J. Ch. 242; 32 L. T. 350; 23 W. R. 329, L. J.J.

Annotation.—*Dtd.* *Re* Glubb, Bamfield v. Rogers, [1900] 1 Ch. 354.

161. —.] — A husband transferred securities of large value to his wife, intending them as a gift to her absolutely. When he made the gift he knew of his marriage settlement, but did not realise that the gift would come within the operation of a clause therein under which his wife covenanted to settle all after acquired property. It having been decided that the gift came within the operation of that clause, the husband brought this action for the purpose of obtaining a revocation of the gift upon the ground that it was made under a mistake of fact:—*Held*: the gift being voluntary, & having been made under a mistake of fact, the husband was entitled to have it set aside.—ELLIS v. ELLIS (1909), 26 T. L. R. 166.

162. Forgetfulness.] —An appointment by deed poll, made in entire forgetfulness by the appointor of an earlier appointment to the same person, may be rescinded & set aside on the ground of mistake.—HOOD OF AVALON (LADY) v. MACKINNON, [1909] 1 Ch. 476; 78

L. J. Ch. 300; 100 L. T. 330; 25 T. L. R. 290; 53 Sol. Jo. 269.

Annotation.—*Apld.* *Ellis v. Ellis* (1909), 26 T. L. R. 166.

163. Innocent misrepresentation — Equitable right to recover.]—Where a voluntary gift is obtained by means of an innocent misrepresentation of fact by the donee, the donor, on the discovery of the mistake, has a right in equity, though he may have none at law, to recover his gift.—*Re* GLUBB, BAMFIELD v. ROGERS, [1900] 1 Ch. 354; 69 L. J. Ch. 278; 82 L. T. 412, C. A.

See, generally, MISREPRESENTATION & FRAUD; MISTAKE.

Undue influence.]—See, generally, CONTRACT, Vol. XII., pp. 98 *et seq.*, Nos. 611 *et seq.*

— **Between solicitor & client.]—**See SOLICITORS.

F. Failure of Purpose of Gift.

See Sect. 7, *post*.

G. Gifts to Persons in Fiduciary Capacity.

Principal & agent.]—See AGENCY, Vol. I., pp. 475 *et seq.*, Nos. 1570 *et seq.*

Solicitor & client.]—See SOLICITORS.

Husband and wife.]—See HUSBAND & WIFE.

Trustee & cestui que trust.]—See TRUSTS & TRUSTEES.

Parent & child.]—See CONTRACT, Vol. XII., pp. 101 *et seq.*, Nos. 618 *et seq.*

Guardian & ward.]—See CONTRACT, Vol. XII., p. 106, Nos. 657, 660.

164. Executor & beneficiary.] —Where a document has been obtained by an exor. named in a will, before probate, from a beneficiary, for a gift by the latter to the former, the ct. will regard the transaction with great suspicion & will not uphold it unless the circumstances show that there was no misrepresentation, pressure or unfairness on the exor.'s part, that the beneficiary acted deliberately, & thoroughly knew & appreciated what he was doing, that he signed the document independently of any influence on the exor.'s part & without being actuated by fear of not complying with the wishes of the exor.—WHEELER v. SARGEANT (1893), 69 L. T. 181; 3 R. 663.

SECT. 7.—CONDITIONAL GIFTS.

SUB-SECT. 1.—EXPRESS CONDITIONS.

165. Power to impose condition — Binding on infant.]—A. gives lottery tickets amongst her servants, on condition if any of them came up a prize of 20s. or more, they should give one half to her daughter. The ticket given to the foot boy came up a prize of £1000. On a bill by the daughter, a moiety of the £1000 decreed to her.

Cujus est dare, ejus est disponere, & an infant is to be bound by it as well as one of full age, & may be a trustee (*per* CUR.).—SCOT v. HAUGHTON & FULLER (1706), 2 Vern. 560; 23 E. R. 963.

In equity to maintain a deed of gift.—BEEMAN v. KNAPP (1867), 13 Gr. 398.—CAN.

n. —.] — A widower, a shrewd, thrifty man, possessed of considerable

PART III. SECT. 7, SUB-SECT. 1.

m. **Power to impose condition.]—**A conveyance by a man, 84 years of age, of his farm, which was almost his only means, to his married daughter,

subject to a provision that she should properly maintain him, but with no personal liability on the part of any one to see to his maintenance:—*Held*: to be a deed of gift, & only sustainable by the same evidence as is necessary

Sect. 7.—Conditional gifts: Sub-sects. 1 & 2.]

166. — Chattel as heirloom.]—A gift of chattels accompanied by a letter containing a description, of them, with the following words added thereto: "N.B. This necklace is to be considered as an heirloom in the family, & is to be left to the eldest son & his heirs, after death of his mother, as long as the family shall continue" was held to be only a conditional gift, & the exor. of the donee was ordered to deliver up the article in question to the person entitled to heirlooms.—*SEALE v. HAYNE* (1863), 3 New Rep. 189; 9 L. T. 570; 9 Jur. N. S. 1338; 12 W. R. 239.

Annotation:—Held. *Shelley v. Shelley* (1868), 37 L. J. Ch. 357.

167. Purchase of army commission—Money unapplied at donor's death—Retirement of donee due to ill health.]—A sum of money was paid by A. to B. for the purpose of purchasing C. promotion in the army & it remained unapplied in the hands of B. at the death of A. C. having been compelled from the bad state of his health to quit the army, & having no prospect of being able to enter into the service again, filed a bill for the money, & it was decreed to be paid to him.—*LECHE v. KILMOREY (LORD)* (1823), Turn. & R. 207; 37 E. R. 1076.

Annotations:—Mentd. *Lawrie v. Bankes* (1858), 4 K. & J. 142; *Parsons v. Coke* (1858), 27 L. J. Ch. 828.

Compare Nos. 177–181, post.

168. Condition subsequent—Donor rendering performance impossible—Validity.]—An original gift complete in itself, but followed by a condition making it void if the donee should neglect or refuse to do something which testator has rendered impossible to be done, is not to be divested by such condition, unless the thing directed to be done is of the essence of the original gift.

Testator bequeathed certain shares & stocks "to University College, London, for the purpose of founding in it a new Professorship of Archæology, for the regulation of which professorship I purpose preparing a code of rules which I intend to authenticate under my hand." The rules & the fact of the gift were to be communicated to the college as soon as convenient after his decease, & if the college should neglect or refuse within twelve months to signify by writing to the exors. of testator's will their acceptance of the said rules, the gift to the college was to be null & void, & the shares & stocks were to sink into his residue. Testator died seven years after the date of his will without having made any rules:—*Held*: (1) the gift to the college was complete in itself, the words referring to the intended rules not being of the essence of the gift, since they were only a statement of what testator intended to do, & were not a restriction on or description of that gift; (2) as the rules were never prepared by testator, there could be no refusal on the part of the college to accept "the said rules" & therefore all the directions with reference to the rules might be struck out, leaving the gift complete & free from any liability to be made void.—*YATES v. UNIVERSITY COLLEGE, LONDON* (1875), L. R.

real & personal estate, being apprehensive of a suit against him for breach of promise, determined to convey his land to his children, which he did, taking conditional notes for the purchase-money. The children did not occupy any confidential relation

towards him, & the transaction was his own suggestion, without any influence or pressure on their part. What he retained was more than ample for his wants:—*Held*: the deeds could not be impeached by the father.—*LUTON v. SANDERS* (1868), 14

7 H. L. 438; 45 L. J. Ch. 137; 32 L. T. 43; 23 W. R. 408, H. L.

Annotation:—As to (1) *Apld. Re Williams, Taylor v. University of Wales* (1908), 24 T. L. R. 716.

169. — Partial restraint of marriage—Validity.]—A condition subsequent in partial restraint of marriage, e.g., a condition providing for the forfeiture of interests, given by a settlor to a daughter of the settlor & her children, upon the marriage of the daughter at any time without the consent of named persons, is valid & enforceable if it be accompanied by a gift over of the fund on marriage without the required consent.—*Re WHITTING'S SETTLEMENT, WHITING v. DE RUTZEN*, [1905] 1 Ch. 96; 74 L. J. Ch. 207; 91 L. T. 821; 53 W. R. 293; 21 T. L. R. 83; 49 Sol. Jo. 83, C. A.

Annotation:—Consd. *Re Hewett, Eldridge v. Iles*, [1918] 1 Ch. 458.

170. Fulfilment of condition—Necessary to entitle donee to gift.]—Testatrix made her will in 1873, & thereby bequeathed a legacy of £150 to H., who was living with her as a domestic servant. In Aug. 1877, testatrix handed to C., her solr., whom she had appointed one of her exors., a promissory note for £200, signed by herself & payable on demand to H., telling C. not to mention the note to any one but H., but to retain it till the death of testatrix, & then to give it to H., if she should remain in the service of testatrix until her death. H. was informed of the note soon after it had been handed to C. Testatrix had previously told H. that, if she would continue in her service until her death, she would leave in the care of C. a present for her, beyond what she might leave to her in her will. H. remained in the service of testatrix until the death of the latter, & the promissory note continued in the possession of C. Testatrix died in 1881. She had never revoked the direction which she had given to C. about the note:—*Held*: C. was constituted a trustee of the note, that he might after the death of testatrix hand it over to H. if she had fulfilled the prescribed condition, & as testatrix had never revoked the direction which she had given to C., H. was entitled to prove for the amount of the note in the administration of the estate of testatrix.—*Re RICHARDS, SHENSTONE v. BROCK* (1887), 36 Ch. D. 541; 56 L. J. Ch. 923; 57 L. T. 249; 36 W. R. 118.

Annotation:—Consd. *Re Whitaker* (1889), 42 Ch. D. 119.

171. Construction of deeds of gift—As in testamentary instruments.]—Testator gave to an unmarried woman with whom he cohabited an annuity of £500 for life, without any condition as to marriage. By codicil made in anticipation of the birth of a son, subsequently born, he revoked that annuity & gave her an annuity of £1,200 for life, & declared that if she should marry after his death she should be paid an annuity of £800 in lieu of the £1,200, & directed his trustees after her marriage to apply a sum of £400 a year or part thereof for the maintenance & advancement of his son till twenty-one, & on his attaining twenty-one to pay him any accumulative balance & thereafter to pay him an annuity of £400 till her death. He devised his real estate for the

Gr. 537.—CAN.

o. — Subsequent to gift.]—To a gift divesting the donor of all his interest in certain property, a condition cannot afterwards be attached.—*RAM SARUP v. BELA* (1883), 1 L. R. 6 All. 313; L. R. 11 Ind. App. 44.—IND.

benefit of his son & charged all his estate with payment of the annuities. By a codicil made after the birth of the son he repeated the provisions of the earlier codicil:—*Held*: the effect of the gift was an annuity of £1,200 only until marriage with a gift over of £400 of it on marriage & a residuary annuity of £800 for life.

The rule of construction is the same in the case of a will & of a deed.—*Re HEWITT, ELDRIDGE v. ILES*, [1918] 1 Ch. 458; 118 L. T. 524; *sub nom. Re HEWITT, ELDRIDGE v. ILES*, 87 L. J. Ch. 209.

Conditions in wills.—*See* WILLS.

Gifts over on bankruptcy.—*See* BANKRUPTCY, Vol. V., pp. 653 *et seq.*

SUB-SECT. 2.—IMPLIED CONDITIONS.

172. Gift in contemplation of marriage—Marriage not solemnised—Right of donor to restitution.—*Pltf. sues for tokens he delivered to deft., as a suitor in marriage, & obtains them.*—*YOUNG v. BURRELL* (1576), Cary, 54; 21 E. R. 29.

173. —.]—*Semle*: where a man gives jewels to a woman during courtship & in contemplation of marriage, if the match is broken off, he is entitled to restitution.—*OLDENBURGH'S CASE* (1676), Freem. K. B. 213; 89 E. R. 151; *sub nom. BEAUMONT v. —*, 2 Mod. Rep. 140.

Annotation:—*Mentd. Lockyer v. Simpson & Brome* (1730), Mos. 298.

174. —.]—**How far intentions of suitor material.**—If a person who makes addresses on a view of marriage, & a reasonable expectation of success, gives presents, & the lady deceives him afterwards, the presents ought to be returned, or the value of them allowed. But where made to introduce a person only to a woman's acquaintance, he is looked upon in the light of an adventurer; & if he loses by the attempt, must take it for his pains, especially where there is a disproportion between the lady's fortune & his.—*ROBINSON v. CUMMING* (1742), 2 Atk. 409; 26 E. R. 646, L. O.

Annotations:—*Consd. Jacobs v. Davis*, [1917] 2 K. B. 532. *Mentd. Webber v. Hunt* (1815), 1 Madd. 13; *Booth v. Leicester* (1838), 3 My. & Cr. 459; *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162.

175. —.]—When an engagement ring is given by a man to a woman, there is an implied condition that the ring shall be returned if the engagement is broken off.—*JACOBS v. DAVIS*, [1917] 2 K. B. 532; 86 L. J. K. B. 1497; 117 L. T. 569; 33 T. L. R. 488; 61 Sol. Jo. 613.

176. —.]—*JEFFREYS v. LUCK* (1922), 57 L. Jo. 84, 153 L. T. 139.

177. Funds raised by subscription—For charitable objects—Right to unappropriated surplus.—Where a fund was raised by subscription for the

maintenance & support of two distressed ladies, & at the death of the survivor of them, a portion of the fund remained unapplied:—*Held*: there was a resulting trust of the balance of the fund for the subscribers thereto.—*Re ABBOTT FUND TRUSTS, SMITH v. ABBOTT*, [1900] 2 Ch. 326; 69 L. J. Ch. 539; 48 W. R. 541.

Annotation:—*Distd. Re Andrew's Trust, Carter v. Andrew*, [1905] 2 Ch. 48.

178. —.]—A fund was subscribed by the friends of a deceased clergyman for the education of his children, all of whom were then infants, & the document declaring the trusts of the fund stated that the money was not intended for the exclusive use of any one of them in particular, nor for equal division among them, but as deemed necessary to defray the expenses of all, & that solely in the matter of education. The education of the children was paid for partly out of the trust fund & partly out of moneys respectively coming to them under their father's will. When all the children had grown up there remained a portion of the trust fund unapplied:—*Held*: (1) there was no resulting trust of the balance for the subscribers; (2) the balance ought to be divided equally amongst the children.—*Re ANDREW'S TRUST, CARTER v. ANDREW*, [1905] 2 Ch. 48; 74 L. J. Ch. 462; 92 L. T. 766; 53 W. R. 585; 21 T. L. R. 512; 49 Sol. Jo. 565.

179. —.]—"The Benefit Society for Girls educated at the School of Industry, Kendal," was established in 1808, & was registered as a friendly society under Friendly Societies Act, 1793 (c. 54), s. 2. It consisted of honorary members & benefited members. The honorary members were ladies who gave in their names when the society was formed or were afterwards elected according to the rules & paid a subscription. They could not in any way derive benefit from the funds of the society. The benefited members were girls educated at the School of Industry; they paid weekly contributions to the society from the age of seven to sixty-five, & were entitled to certain weekly payments in sickness varying with age up to sixty-five, & to an annuity of 2s. a week from fifty-six to sixty-five, 2s. 6d. from sixty-five to seventy, & 4s. from seventy for the rest of their lives. All payments by the members & all sick allowances ceased at sixty-five. The annuities became payable automatically on a member attaining fifty-six without any inquiry as to poverty. The rules of the society provided that the contributions of honorary members should be appropriated, one half "to raise a capital the interest of which would be sufficient to pay the allowance to children under fifteen"; the other half "to be under the special direction of honorary members for relief in extraordinary cases not provided by the general fund."

The School of Industry was closed in 1845, & after that date no new members were admitted, but subscriptions continued to be received from

PART III. SECT. 7, SUB-SECT. 2.

172 i. Gift in contemplation of marriage—Marriage not solemnised—Right of donor to restitution.—*RYAN v. WHELAN*, 21 C. L. T. 406.—CAN.

172 ii. —.]—*Deft. promised to marry pltf. upon condition of his absolutely refraining thereafter from taking any intoxicating liquor; pltf. broke his promise, & the engagement came to an end by reason of the breach of the condition on which it*

was entered into:—*Held*: pltf. was not entitled to recover any personal presents which during the engagement he made to deft. in prospect of marriage; *aliter*, as to articles purchased with pltf.'s money with a view to furnishing a house upon marriage, & articles & money lent to deft.—*SEILER v. FUNK* (1914), 32 O. L. R. 99; 7 O. W. N. 179.—CAN.

172 iii. —.]—*BRAY v. FRYKLUND* (1921), 62 D. L. R. 638.—CAN.

172 iv. —.]—If a gift is made in the hope of future marriage & that marriage become impossible, the gift must be returned to the giver.—*MACKENZIE v. MUTUAL LIFE INSURANCE CO. OF NEW YORK* (1906), T. H. 116.—S. AF.

p. — Marriage solemnised—Whether gifts returnable after death of wife.—Ordinary gifts, such as jewellery, etc., given by a man to his betrothed do not come into the category of gifts given strictly on the

money & other effects, which at the time of A.'s decease should be in two specified rooms in his mansion house, except an iron chest & its contents, & the contents of a certain closet. A. lived almost exclusively in the two rooms mentioned in the instrument, & B. at the time of the execution of it & from thenceforth until A.'s death, was his bailiff & confidential agent. Two years after the date of this instrument, A. made his will, by which he bequeathed his plate, jewels, household furniture, & money to trustees, upon certain trusts for the benefit of C. & his issue. In a suit for the administration of A.'s estate, B. claimed the benefit of the prior instrument, but without either producing probate of it or showing for what consideration or under what circumstances it was executed:—*Held*: if the instrument was to be considered as testamentary, the ct. would not act upon it without probate, & if it was to be considered as a deed *inter vivos*, this ct. would not give effect to it without further evidence in its support; & the ct. being of opinion, that under the circumstances of the case, such further evidence could not be obtained, declined to direct any inquiries on the subject.—*CONSETT v. BELL* (1842), 1 Y. & C. Ch. Cas. 569; 11 L. J. Ch. 401; 6 Jur. 869; 62 E. R. 1020.

Annotations:—*Refd.* Alexander v. Brame (1855), 25 L. T. O. S. 298. *Mentd.* Flinden v. Stephens (1846), 1 Coop. temp. Cott. 318; Stainton v. Carron Co. (1853), 18 Beav. 146.

Compare EXECUTORS, Vol. XXIV., pp. 791–793, Nos. 8218–8239.

186 Onus of proof on donee.—An old woman was induced, without consideration, to transfer her stock into the name of another, who, by his answer, swore that there had been a gift of it to him, subject to a trust for the transferor, for life.

in 1872 D. transferred to him as a gift shares of a certain stock, part of the assets of the firm, & as corroborative evidence thereof proved the transfer of the stock to him, & a retransfer afterwards on Jan. 30, 1873; which transfer, he said, was to prevent the surplus of the savings bank appearing to be less, & also produced the printed statement of the savings bank of Dec. 31, 1872, showing this stock:—*Held*: this was not such corroborative evidence of the gift as satisfied R. S. O., 1877 (c. 82), s. 10.—*BURN v. BURN* (1885), 8 O. R. 237.—*CAN.*

185 iii. —.—.—]—In an action of ejectment brought by extrix of the grantee from the Crown, to recover a strip of land, one of the defences was, that testator made a parol gift of the strip to defts., shortly after they had purchased adjoining lands from him, & that defts. at once entered into possession of the strip & made improvements thereon:—*Held*: the testimony of one of defts. that plff.'s testator had given him the strip, saying, "If it is of any use to you, you can take it," was admissible, & did not, as a matter of law, require corroboration.—*WORSNUP v. WOOD* (1911), 19 W. L. R. 533.—*CAN.*

r. Onus of proof.—In the case of a gift from a parent to a child, there is no rule which requires the child, in the absence of evidence showing imposition or undue influence, to support the deed by the evidence which might be necessary in the case of a gift from a child to a parent.—*WYCOFF v. HATMAN* (1868), 14 Gr. 219.—*CAN.*

a. —.—.—]—Action originally brought by M. against her husband, P., to recover a sum of money belonging to

plff. deposited in a bank to credit of deft.:—*Held*: the onus had not been discharged by deft. to show that the money received was a gift *inter vivos*.—*McDOUGALL v. PAILLE* (1913), 24 O. W. R. 612; 4 O. W. N. 1602; 13 D. L. R. 861.—*CAN.*

t. —.—.—]—The onus of showing that moneys are the subject of a gift is on the donee.—*JOHNSTONE v. JOHNSTONE* (1913), 28 O. L. R. 334; 4 O. W. N. 915; 12 D. L. R. 537.—*CAN.*

a. —.—.—]—An old man, bed-ridden, executed a trust disposition, by which he conveyed the residue of his estates, after the payment of legacies & annuities, to his trustees for their absolute use. Shortly afterwards he handed over to one of his trustees deposit receipts for sums which almost exhausted the residue. On his death, three years afterwards, the other trustees raised an action of count, reckoning & payment against the holder of the receipts, who pleaded donation:—*Held*: donation was not to be presumed from mere possession of the receipts; & the onus *probandi* was on the party pleading donation; & he had failed to prove it.—*HERON v. M'GEOCH* (1851), 14 Dunl. (Ct. of Sess.) 25; 24 Sc. Jur. 3; 1 Stuart, 4.—*SCOT.*

b. —.—.—]—A. deposited a sum in a bank, & took a deposit-receipt in the name of himself & B. "payable to either or the survivor." A. afterwards handed the receipt to B., who uplifted the money. In an action brought by A. against B. for payment, in which B. pleaded donation:—*Held*: the onus of proving donation lay upon B.—*DURIE v. ROSS* (1871) 9 Macph.

An injunction to restrain the transfer & receipt of the dividends was continued.—*CUSTANCE v. GUNNINGHAM* (1851), 13 Beav. 363; 51 E. R. 140.

187. —.—.—]—Grant purporting to be for consideration.]—Where a grantee, under a deed purporting to be a conveyance for valuable consideration, attempts to support the grant as a gift, the onus of proving that such a gift was intended & made is thrown upon the grantee, & clear evidence in support of the gift will be required.—*COULTWAS v. SWAN* (1871), 19 W. R. 485, L. C.

188. —.—.—]—Of intention to make gift irrevocable.]—The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable; & where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solr. to insist upon the insertion of such power, & the want of it will in general be fatal to the deed.—*COUTTS v. ACWORTH* (1869), L. R. 8 Eq. 558; 38 L. J. Ch. 694; 21 L. T. 224; 17 W. R. 1121.

Annotations:—*Refd.* Phillips v. Mullings (1871), 7 Ch. App. 244; Baker v. Loader (1872), L. R. 16 Eq. 49. *Mentd.* Welman v. Welman (1880), 15 Ch. D. 570.

189. —.—.—]—*WOLLASTON v. TRIBE*, No. 150, *ante*.

See, generally, EVIDENCE, Vol. XXII., pp. 35 *et seq.*

Proof by donee in administration.—*See, generally*, EXECUTORS, Vol. XXIV., pp. 794–796, Nos. 8244–8252.

190. Evidence of motive for gift.—Where control resumed by donor.]—Where after an alleged gift

(Ct. of Sess.) 969; 43 Sc. Jur. 540.—*SCOT.*

a. —.—.—]—Three deposit receipts for £250 in all were blank endorsed by the depositor, & shortly before his death, handed to a niece who was the only member of the family with him at the time. Other relations resident at no great distance, who were as nearly connected with deceased as the niece had not been informed of his illness. The deposited money constituted deceased's whole movable estate & he was known to have made a will by which he had distributed his estate generally among his relations which could not be found after his death. The niece & her son deposed to the deposit receipts having been handed over by way of absolute gift, & there was some corroborative testimony, but in cross-examination the son admitted that the terms used by deceased in speaking of the transference might mean that they had only been given to her in charge. Witnesses deposed to deceased having told them what he had done with his funds, & spoke to expressions, varying in each case, pointing to administration or charge having been the object of the transference:—*Held*: in the circumstances the presumption against donation had not been overcome.—*SHARP v. PATON* (1883), 10 R. (Ct. of Sess.) 1000; 20 Sc. L. R. 685.—*SCOT.*

d. —.—.—]—*DAWSON v. M'KENZIE* (1891), 19 R. (Ct. of Sess.) 261; 29 Sc. L. R. 226.—*SCOT.*

e. —.—.—]—*On executors denying gift.*—In an action brought by the exors. of a father to establish that money delivered by the latter to a son was a mere loan, the burden of proof rests

Sect. 8.—Evidence and proof. Sects. 9 & 10: Sub-sects. 1, 2 & 3. Part IV. Sect. 1: Sub-sects.

the donee restored the control of the property to the donor, mere evidence of motive for the gift was held to be insufficient to establish the donee's right to it.—*JAMES v. JAMES* (1869), 19 L. T. 809.

SECT. 9.—CLAIMS IN RESPECT OF VOLUNTARY BONDS IN ADMINISTRATION.

See EXECUTORS, Vol. XXIII., pp. 355, 356, Nos. 4225–4240.

Position of assignee for value.]—*See* BONDS, Vol. VII., p. 226, No. 686.

Position of payee of promissory note.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 126, 204, Nos. 840, 1256.

SECT. 10.—LIABILITIES INCIDENT TO GIFTS.

SUB-SECT. 1.—DANGEROUS GIFTS.

191. Duty to warn donee—If defect known to donor—Likely to cause injury.]—The principle of law as to gifts is that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time & omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable (*WILLES, J.*).—*GAUTRET v. EGERTON, JONES v. EGERTON* (1867), L. R. 2 C. P. 371; 36 L. J. C. P. 191; 15 W. R. 638.

*Annotations:—***Expld.** *Lowery v. Walker*, [1910] 1 K. B. 173. **Consd.** *Shrimpton v. Hertfordshire County Council* (1910), 74 J. P. 305; *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398. **Refd.** *Heaven v. Pender* (1883), 11 Q. B. D. 503. **Mentd.** *Sandys v. Florence* (1878), 47 L. J. Q. B. 598; *Keeble v. East & West India Dock Co.* (1889), 5 T. L. R. 312; *Calc. Ry. v. Mulholland*, [1898] A. C. 216; *Harris v. Perry*, [1903] 2 K. B. 219; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613; *French v. Hills Plymouth Co.* (1908), 24 T. L. R. 644; *Coldrick v. Partridge, Jones*, [1909] 1 K. B. 530; *R. v. Broad*, [1915] A. C. 1110; *Wilson v. Barry Ry.* (1916), 86 L. J. K. B. 432; *Hayward v. Drury Lane Theatre & Moss' Empires*, [1917] 2 K. B. 899; *Hardy v. C. L. Ry.*, [1920] 3 K. B. 459; *Fairman v. Perpetual Investment Bldg. Soc.*, [1923] A. C. 74; *Sutcliffe v. Clients Investment Co.*, [1924] 2 K. B. 746.

192. —]—The proposition of law, as I understand it, is that the donee must not look a gift horse in the mouth. If something is given it must be enjoyed as it is given & taken with its risks, but subject to this, that if the giver knows of some evil character in it at the time & does not warn the donee, he is responsible, although it was a gift (*BUCKLEY, L.J.*).—*LOWERY v. WALKER*, [1910] 1 K. B. 173; 79 L. J. K. B. 297; 101 L. T. 873; 26 T. L. R. 108; 54 Sol. Jo. 99, C. A.; *revid.* on other grounds, [1911] A. C. 10, H. L.

*Annotations:—***Refd.** *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Hardy v. C. L. Ry.*, [1920] 3 K. B. 459; *Fairman v. Perpetual Investment Bldg. Soc.*, [1923] A. C. 74. **Mentd.** *Grand Trunk Ry. of Canada v. Barnett*, [1911] A. C. 361; *Clinton v. Lyons*, [1912] 3 K. B. 198; *Mowlem v. Dunne*, [1912] 2 K. B. 136; *Tofts v. Pearl Life Assoc.* (1913), 110 L. T. 190; *Norman v. G. W. Ry.*,

[1914] 2 K. B. 153; *Pritchard v. Torkington* (1914), 7 B. W. C. C. 719; *Brackley v. Mid. Ry.* (1918), 114 L. T. 1160; *Wilson v. Barry Ry.* (1916), 116 L. T. 71; *Hayward v. Drury Lane Theatre & Moss' Empires*, [1917] 2 K. B. 899; *Manton v. Brocklebank*, [1923] 1 K. B. 406.

See, generally, NEGLIGENCE.

SUB-SECT. 2.—GIFTS SUBJECT TO CHARGE.

193. Subsequent bankruptcy of donor—While gift in his reputed ownership—Omission to notify change of ownership.]—A., being at the time in partnership with his son & others, executed a deed of gift, whereby he gave, granted, & confirmed to his son, certain paintings, articles of plate, & other effects, which he had in his dwelling-house, upon trust for himself for life, & after his decease for his son absolutely. At the time the deed was executed, formal possession was given to the son by the delivery of one painting in the name of the whole; but with that exception, the effects were left in the possession of A. at his house, & the change of ownership was not made public further than by its being communicated by A. to some of his friends. In this state of circumstances, the firm became bkpt.:—*Held*: inasmuch as the son had omitted to give notice of the change of ownership the possession of A. was referable to his original title, & he was in the reputed ownership of the goods at the time of the bkpcy.—*Re ACRAMAN, Ex p. CASTLE* (1842), 3 Mont. D. & De G. 117; 12 L. J. Bcy. 30; 7 Jur. 47, Ct. of R.

194. Charge created by donor—Liability of donee to contribute.]—An assignor deposited with his bankers the title-deeds of certain leasehold premises together with a policy of assurance on his own life & certain dock warrants, & executed a deed of charge & memorandum of deposit to secure the payment of the balance for the time being due on any accounts he might have with the bank. He subsequently, by a voluntary deed, assigned the leasehold premises to his wife. The deed contained no reference to the charge & memorandum of deposit, & no covenants for title, express or implied. By his will he gave all his property to trustees upon trusts for the benefit of his wife & children. On the death of the assignors his exors. paid off the debt due to the bank. On an application to the ct. for the determination of the question whether the widow, as assignee of the leaseholds, was liable to contribute to the payment of the debt:—*Held*: the charge being one created by the assignor himself, & not a charge paramount to his own title, the widow was under no liability to contribute.—*Re DARBY'S ESTATE, RENDALL v. DARBY*, [1907] 2 Ch. 465; 76 L. J. Ch. 689; 97 L. T. 900.

*Annotation:—***Consd.** *Re Best, Parker v. Best*, [1924] 1 Ch. 42.

SUB-SECT. 3.—ESTATE AND OTHER DEATH DUTIES.

See ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 10–13, Nos. 45–60.

upon the exors., since the relation-ship of father & son gives rise to a rebuttable presumption, if nothing

more appears, that an advance made by the father to the son is a gift & not a loan.—*GROAT v. KINNAIRD* (1914),

29 W. L. R. 675; 7 W. W. R. 264; 20 D. L. R. 421; 7 Alta. L. R. 390.—**CAN.**

Part IV.—Incomplete Gifts.

SECT. 1.—GIFTS INTER VIVOS.

SUB-SECT. 1.—IN GENERAL.

195. How arising.]—Letter to exors. expressing a consent that a sum of £500 was proper to be given to the daughter of deceased husband :—*Held* : not to amount to a gift of so much in their hands, the gift not being perfected & carried into execution.

To make a complete gift, there must not only be a clear intention but the intention must be executed & carried into effect. . . . This letter amounted to a declaration of the property of giving her £500 & shows her approval of a gift to that amount, but does not give effect to the gift & carry it into execution. Nothing is said as to who is to pay the money, or when it is to be paid (PLUMER, V.-C.).—*COTTEEN v. MISSING* (1815), 1 Madd. 176 ; 56 E. R. 66.

Annotations :—*Reid*. Hooper v. Goodwin (1818), 1 Swan. 485. *Mentd*. M'Fadden v. Jenkyns (1842), 1 Hare, 458.

196. Failure of donor to pass property—Although intention clear.]—R. having died intestate, possessed of considerable personal property, & entitled, after the death of his wife, to the principal of certain bank stock, standing in the name of a trustee, his brother, by letter, expressed his intention of relinquishing his share of the intestate's estate to the widow, executed to the trustee, transferring to the widow, a release of the bank stock, & directed the preparation of a release of the general personal estate, the execution of which was prevented by his death, but his wish to execute it continued to his last hour : the release of the stock is effectual in favour of the intestate's widow ; but the intention to relinquish the share of the general personal estate not being perfected, amounts not to a gift ; & she, as administratrix, must account to the representatives of the brother, but without interest.

A gift at law, or in equity, supposes some act to pass the property : in donations *inter vivos*, if the subject is capable of delivery, delivery ; of a chose in action, a release, or equivalent instrument ; in either case, a transfer of property is required. An intention to give, is not a gift (PLUMER, M.R.).—*HOOPER v. GOODWIN* (1818), 1 Swan. 485 ; 1 Wils. Ch. 212 ; 36 E. R. 475.

Annotation :—*Reid*. Cochrane v. Moore (1890), 25 Q. B. D. 57.

197. ———. ———.]—*TRIMMER v. DANBY*, No. 63, *ante*.

198. ———. ———.]—*Re THEOBALD, HOHLER v. WILSON* (1892), 9 T. L. R. 110.

199. ———. ———.]—*Or to make valid declaration of trust.*—*Re FENNINGS, BAILEY v. BEAVEN* (1900), 16 T. L. R. 427.

200. ———. ———.]—In 1902 their father told plffs., his two unmarried daughters, that they would be entitled on his death to the proceeds of

certain policies of insurance effected on his life, & on many subsequent occasions he repeated this statement & told them how they would be able to obtain the money after his death. The father had made his will in 1897, but it contained no mention of the policies, nor were they mentioned in a codicil which he executed in 1900. After their father's death plffs. claimed the proceeds of the policies :—*Held* : the claim failed, as there was neither a gift by deceased of the proceeds of the policies, but at the most a promise to make a gift, nor a declaration of trust by deceased in favour of plffs.—*VAVASSEUR v. VAVASSEUR* (1909), 25 T. L. R. 250.

Annotation :—*Reid*. *Re Innes, Innes v. Innes*, [1910] 1 Ch. 188.

Validity of assignments of choses in action generally, *see* CHOSSES IN ACTION, Vol. VIII., pp. 442 *et seq*.

SUB-SECT. 2.—NON-DELIVERY.

See Part III., Sect. 1, sub-sect. 2, B., *ante*.

Necessity for delivery.]—*See* Part III., Sect. 1, sub-sect. 2, B. (b), *ante*.

SUB-SECT. 3.—NON-COMPLIANCE WITH FORMALITIES OF TRANSFER.

A. Stocks and Shares.

201. General rule—Property remains in donor.]

(1) Receipt for a subscription to a navigation, with an indorsement, signed by the owner, declaring, that he thereby assigned to his daughter A. all his interest, found among the papers of his extrix. ; no evidence that he ever parted with the paper ; & a declared intention of satisfaction by a marriage portion. Bill for an assignment dismissed.

(2) An exor. is never called upon to do any act to perfect a gift *inter vivos* except in the particular cases of supplying a defective execution of a power, & the want of surrender of a copyhold.

(3) Can I presume the fact of delivery ? The utmost is absence of all proof. I cannot raise that presumption in opposition to the *prima facie* inference, from the custody, in which this paper was found, in which, upon the supposition of delivery & continued possession, it ought not to have been found. . . This instrument of itself was not capable of conveying the property. It is said to amount to a declaration of trust. O. [the donor] was no otherwise a trustee than as any man may be called so, who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee. Nor was that mode of doing what he professed in his

PART IV. SECT. 1, SUB-SECT. 1.

1. General rule.]—A gift must be complete, & if it is complete it is valid between the parties to the gift, the donor & the donee ; but so long as the gift is not complete nothing has gone from the donor to the donee. It

still remains the donor's.—*Re SKINNER* (1894), 6 Q. L. J. 68.—*AUS*.

g. ———.]—A donation will not be enforced unless it is valid & complete.—*VAN RENEN'S TRUSTEES v. VERSFELD* (1892), 9 S. C. 161 ; 2 C. T. R. 101.—*S. AF*.

h. ———. *Incapacity of wife—To take gift from husband.*—A gift from a husband to a wife is not an incomplete gift by reason of the incapacity of the wife at law to take a gift from her husband.—*KENT v. KENT* (1892), 19 A. R. 352.—*CAN*.

Sect. 1.—Gifts inter vivos: Sub-sect. 3, A. & B.]

contemplation. He meant a gift. He says he assigns the property. But it was a gift, not complete. The property was not transferred by the act. There is no case in which a party has been compelled to perfect a gift, which in the mode of making it, he has left imperfect. There is *locus penitentiae* as long as it is incomplete & C. did repent (GRANT, M.R.).—ANTROBUS v. SMITH (1805), 12 Ves. 39; 33 E. R. 16.

Annotations:—As to (1) Reqd. Dillon v. Coppin (1839), 4 My. & Cr. 647; Bridge v. Bridge (1852), 16 Beav. 315; Cheale v. Kenward (1858), 3 De G. & J. 27; Pearson v. Amicable Assee. Office (1859), 27 Beav. 229; Gilbert v. Overton (1864), 4 New Rep. 420. *As to (3) Consd.* Edwards v. Jones (1836), 1 My. & Cr. 226; Airey v. Hall (1856), 3 Sm. & G. 315. *Reqd.* Cotten v. Missing (1815), 1 Madd. 176; McFadden v. Jenkyns (1842), 1 Hare, 458; Meek v. Kettlewell (1843), 1 Ph. 342; Kekewich v. Manning (1851), 1 De G. M. & G. 176; Voyle v. Hughes (1854), 2 Sm. & G. 18; Parnell v. Hingston (1856), 3 Sm. & G. 337; Moore v. Moore (1874), L. R. 18 Eq. 474; *Re* Shield, Pethybridge v. Burrow (1885), 53 L. T. 5.

202. ————]—A father executed a deed of assignment of certain East India stock & Globe Insurance shares, to his daughter, & her husband, & their children; the deed was retained by him, & found inclosed in an envelope, on which he had in his own handwriting directed the deed to be given up to his daughter on his death. No transfer according to the prescribed forms was made during the father's lifetime:—*Held:* the stock & shares did not pass by the deed, but constituted part of the father's estate.—DILLON v. COPPIN (1839), 4 My. & Cr. 647; 9 L. J. Ch. 87; 4 Jur. 427; 41 E. R. 249, L. C.

Annotations:—Consd. Donaldson v. Donaldson (1854), Kay, 711; Pearson v. Amicable Assee. Office (1859), 27 Beav. 229. *Reqd.* McFadden v. Jenkyns (1842), 1 Hare, 458; Meek v. Kettlewell (1842), 1 Hare, 464; Fletcher v. Fletcher (1844), 4 Hare, 67; Hall v. Palmer, Russell v. Palmer (1844), 13 L. J. Ch. 352; Kekewich v. Manning (1851), 1 De G. M. & G. 176; Parnell v. Hingston (1856), 3 Sm. & G. 337; Barton v. Gainer (1858), 6 W. R. 624. *Mentd.* Jefferys v. Jefferys (1841), Cr. & Ph. 138; *Re* Roby, Howlett v. Newington (1907), 77 L. J. Ch. 169.

203. ————]—A. made a voluntary assignment of turnpike bonds & shares in cos. to B., in trust for himself for life, & after his death, for his nephew. He delivered the bonds & shares to B., but did not observe the formalities required, by Turnpike Roads Act, 1822 (c. 126), & the deeds by which the cos. were formed, to make the assignment effectual:—*Held:* on his death, no interest, in either the bonds or the shares, passed by the assignment, & B. ought to deliver them to his exors.—SEARLE v. LAW (1846), 15 Sim. 95; 15 L. J. Ch. 187; 7 L. T. O. S. 78; 10 Jur. 191; 60 E. R. 553.

Annotations:—Expld. Parnell v. Hingston (1856), 3 Sm. & G. 337; Cheale v. Kenward (1858), 3 De G. & J. 27. *Reqd.* Rummens v. Hare (1876), 1 Ex. D. 169; *Re* Richardson, Shillito v. Hobson (1885), 30 Ch. D. 396.

204. ————]—**Despite direction to transfer—But not acted upon.**—The ct. will not assist a volunteer by making effectual an incomplete gift.

A. directed the certificates of some United States Bank shares standing in his name to be delivered to his nephew, & in a letter to him stated, that "he made a free gift of them" to him. A. also executed a power of transferring the shares, but this was not acted on in A.'s life. The shares being found in A.'s name at his death:—*Held:* they formed part of his personal estate.—WEALE v. ORLIVE (1853), 17 Beav. 252; 51 E. R. 1030; *subsequent proceedings* (1863), 32 Beav. 421.

Annotation:—Reqd. Evans v. Jennings (1858), 32 L. T. O. S. 34.

205. ————]—**Parol declaration** of trust money handed over to a third party, on trust, by a person *in extremis*, supported but held invalid as to stock, for which a power of attorney had been given by the settlor, but which had not been acted on at her death.—PECKHAM v. TAYLOR (1862), 31 Beav. 250; 6 L. T. 487; 54 E. R. 1131.

206. ————]—T. executed a voluntary deed purporting to assign fifty of his shares in the L. Bank to S., to be held by him upon certain trusts for the benefit of pltf's. The charges were transferable only by entry in the books of the bank; but no such transfer was ever made. S. held at the time a general power of attorney authorising him to transfer T.'s shares, & T. after the execution of the settlement, gave him a further power of attorney authorising him to receive the dividends on his shares in the bank. T. lived three years after the execution of the deed, during which period the dividends on the shares were received by S., & remitted by him to pltf's., sometimes directly & sometimes through T.:—*Held:* as it was not the intention of the settlor to constitute himself a trustee of the shares, but to vest the trust in S. there was no valid trust of the shares created in the settlor; no valid trust of the shares was created in S., for although he held a power of attorney under which he might have vested the shares in himself, he did not do so, & was not bound to do so without directions from the settlor, since he held the power only as agent for the settlor; therefore the disposition of the shares failed, as being an imperfect voluntary gift.—MILROY v. LORD (1862), 4 De G. F. & J. 264; 31 L. J. Ch. 798; 7 L. T. 178; 8 Jur. N. S. 806; 45 E. R. 1185, L. J.

Annotations:—Folld. Warriner v. Rogers (1873), L. R. 16 Eq. 340. *Consd.* Richards v. Delbridge (1874), L. R. 18 Eq. 11; Heartley v. Nicholson (1875), L. R. 19 Eq. 233. *Apld.* Bottle v. Knockner (1876), 46 L. J. Ch. 159. *Apprvd.* *Re* King, Sewell v. King (1879), 14 Ch. D. 179. *Folld.* *Re* Breton's Estate, Breton v. Woolven (1881), 17 Ch. D. 416. *Apld.* *Re* Shield, Pethybridge v. Burrow (1885), 53 L. T. 5. *Consd.* *Re* Patrick, Bills v. Tatham (1890), 63 L. T. 752; Johnstone v. Mappin (1891), 60 L. J. Ch. 241. *Reqd.* Moore v. Moore (1874), L. R. 18 Eq. 474; Bizzey v. Flight (1876), 45 L. J. Ch. 852; *Re* Ashcroft, *Ex p.* Todd (1887), 19 Q. B. D. 186; Coleman v. North (1898), 47 W. R. 57; *Re* Griffin, Griffin v. Griffin, [1899] 1 Ch. 408; *Re* Smith, Bull v. Smith (1901), 84 L. T. 835; Mallott v. Wilson, [1903] 2 Ch. 494; Carter v. Hungerford, [1917] 1 Ch. 260; *Re* Williams, Williams v. Ball, [1917] 1 Ch. 1; Macedo v. Stroud, [1922] 2 A. C. 330.

207. ————]—**Testator, whilst** confined to his room of the illness of which he died, gave to his son F. certain bank shares, & on the same day wrote to the manager of the bank, directing that the shares should be transferred to F. Before any transfer was made, testator died. The evidence failing to support a contention on the part of F. that this was a gift accompanied by a condition or contract that he, taking the shares, should discharge a debt due from testator to the bank:—*Held:* the gift was voluntary, & not having been perfected by transfer of the shares, it fell into the residue.—LAMBERT v. OVERTON (1864), 11 L. T. 503; 13 W. R. 227.

208. ————]—**Entered in minute book of company.**—Testator, who was the owner of a share in the colliery, on Feb. 11, 1865, wrote to pltf., his daughter, as follows: "I have another present to make shortly, one share of R. Colliery . . . & you may now consider that you have this yourself from Jan. 2 to receive dividends upon. I am also going to give S. one, the same." On the 17th he attended a meeting of shareholders

in the colliery, & signed the following entry in the minute book: "That N.'s (his own) proposition of transferring two of his shares to the parties undernamed be agreed to, viz." (pltf. & her sister). It was admitted that this signature was not sufficient, according to the regulations of the deed of partnership, to pass the property in the shares. On Feb. 25, he again wrote to pltf.: "I have arranged & made all right with the shares for you & S., & dividends will be sent from Jan. 2." On Mar. 4 testator wrote to pltf.: "Next meeting (private) we will be enabled to make another dividend, when you & S. will be informed." On Mar. 16 he sent pltf. a cheque for the first dividend, with a letter thus: "Herewith I enclose cheque for £37 10s., which you can receive at the bank. . . first dividend made this day." On Mar. 18 he again wrote to pltf., as follows: "I have yours in reply to the receipt of dividend—long may you live to enjoy it;" & in the same letter, after referring to the meeting of Jan. 17, he further said: "Well, when I got in, I openly at once asked the question in the presence of" (four persons whom he named), "I was about to give my two daughters one share each, & which is the way to do it? They were all pleased. It was entered in the minutes of the book":—*Held*: the above expressions in letters, signature of minute, & gift of dividend, did not amount to a declaration by testator, nor to proof of an intention & determination on his part that he would hold the shares for pltf.; but testator, having the desire & intention that she should, from & after Feb. 11, 1805, have the shares as her property, failed to fulfil that desire & complete that intention.—*HEARTLEY v. NICHOLSON* (1875), 1 L. R. 19 Eq. 233; 44 L. J. Ch. 277; 31 L. T. 822; 23 W. R. 374.

209. ———.]—A husband, two years before his death, gave to his wife a railway debenture subsequently converted into railway stock, which remained in his name, & on which the dividends were received by him, but paid to his wife. He gave the certificates to his wife, & they remained in her possession until he required them in order to replace a lost dividend warrant. While on his death-bed he handed the certificates to his wife, saying, "These are yours," & also gave her a deposit note:—*Held*: (1) the gift of the stock failed as being incomplete, & it could not be supported as a declaration of trust, the intention to make an immediate gift being inconsistent with a declaration of trust; (2) railway stock cannot be the subject of *donatio mortis causâ*; (3) the gift of the deposit note was a good *donatio mortis causâ*.—*MOORE v. MOORE* (1874), L. R. 18 Eq. 474; 43 L. J. Ch. 617; 30 L. T. 752; 38 J. P. 804; 22 W. R. 729.

Annotations:—*As to* (1) *Consd.* *Re* Shield, Pethybridge v. Burrow (1885), 53 L. T. 5. *Re* Baddeley v. Baddeley (1878), 48 L. J. Ch. 36; *Re* Ashcroft, *Ex p.* Todd (1887), 19 Q. B. D. 186. *As to* (2) *Re* Weston, Bartholomew v. Menzies, [1902] 1 Ch. 680.

B. Interests in Land.

210. Purported grant of freehold—By deed-poll.]—A. being seised in fee, executed a deed-poll, whereby he voluntarily granted it to his wife as her sole & absolute property for ever:—*Held*:

this was an imperfect voluntary gift, the relation of trustee & *cestui que trust* had not thereby been created, & a ct. of equity would not interfere to assist either party.—*PRICE v. PRICE* (1851), 14 Beav. 598; 21 L. J. Ch. 53; 18 L. T. O. S. 131; 51 E. R. 414; *on appeal* (1852), 1 De G. M. & G. 308, L. J.J.

211. ——— By memorandum in writing.]—*WARNER v. ROGERS*, No. 247, *post*.

212. Purported transfer of leasehold—By indorsement on document of title.]—RICHARDS v. DELBRIDGE, No. 259, *post*.

213. Letter bequeathing real property—Not attested as will.]—A man, when engaged to marry, wrote a letter to his intended wife stating that, as life was uncertain & she was the person he loved best, he bequeathed her certain cottages. The letter was not attested as by law required in the case of a will:—*Held*: the letter was only a statement of a gift, & did not contain any contract, & there was no memorandum in writing to satisfy Stat. Frauds, s. 4.—*VINCENT v. VINCENT* (1887), 56 L. T. 243; 3 T. L. R. 398, C. A.

For requisites of valid transfer, *see, generally*, REAL PROPERTY.

214. Purported transfer of mortgagee's interest—Letter directing executors to release.]—Mere declaration of trust by the owner of property in favour of a volunteer is altogether inoperative, & the ct. will not interfere in such a case; *aliter* where there has been a change of legal ownership & so a trust constituted.

Letters written by a mtgee. to the mtgor. & persons interested under him, containing the expressions "I now give this gift to become due at my death, unconnected with my will," "I hereby request my exors. to cancel the mortgage deed, etc." "I again direct & promise that my exors. shall comply with my former request, i.e., to cancel all deeds & papers I may have chargeable on the R. estate":—*Held*: not to operate either as a declaration of trust or as a valid gift.—*SCALES v. MAUDE* (1855), 6 De G. M. & G. 43; 25 L. J. Ch. 433; 26 L. T. O. S. 131; 1 Jur. N. S. 1147; 4 W. R. 109; 43 E. R. 1146, L. C.
Annotations:—*Consd.* *Evans v. Jennings* (1858), 32 L. T. O. S. 31. *Re* Jones v. Lock (1865), 1 Ch. App. 25.

215. ——— By delivery of deed—*Equitable mortgage.]—Equitable mtgee. by a deposit of a deed cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deed: & as his interest in the deed is only incidental to his interest in the mtge., the donee of the deed has no right to retain it.—Re RICHARDSON, SHILLITO v. HOBSON* (1885), 30 Ch. D. 396; 55 L. J. Ch. 741; 53 L. T. 746; 34 W. R. 286, C. A.

Annotations:—*Foll.* *Re* Hancock, Hancock v. Berrey (1888), 57 L. J. Ch. 793. *Mentd.* *Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579; *London County & Westminster Bank v. Tompkins*, [1918] 1 K. B. 515

216. ———.]—By an indenture made in 1858, G. mortgaged to his father a share of personal estate to which G. was entitled in reversion, expectant on his mother's death. The father died in 1872, having made another son, O., his exor. & residuary legatee. The mother died in

if one were prepared & sent to him. The mtgee. died two months later, no assignment having been executed by him, & one of the mtges. having been partly discharged by him:—*Held*:

PART IV. SECT. 1, SUB-SECT. 3.—B.
k. Gift of mortgages—Assignment of mortgages not executed.]—The holder of two mtgos., while very ill & about

to start on a journey for the benefit of his health, handed the mtgos. & some title deeds to deft., telling her that they were for her & that he would execute an assignment of them to her

Sect. 1.—Gifts inter vivos: Sub-sect. 3, B., C. & D.; sub-sects. 4 & 5. Sect. 2: Sub-sect. 1, A.]

1887. C. shortly afterwards sent a letter to G., inclosing the indenture, & stating that he handed it over to G. in compliance with the wish of their late mother. C. afterwards changed his mind, & claimed the share under the mtge. No interest had ever been paid on the mtge. debt by G., & no acknowledgment given by him in respect of it:—*Held*: in the absence of any consideration, the letter, though coupled with delivery of the mtge. deed, was not an effectual release, & was incomplete as a gift, & did not amount to a declaration of trust, & C. was entitled to the share.—*Re HANCOCK, HANCOCK v. BERREY* (1888), 57 L. J. Ch. 793; 59 L. T. 197; 36 W. R. 710.

Annotations:—Consd. Re Lake's Trusts (1890), 63 L. T. 416. *Mentd.* London & Midland Bank v. Mitchell, [1899] 2 Ch. 161; *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67; *Re Hazeldine's Trusts* (1907), 77 L. J. Ch. 97.

See, generally, MORTGAGE.

C. Insurance Policies.

217. *Retention by donor.*—J. made a voluntary assignment, by deed, of a policy of assurance upon his own life for £1,000 to trustees upon trust for the benefit of his sister & her children, if she or they should outlive him. The deed was delivered to one of the trustees, & the grantor kept the policy in his own possession. No notice of the assignment was given to the assurance office, & J. afterwards surrendered for a valuable consideration the policy & a bonus declared upon it, to the assurance office. Upon a bill filed by the surviving trustee of the deed, to have the value of the policy replaced:—*Held*: upon the delivery of the deed, no act remained to be done by the grantor to give effect to the assignment of the policy, & he was bound to give security to the amount of the value of the policy assigned by the deed.—*FORTESCUE v. BARNETT* (1834), 3 My. & K. 36; 3 L. J. Ch. 106; 40 E. R. 14; *previous proceedings* (1833), 1 Coop. temp. Cott. 367.

Annotations:—Expld. Edwards v. Jones (1836), 1 My. & Cr. 226; Ward v. Audland (1845), 8 Beav. 201. *Consd.* Bizzey v. Flight (1876), 24 W. R. 957. *Reid.* Kekewich v. Manning (1851), 1 De G. M. & G. 176; Bridge v. Bridge (1852), 16 Beav. 315; Donaldson v. Donaldson (1854), 23 L. T. O. S. 306; Pearson v. Amicable Assoc. Office (1859), 27 Beav. 229; Re King, Sewell v. King (1870), 14 Ch. D. 172; Re Richardson, Weston v. Richardson (1882), 47 L. T. 514; Re Patrick, Bills v. Tatham, [1891] 1 Ch. 82; Re Griffin, Griffin v. Griffin, [1899] 1 Ch. 408; Re Williams, Williams v. Ball, [1917] 1 Ch. 1. *Mentd.* M'Fadden v. Jenkins (1842), 1 Haro, 458; Voyle v. Hughes (1854), 2 Sm. & G. 18; Parnell v. Hingston (1856), 3 Sm. & G. 337.

218. —]—WARD v. AUDLAND, No. 238, *post*.

219. —]—In detinue by an administratrix for a policy of insurance, the evidence was that the intestate had given the policy to deft. No

assignment was executed, but deft. retained the policy, & had possession of it at the time of the intestate's death:—*Held*: the action was not maintainable, for though there had been no assignment of the policy & the right to the money secured by it might not be affected, the right to the document itself passed by the gift to deft.—*RUMMENS v. HARE* (1876), 1 Ex. D. 169; 46 L. J. Q. B. 30; 34 L. T. 407; 24 W. R. 385. C. A.; *previous proceedings* (1875), 32 L. T. 428.

Annotation:—Reid. Re Richardson, Shillito v. Hobson (1885), 30 Ch. D. 396.

220. *Payment of premiums by donor.*—*Qu.*: whether, where by a policy of assurance the policy money is agreed to be paid on the death of A., the assured, to B., his nominee, & A. pays the premiums during his life, this amounts to a complete gift in favour of B., enforceable after the death of A. against his creditors.—*CLAYTON v. OWEN* (1862), 31 Beav. 285; 6 L. T. 802; 8 Jur. N. S. 1117; 54 E. R. 1148; *sub nom.* Re OWEN, CLAYTON v. OWEN, 31 L. J. Ch. 825; 10 W. R. 770.

221. *Effect of death of assignor.*—The owner of a life policy gave it to his housekeeper with the following signed indorsement, namely: "I authorise"—naming her—"my housekeeper & no other person to draw this insurance in the event of my predeceasing her, this being my sole desire & intention at time of taking this policy out, & this is my signature." The assignor paid the premiums until his death:—*Held*: the assignment was inoperative on the ground that it was an incomplete gift, being either a revocable mandate or authority which was revoked by the death of the assignor, or, if taking effect on the death, a testamentary document not duly executed.—*Re WILLIAMS, WILLIAMS v. BALL*, [1917] 1 Ch. 1; 86 L. J. Ch. 36; 115 L. T. 689; 61 Sol. Jo. 42, C. A.

Annotation:—Consd. Re Westerton, Public Trustee v. Gray, [1919] 2 Ch. 104.

Compare Nos. 224–228, 230, 321, 335, post.

See, generally, INSURANCE.

D. Copyright.

222. *Gift by parol.*—*ROBERTS v. BIGNELL, ASHER & ROBERTSON* (1887), 3 T. L. R. 552, D. C. *Annotation:—Mentd.* Fuller v. Blackpool Winter Gardens & Pavilion Co., [1895] 2 Q. B. 429.

See, further, COPYRIGHT, Vol. XIII., pp. 189 et seq.

SUB-SECT. 4.—DEATH OF DONOR PENDING PAYMENT OF CHEQUES.

223. *Cheque presented after donor's death—Effect of death.*—*TATE v. HILBERT*, No. 321, *post*.

there was merely an incomplete & ineffective gift *inter vivos*, & the mtges. formed part of the mtgee's estate.—*WOOD v. BRADLEY* (1901), 21 C. L. T. 107; 1 O. L. R. 118.—*CAN.*

PART IV. SECT. 1, SUB-SECT. 3.—C.

220 i. *Payment of premiums by donor.*—A father took out a policy of assurance upon the life of his pupil son. The policy provided that during the son's minority, the father should be entitled to the surrender value of the policy, & that, if the son died before attaining majority, the premiums there

paid should be repaid to the father; but if the son attained majority & he or his assigns continued to pay the premiums, the sum assured should be paid on his death to his exors. The son was also entitled at majority to exercise certain options. The father paid the premiums during the son's minority. The son attained majority, but died before the next premium fell due, & without having exercised any of the options. He knew of the existence of the policy, but it had not been delivered or intimated to him by his father. In a competition between the father & the son's extrix. for the

proceeds of the policy:—*Held*: as the policy was a gratuitous provision by the father for the son, & as it had never been delivered to the son, either actually or constructively, there had been no completed gift of the policy to him, & he had acquired no *jus quæsitum* under it.—*CARMICHAEL v. CARMICHAEL'S EXECUTRIX*, [1910] S. C. 636.—*SCOT.*

PART IV. SECT. 1, SUB-SECT. 4.

1. *Cheque not presented—Effect of death of donor.*—In June or July, 1889, F. made a gift in the presence of

224. —[*Re* THEOBALD, HOHLER v. WILSON (1892), 9 T. L. R. 110.

225. **Payment in ignorance of death.**—HUGHES v. WAINESLEY (1848), 12 Jur. 834, n.

226. **Cheque presented before donor's death—Complete gift inter vivos.**—(1) A. being indebted to B. in £200 appointed him exor. of his will. When on his death-bed, A. gave to B. a cheque for £900 with the following memorandum thereon: "C., £200, B., £200, exorship. fund £500." At the same time, A. gave to B. verbal instructions to keep £200 in discharge of the debt, to hold £200 for C., & to treat the remaining £500 as part of his estate. The cheque was cashed & the money placed to B.'s account at his bankers before A.'s death:—*Held*: the £200 was a gift *inter vivos* in favour of C., & not a *donatio mortis causa*.

(2) A *donatio mortis causa* is subject to the donor's debts.—TATE v. LEITHEAD (1854), Kay, 658; 2 Eq. Rep. 1105; 23 L. J. Ch. 736; 23 L. T. O. S. 252; 2 W. R. 630; 69 E. R. 279.

Annotations:—As to (1) *Reid*. Bromley v. Brunton (1868), L. R. 6 Eq. 275; *Re* Mead, Austin v. Mead (1880), 43 L. T. 117. *Generally*, *Mentd.* Edwards v. Batley (1854), 23 L. J. Ch. 872.

227. **Payment improperly refused.**—A cheque was given by A. to B., & presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the cheque not having been paid:—*Held*: a complete gift, *inter vivos*, of the amount of the cheque.—BROMLEY v. BRUNTON (1868), L. R. 6 Eq. 275; 37 L. J. Ch. 902; 18 L. T. 628; 16 W. R. 1006.

Annotations:—*Consd.* *Re* Beaumont, Beaumont v. Ewbank, [1902] 1 Ch. 889. *Reid*. *Re* Leaper, Blythe v. Atkinson, [1916] 1 Ch. 579.

228. **Non-payment due to suspicious signature—Subsequent death of donor.**—*Re* SWINBURNE, SUTTON v. FEATHERLEY (1925), 160 L. T. Jo. 296, C. A.

229. — **At foreign bank — Death before presentation at bank on which drawn.**—ROLLS v. PEARCE, No. 335, *post*.

Compare Part V., Sect. 2, sub-sect. 2, B. (c), *post*.

230. **Bill accepted in blank—Authority to fill in—Revocation by death.**—Where value is given for a blank acceptance, the authority to fill it up, being coupled with an interest, is not revoked by death; but where there is no such interest, the authority to fill up & negotiate is terminated by the death of the acceptor.

If C. had given any valuable consideration to S. there would have been room for the argument

that the authority, being coupled with an interest, was not revoked by the death of S. But there was no such valuable consideration. The mere possession of the blank acceptances by C. did not give him such a beneficial interest in them to prevent a revocation by the death of S. (STUART, V.-C.).—HATCH v. SEARLES, STANWAY'S CASE, CONWAY'S CASE (1854), 2 Sm. & G. 147; 2 Eq. Rep. 614; 22 L. T. O. S. 280; 2 W. R. 242, 297; 65 E. R. 342; *affd.*, 24 L. J. Ch. 22, L. JJ.

Annotations:—*Consd.* Carter v. White (1882), 20 Ch. D. 225. *Mentd.* France v. Clark (1884), 26 Ch. D. 257; Faulks v. Atkins (1893), 10 T. L. R. 178.

SUB-SECT. 5.—IMPERFECT DECLARATION OF TRUST.

See Sect. 2, sub-sect. 1, B., *post*.

SECT. 2.—COMPLETION OF INCOMPLETE GIFTS INTER VIVOS.

SUB-SECT. 1.—ASSISTANCE OF COURT.

A. In General.

231. **No assistance to complete — Parol promise to settle estate.**—BROWNSMITH v. GILBORNE (1727), 2 Stra. 738; 93 E. R. 818.

232. **Voluntary agreement to assign.**—I do not lay it down as a universal rule, that the ct. will in no case execute a voluntary conveyance, though I do not recollect a precedent of that sort. It is certain that, in general, cts. will not compel the performance of voluntary agreements. An agreement, in its nature, imports a reciprocity, & a *quid pro quo*, & where that reciprocity does not exist, the power of enforcing it does not exist. I know no instance where a ct. of equity has compelled a man to execute what was a mere act of volition (LORD NORTHINGTON, C.).—WYCHERLEY v. WYCHERLEY (1763), 2 Eden, 175; 28 E. R. 864, L. C.

Annotations:—*Consd.* Houghton v. Houghton (1852), 15 Beav. 278. *Reid*. Bentley v. Mackay (1862), 31 Beav. 143. *Mentd.* Baker v. Bradley (1854), 2 Sm. & G. 531; Hoblyn v. Hoblyn (1889), 41 Ch. D. 200.

233. — (1) Distinction as to volunteers. The assistance of the ct. cannot be had without consideration to constitute a party *cestui que trust*; as upon a voluntary covenant to transfer stock, etc. But if the legal conveyance is actually made, constituting the relation of trustee & *cestui que trust* as if the stock is actually transferred, etc., though without consideration, the equitable interest will be enforced.

witnesses, of £500 by cheque to S., his daughter, to whom he had promised the amount on the occasion of her marriage. He requested her & her husband to hold the cheque until Sept. 15, following, when there would be funds available for its payment; but in Aug. he died, & the cheque was never presented. On an action against the exors. for £500 with interest, & costs, final judgment was ordered for the amount claimed, with interest; & costs were allowed both parties out of the estate.—SINNAMON v. HARDGRAVE (1890), 4 Q. L. J. 16.—**AUS.**

m. *Cheque made payable on death of donor—Effect of.*—A person some months before his death but in good health, gave his housekeeper a bank

cheque in the following terms: £100 sterling Elgin . . . 188. The North of Scotland Banking Company, Elgin—Pay to me or bearer, One Hundred Pounds when am dead, sterling on account of John Grant. In an action by the housekeeper against the grantor's exors. for payment of the sum in the cheque:—*Held*: the cheque was made payable after grantor's death, & so did not dispossess him of anything, it could not operate as a donation, either *inter vivos* or *mortis causa*.—MILNE v. GRANT'S EXECUTORS (1884), 11 R. (Ct. of Sess.) 887.—**SCOT.**

PART IV. SECT. 1, SUB-SECT. 5.

n. *Declaration of intention to settle*

shares.—A. informed his wife that he was going to transfer shares into their joint names as part of a trust fund for her & their daughter's benefit, & that in the meantime, & until the transfer was completed, he would himself hold the shares upon trust:—*Held*: this was not an immediate & complete declaration of trust but merely a declaration by A. of his intention to settle the shares, & of his intention meantime to keep them *in medio*, so that they might be ready when the trust was effectively declared: the whole transaction was inchoate.—ALLAN v. INLAND REVENUE COMRS., [1925] N. 50.—**IR.**

Sect. 2.—Completion of incomplete gifts inter vivos:
Sub-sect. 1. A.]

(2) Settlement of leasehold estates not revoked by a subsequent assignment by the trustee to the settlor, entitled for life, or by the will of the latter; no intention to revoke appearing; & the terms of a power of revocation not being complied with.—*ELLISON v. ELLISON* (1802), 6 Ves. 656; 31 E. R. 1243, L. C.

Annotations:—As to (1) Consd. *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Bridge v. Bridge* (1852), 16 Beav. 315; *Beech v. Keep* (1854), 18 Beav. 285; *Dillrow v. Bone* (1862), 3 Giff. 538. *Expld.* *Paul v. Paul* (1880), 15 Ch. D. 580. *Refd.* *Alexander v. Wellington* (1831), 2 State Tr. N. S. 764; *Garrard v. Lauderdale* (1831), 2 Russ. & M. 451; *Bill v. Cureton* (1835), 2 My. & K. 503; *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Dillon v. Coppin* (1839), 4 My. & Cr. 647; *Hughes v. Stubbs* (1842), 1 Hare, 476; *M'Fadden v. Jenkins* (1842), 1 Hare, 458; *Meek v. Kettlewell* (1842), 1 Hare, 464; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299; *Donaldson v. Donaldson* (1854), Kay, 711; *Burton v. Jackson* (1856), 26 L. T. O. S. 321; *Forbes v. Forbes* (1857), 3 Jur. N. S. 1206; *Macedo v. Stroud*, [1922] 2 A. C. 330. *As to (2) Refd.* *Gilbert v. Overton* (1864), 2 Hem. & M. 110.

234. ———.] — It is clear that this ct. will not assist a volunteer. Yet if the act be completed, though voluntary, the ct. will act upon it. It has been decided that upon an agreement to transfer stock, this ct. will not interpose, but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more (LORD ELDON, C.).—*Ex p. PYE, Ex p. DUBOST* (1811), 18 Ves. 140; 34 E. R. 271, L. C.

Annotations:—Expld. *Meek v. Kettlewell* (1842), 1 Hare, 464. *Consd.* *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Weale v. Ollive* (1853), 17 Beav. 252. *Apprvd.* *Airey v. Hall* (1856), 3 Sm. & G. 315. *Consd.* *Vandenberg v. Palmer* (1856), 4 K. & J. 204; *Forrest v. Forrest* (1865), 34 L. J. Ch. 428; *Roberts v. Roberts* (1865), 13 L. T. 492; *Richardson v. Richardson* (1867), L. R. 3 Eq. 686; *Warriner v. Rogers* (1873), L. R. 16 Eq. 340. *Refd.* *Cooten v. Missing* (1815), 1 Madd. 176; *Hooper v. Goodwin* (1818), 1 Swan. 485; *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Hughes v. Stubbs* (1842), 1 Hare, 476; *M'Fadden v. Jenkins* (1842), 1 Hare, 458; *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299; *Price v. Price* (1851), 14 Beav. 598; *Donaldson v. Donaldson* (1854), Kay, 711; *Tierney v. Wood* (1854), 19 Beav. 330; *Parnell v. Hington* (1856), 3 Sm. & G. 337; *Forbes v. Forbes* (1857), 3 Jur. N. S. 1206; *Milroy v. Lord* (1862), 4 De G. F. & J. 264; *Peckham v. Taylor* (1862), 31 Beav. 250; *Grant v. Grant* (1865), 34 Beav. 623; *Penfold v. Mould* (1867), L. R. 4 Eq. 562; *Harding v. Harding* (1886), 17 Q. B. D. 442. *Mentd.* *Wetherby v. Dixon* (1815), Coop. G. 279; *Colvin v. Fraser* (1829), 2 Hag. Ecc. 266; *Platt v. Platt* (1830), 3 Sim. 503; *Wharton v. Durham* (1834), 3 My. & K. 472; *Powys v. Mansfield* (1837), 3 My. & Cr. 359; *Pym v. Lockyer* (1841), 5 My. & Cr. 29; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Suisse v. Lowther* (1843), 2 Hare, 424; *Kirk v. Eddowes* (1844), 3 Hare, 509; *Dipple v. Corles* (1853), 11 Hare, 183; *Thomas v. Thomas* (1859), 8 W. R. 71; *Tucker v. Burrow* (1865), 2 Hem. & M. 515; *Chichester v. Coventry* (1867), L. R. 2 H. L. 71; *Bennet v. Bennet* (1879), 10 Ch. D. 474; *Montagu v. Sandwich* (1886), 32 Ch. D. 525; *Re Hamlet*, *Stephen v. Cunningham* (1888), 38 Ch. D. 183; *Re Lacon*, *Lacon v. Lacon*, [1891] 2 Ch. 482; *Re Ashton*, *Ingram v. Papillon*, [1897] 1 Ch. 574; *Re Jaques*, *Hodgson v. Brailsby*, [1903] 1 Ch. 267; *Re Roby*, *Howlett v. Newington*, [1908] 1 Ch. 71; *Carter v. Hungerford* (1916), 115 L. T. 857; *Re Dawson*, *Swainson v. Dawson*, [1919] 1 Ch. 102.

235. ———.] — P. being seised of an estate by lease for lives renewable for ever, subject to a rent equal in amount to a rent which a subtenant paid him for part of the estate, agreed in writing to let the other part in his own possession to D., his brother, for the lives of D. & two others, & the life of the survivor, free from rent & assessments during D.'s life, to be subject to a rent of £350 during the other lives or life surviving D.: leases to be executed at the request of either party. A memorandum was added, of the same date, signed by both parties, stating: "Rent to be

payable half-yearly, every May 1, & Nov. 1, 'henceforward.'" Prior to the agreement, D. being elected Member of Parliament for a city, was required to take the Members' qualification oath; & a petition was threatened against his return for want of qualification, but was abandoned at the date of the agreement. P. died intestate, without executing a lease, or parting with possession:—*Held*: the circumstances & evidence showed that the object of the agreement was to give D. a qualification for Parliament; that no interest in the property passed, & that the parties never intended that the agreement should be executed; & therefore the execution of it could not be enforced, either as an agreement for valuable consideration (which was the case made by the bill), or as a gift.

Cts. of equity do not decree specific performance of incomplete gifts.—*CALLAGHAN v. CALLAGHAN* (1841), 8 Cl. & Fin. 374; 8 E. R. 145, H. L.

236. ———.] — Testator bequeathed a sum of money to trustees in trust for his daughter for life, & in case she died without leaving issue, for her next of kin, exclusive of her husband. During the lifetime of the daughter, her mother, as presumptive next of kin, by a voluntary deed assigned her expectant interest in reversion to the husband:—*Held*: on the death of the daughter, without leaving issue, the assignment operated only as an agreement to assign; & consequently that being voluntary, a ct. of equity would not enforce it.—*MEEK v. KETTLEWELL* (1843), 1 Ph. 342; 13 L. J. Ch. 28; 2 L. T. O. S. 205; 7 Jur. 1120; 41 E. R. 662, L. C.

Annotations:—Apprvd. *Price v. Price* (1851), 14 Beav. 598. *Consd.* *Bridge v. Bridge* (1852), 16 Beav. 315; *Voyle v. Hughes* (1854), 2 Sm. & G. 18. *Expld.* *Penfold v. Mould* (1867), L. R. 4 Eq. 562. *Consd.* *Re Parsons*, *Stockley v. Parsons* (1890), 45 Ch. D. 51. *Fold.* *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697. *Consd.* *Re Mudge*, [1914] 1 Ch. 115. *Refd.* *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365; *De Houghton v. Money* (1865), L. R. 1 Eq. 154; *Richardson v. Richardson* (1867), L. R. 3 Eq. 686; *Baddeley v. Baddeley* (1878), 38 L. T. 906; *Harding v. Harding* (1886), 17 Q. B. D. 442; *Re Lind*, *Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345. *Mentd.* *Cramer v. Moore* (1855), 25 L. T. O. S. 31; *Re Johnson*, *Moore v. Johnson*, [1891] 3 Ch. 48.

237. ———.] — (1) If the legal owner of stock execute a declaration of trust in favour of a volunteer, equity will compel the execution of the trust; but if he merely assigns the stock & makes no transfer, the ct. will afford him no assistance.

(2) Voluntary settlement of an equitable interest in real estate held ineffectual, the legal estate not having passed to the trustees thereof.—*BRIDGE v. BRIDGE* (1852), 16 Beav. 315; 22 L. J. Ch. 189; 20 L. T. O. S. 75; 16 Jur. 1031; 1 W. R. 4; 51 E. R. 800.

Annotations:—As to (1) Consd. *Beech v. Keep* (1854), 18 Beav. 285. *Dbtd.* *Re King*, *Sewell v. King* (1870), 14 Ch. D. 179. *Refd.* *Donaldson v. Donaldson* (1854), 1 Jur. N. S. 10; *Tierney v. Wood* (1854), 19 Beav. 330; *Re Way's Trusts* (1864), 4 New Rep. 453. *As to (2) Consd.* *Beech v. Keep* (1854), 18 Beav. 285; *Gilbert v. Overton* (1864), 2 Hem. & M. 110. *Generally, Mentd.* *Hogarth v. Phillips* (1858), 4 Drew. 360; *Lambe v. Orton* (1860), 1 Drew. & Sm. 125.

238. Voluntary settlement.] — (1) A trustee under a voluntary settlement of chattels, policy of assurance & intge., filed a bill against the representatives of the settlor for the recovery thereof:—*Held*: if the property was legally vested in pltf., he might recover it at law & apply it on the trusts; but if otherwise, then as the deed was voluntary, the ct. could afford pltf. no assistance in recovering it.

(2) In the case of an imperfect voluntary deed, neither the assignor nor his exor. can be compelled to permit the assignee to use his name for the recovery of the debt.

(3) Neither a voluntary assignment by deed of a mtge. debt, accompanied by a grant, not specifying the particular estate, but of all estates held in mtge., & by a covenant for further assurance & without delivery of the mtge. deed or notice to the mtgor., nor the voluntary assignment of a policy of assurance retained in the hands of the assignor, & without notice given to the grantor, though accompanied by a covenant for further assurance, can be considered as a complete & effectual assignment, to be acted upon & enforced by the assignee, without any further or other act to be done by the assignor.—WARD v. AUDLAND (1845), 8 Beav. 201; 14 L. J. Ch. 145; 9 Jur. 384; 50 E. R. 79; *subsequent proceedings* (1847), 16 M. & W. 862.

Annotations:—As to (1) Rejd. Kekewich v. Manning (1851), 1 De G. M. & G. 176; *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461. *Generally, Mentd. Price v. Price* (1851), 14 Beav. 598; *Parnell v. Hingston* (1856), 3 Sm. & G. 337; *Walrond v. Walrond* (1858), 28 L. J. Ch. 97.

239. ———.—]—BRIDGE v. BRIDGE, No. 237, *ante*.

240. ———. **Transfer of shares.**]—WEALE v. OLIVE, No. 204, *ante*.

241. ———.—]—FORREST v. FORREST, No. 121, *ante*.

242. ———. **Transfer of stock.**]—*Ex p. PYE, Ex p. DUBOST*, No. 234, *ante*.

243. ———.—]—BEECH v. KEEP, No. 253, *post*.

244. ———.— **Assignment of equitable interest intended.**]—A husband may constitute himself a trustee for his wife, the declaration need not be in writing, but the words must be clear, unequivocal & irrevocable.

Any words that show that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property, are, in my opinion, sufficient for the purpose of creating the trust. If A. who has a £1,000 consols standing in his name says to B., in the presence of witnesses or in writing, it does not matter which, "I hereby give you £1,000 consols now standing in my name in the books of the governor & company of the Bank of England, in my opinion that would create A. a trustee for B. & the gift would be complete. I think that is what is established in *Ex p. Pye, Ex p. Dubost*, No. 234, *ante* (ROMILLY, M.R.).—GRANT v. GRANT (1865), 34 Beav. 623; 6 New Rep. 347; 34 L. J. Ch. 641; 12 L. T. 721; 11 Jur. N. S. 787; 13 W. R. 1057; 55 E. R. 776.

Annotations:—Consd. Baddeley v. Baddeley (1878), 9 Ch. D. 113; *Re Breton's Estate, Breton v. Woollven* (1881), 17 Ch. D. 416. *Rejd. Moore v. Moore* (1874), L. R. 18 Eq. 474. *Mentd. Browne v. Collins* (1872), 21 W. R. 222; *Williams v. Mercer* (1882), 51 L. J. Q. B. 594.

245. ———. **Agreement to transfer interest in land—Lease.**]—The principle of this ct., established by a great number of cases, is that it will not interfere between volunteers, in the legal sense of the term, but will leave them to their remedy at law, whatever that may be. The ct. will neither, at the instance of the donor who repents

his gift, cause the deed of gift to be delivered up, nor will it at the instance of the donee interfere to complete an imperfect deed of gift.

A ct. of equity will not, in the absence of fraud set aside, in favour of a subsequent purchaser for valuable consideration, a voluntary gift of an interest in land made by an instrument not under seal, but will leave the parties to their remedy at law.

A. entered into a voluntary agreement as to a leasehold with C., & he afterwards contracted to sell it to E. for valuable consideration:—*Held*: a suit by E. against A. & C. to have the rights of the parties declared & the voluntary agreement cancelled, could not be maintained.—DE HOUGHTON v. MONEY (1865), L. R. 1 Eq. 154; 35 Beav. 98; 14 W. R. 159; 55 E. R. 832; *sub nom. HOUGHTON v. MONEY*, 13 L. T. 447; *affd. DE HOUGHTON v. MONEY* (1866), 2 Ch. App. 161, L. J.J.

Annotation:—Rejd. Townend v. Toker (1866), 35 L. J. Ch. 608.

246. ———.—]—Deft. K., claimed a leasehold messuage, which she alleged testator had built for her. The land on which this house was built was to be held on a long lease from the Dover Harbour Board, to be granted to testator upon the completion of the house. This lease, however, had not been granted at the time of testator's death, but there was a duplicate copy in an envelope amongst testator's papers, on which was written "for K." Proposals for a lease of a part of this house had been made & accepted, & on the envelope, which contained the letter of acceptance, was written, "The lease of twenty-one years to T., of London, to be made out in K.'s name," also, "T.'s rent to be paid to K., making without harbour rent, £45." Evidence of testator's intention was given. Deft., K., was appointed extrix:—*Held*: as to the leasehold house, the gift was an imperfect gift, which could not be perfected without the aid of the ct., & that aid, according to the principles laid down in *Milroy v. Lord*, No. 206, *ante*, could not be given.—BOTTLE v. KNOCKER (1876), 46 L. J. Ch. 159; 35 L. T. 545; 25 W. R. 209.

Compare No. 259, *post*.

247. ———. **Transfer of real estate.**]—The ct. will not enforce an incomplete voluntary assignment, evidenced by delivery of a box, retaining the key, such box containing what purported to be a written memorandum of gift of real estates & chattels, the memorandum not being under seal.—WARRINER v. ROGERS (1873), L. R. 16 Eq. 340; 42 L. J. Ch. 581; 28 L. T. 803; 21 W. R. 766.

Annotations:—Consd. Richards v. Delbridge (1874), L. R. 18 Eq. 11. *Distd. Baddeley v. Baddeley* (1878), 48 L. J. Ch. 36. *Consd. Re Shield, Pethybridge v. Burrow* (1885), 53 L. T. 5. *Rejd. Heartley v. Nicholson* (1875), L. R. 19 Eq. 233.

248. ———. **As gift inter vivos—Gift invalid as donatio mortis causa.**]—To constitute a good *donatio mortis causa*, the gift must be made in contemplation of death, & to take effect only on the death.

A party being afflicted with cancer, of which complaint she died, executed an assignment of "all her right, title, & interest in a bond," to her niece, & she died five days after:—*Held*: it was not a valid *donatio mortis causa*, & the assistance

PART IV. SECT. 2, SUB-SECT. 1.—A.

245 i. *No assistance to complete.*]—*Agreement to transfer interest in land—Lease.*]—CALLAGHAN v. CALLAGHAN (1841), 8 Cl. & Fin. 374.—IR.

Sect. 2.—Completion of incomplete gifts inter vivos:
Sub-sect. 1, A. & B.]

of the ct. in carrying into effect the assignment in favour of the niece as a gift *inter vivos* should be refused.—**EDWARDS v. JONES** (1836), 1 My. & Cr. 226; 5 L. J. Ch. 194; 40 E. R. 361, L. O.

Annotations:—**Consd.** Meek v. Kettlewell (1843), 1 Ph. 342; Kekewich v. Manning (1851), 1 De G. M. & G. 176; Price v. Price (1851), 14 Beav. 598; Donaldson v. Donaldson (1854), Kay, 711; *Re* Richardson, Shillito v. Hobson (1885), 30 Ch. D. 396. **Refd.** M'Fadden v. Jenkyns (1842), 1 Haro, 458; Bridge v. Bridge (1852), 16 Beav. 315; Staniland v. Willott (1852), 3 Mac. & G. 664; Voyle v. Hughes (1854), 2 Sm. & G. 18; Pownall v. Anderson (1856), 2 Jur. N. S. 857; Moore v. Moore (1874), L. R. 18 Eq. 474; *Re* Shield, Pethybridge v. Burrow (1885), 53 L. T. 5. **Mentd.** Beaton v. Beaton (1841), 12 Sim. 281; Ward v. Audland (1845), 8 Beav. 201.

249. —.]—**HOWARD v. FINGALL**, No. 4, *ante*.

250. —.]—Effect given to a voluntary assignment of a policy of assurance containing an irrevocable power of attorney.

No person can state too strongly to command my assent the proposition that if a voluntary assignment of any property is imperfect or incomplete & the assistance of a ct. of equity is required to give effect to it, this ct. will not interfere to give effect to it (**LORD ROMILLY, M.R.**).

I fully admit that in these cases there is a distinction between that species of instrument which, by assignment, passes the property, & that which simply operates as a declaration of trust. The question is whether this is a complete instrument or whether it requires the assistance of a ct. of Equity for its enforcement? I am of opinion that it is a complete & perfect instrument (**LORD ROMILLY, M.R.**).—**PEARSON v. AMICABLE ASSURANCE OFFICE** (1859), 27 Beav. 229; 7 W. R. 629; 54 E. R. 89.

Annotations:—**Refd.** Garrick v. Taylor (1860), 29 Beav. 79; *Re* King, Sewell v. King (1879), 14 Ch. D. 179.

Exception in favour of donatio mortis causâ.]—
See Part V., Sect. 4, *post*.

B. Incomplete Gift not Construed as Declaration of Trust.

251. Gift by transfer intended—Stock—No consideration.]—**ELLISON v. ELLISON**, No. 233, *ante*.

252. By ineffectual instrument.]—
ANTROBUS v. SMITH, No. 201, *ante*.

253. No transfer made.]—This ct. will not enforce the transfer of stock in favour of a volunteer to whom it has been merely assigned. Some consols belonging beneficially to A. for life, with remainder to B., stood in the names of two trustees, of the survivor of whom B. was the representative. B. voluntarily assigned the stock

to A., but no transfer was made. The ct. refused either to declare B. a trustee of the stock for A. or to compel her to transfer it. The distinction between an assignment for the benefit of a volunteer, & a declaration of trust in his favour, though very thin, yet pervades the cases.—**BEECH v. KEEP** (1854), 18 Beav. 285; 23 L. J. Ch. 539; 23 L. T. O. S. 54; 18 Jur. 971; 2 W. R. 316; 52 E. R. 113.

Annotations:—**Refd.** Donaldson v. Donaldson (1854), 23 L. T. O. S. 306; *Re* Way's Trusts (1864), 10 Jur. N. S. 836.

254. —.]—**MILROY v. LORD**, No. 206, *ante*.

255. By husband to wife.]—**MOORE v. MOORE**, No. 209, *ante*.

256. Whether relationship material.]—Words importing a present intention on the part of a husband to make a gift to his wife cannot be held to operate as a declaration of trust. There is no difference in this respect between an intended gift to a wife & an intended gift to a stranger.—*Re* **BRETON'S ESTATE**, **BRETON v. WOOLLVEN** (1881), 17 Ch. D. 416; 50 L. J. Ch. 369; 44 L. T. 337; 29 W. R. 777.

Annotation:—**Consd.** *Re* Whittaker, Whittaker v. Whittaker (1882), 21 Ch. D. 657.

257. Direction to transfer after death.]—Some time before his death testator informed his daughter's companion, F. P., that he intended to give her a debenture bond for £1,000 in the M. S. & L. Ry. Co. Shortly afterwards he signed the following memorandum: "I wish to communicate to my exors. that I have to-day given to Miss F. P. my £1,000 debenture bond of the M. S. & L. Ry. Co.; but, as I shall require the annual dividends to meet my necessary expenses, I retain the document in my own possession for my lifetime, requesting you, on my decease, to hand it over to Miss F. P., & communicate to the secretary of the railway co. at the Manchester office, relative to the transfer of the said bond being entered in their books. Given under my hand this 9th day of Feb. 1882. As witness my hand —G. S. P.S.—You will find the bond in my deed-box attached to this memorandum." After testator's death a certificate of debenture stock for £1,000 in the M. S. & L. Ry. Co. was found with the memorandum in the deed-box:—**Held**: the memorandum was an ineffectual attempt to assign the debenture stock, & did not amount to a good declaration of trust, & F. P. had no interest in the debenture stock.—*Re* **SHIELD, PETHYBRIDGE v. BURROW** (1885), 53 L. T. 5, C. A.

258. Attempt to assign lease—By letter.]—Testator, having, by his will, given certain leaseholds to A., for life, with a power of appointment, & in default, to A.'s children, writes a letter to his solr., in whose hands the lease is deposited,

249 i. No assistance to complete.]—*Re* **ELLIS**, *Ex p.* OFFICIAL ASSIGNEE, **ELLIS** (1894), 15 N. S. W. B. 41.—**AUS.**

c. — Voluntary promise to pay —Donee unaware of promise until after donor's death.]—**ALISON v. ALISON** (1890), 11 N. S. W. Eq. 162.—**AUS.**

p. — Deposit of money.]—**SPRUCE v. EDWARDS**, 25 C. L. T. 118.—**CAN.**

q. — In joint names of donor & donee—Gift testamentary in character.]—S. deposited money in the joint name of himself & his niece, with right of either or the survivor to withdraw, & his intention was that she

should have the balance at his death:—**Held**: that as it was neither a gift *inter vivos* nor a trust created in her favour, but a gift testamentary in character, it was ineffectual by reason of the provisions of C. S. 1903, c. 160.—**SHORTILL v. GRANNEN** (1920), 47 N. B. R. 463; 55 D. L. R. 416.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 1.—B.

252 i. Gift by transfer intended—Stock—By ineffectual instrument.]—**AMARENDRA KRISHNA DUTT v. MONTMUNJARY DEB** (1921), 1 L. R. 48 Calc. 986.—**IND.**

252 ii. — — — —.]—**WEST v.**

WEST (1882), 9 L. R. Ir. 121.—**IR.**

253 i. — — — No transfer made.]—In 1866, B. delivered to each of his nieces a govt. debenture, writing their names in pencil in the corner of their respective debentures. The debentures remained in their possession for three years, when they were handed back to B. for safe keeping. In 1868 B., without consulting his nieces, sold the debentures:—**Held**: there had been no gift to or valid declaration of trust for the nieces.—**REDDIN v. STAFFORD** (1871), 5 Nfld. L. R. 389.—**NFLD.**
r. — Deposit receipt of money in bank.]—**O'FLAHERTY v. BROWNE**, [1907] 2 I. R. 416, 428.—**IR.**

stating that he had given such lease to his son, in trust for his two daughters, or, in the event of their death, of any other of his children. The letter concluded with the words, "This is my instruction to you, as my solr.," & was signed by testator, a witness's name being appended. This document is delivered to the son, & by him to the solr., but there is no evidence to show that anything was done upon it, or of what passed on the occasion of the letter being written:—*Held*: the document did not constitute a gift *inter vivos*, nor a declaration of trust.

Upon the question whether this document operated in any way to give the two children [of A.] the beneficial interest in the two leasehold houses, it was beyond controversy that it was not a testamentary instrument which would take effect on the death of [testator]. If it operated at all it must do so immediately as between the parties. It was clear it would not operate as an assignment. The only other mode in which it could operate was that contended for by counsel for the two children, namely that *co instanti* it constituted [testator] a trustee for the children & that was really the only question. But before resorting to a subtle & ingenious argument to prove that it was so, the instrument itself must be looked at, to see what, upon an ordinary interpretation it purported to be (KINDERSLEY, V.-C.).—*Re MILLS'S ESTATE* (1859), 7 W. R. 372.

259. — By indorsement on title deeds.]—An imperfect voluntary gift that has been intended to take effect by transfer will not have effect given to it as a declaration of trust.

A person entitled to a leasehold mill, with plant, machinery & stock-in-trade, indorsed on the lease a memorandum: "This deed & all thereto belonging I give to A. from this time forth, with all the stock-in-trade;" & he signed the memorandum & handed the deed to A.'s mother. After his death A. claimed the mill & appurtenances on the ground that the memorandum amounted to a valid declaration of trust:—*Held*: A.'s claim was bad, on the ground that words importing a present intention to give cannot be held to amount to an intention to retain as trustee.—*RICHARDS v. DELBRIDGE* (1874), L. R. 18 Eq. 11; 43 L. J. Ch. 459; 22 W. R. 584.

Annotations:—*Consd.* Heartley v. Nicholson (1875), L. R. 19 Eq. 233; *Re Breton's Estate*, Breton v. Woolven (1881), 17 Ch. D. 416. *Refd.* Moore v. Moore (1874), L. R. 18 Eq. 474; *Re Caplen's Estate*, Bulbeck v. Silvester (1876), 45 L. J. Ch. 280; *Baddeley v. Baddeley* (1878), 9 Ch. D. 113. *Re Shild, Pethybridge v. Burrow* (1885), 53 L. T. 5; *Re Ashcroft, Ex p. Todd* (1887), 19 Q. B. D. 186; *Re Patrick, Bills v. Tatham* (1890), 63 L. T. 752; *Carter v. Carter*, [1896] 1 Ch. 62. *Mentd.* *Re Gompertz's Estate*, Parker v. Gompertz (1911), 56 Sol. Jo. 11; *German v. Yates* (1915), 32 T. L. R. 52; *Re Chrimes, Locovich v. Chrimes*, [1917] 1 Ch. 30.

260. — Documents operating as assignment—Or declaration of trust—Assurance policy.]—*PEARSON v. AMICABLE ASSURANCE OFFICE*, No. 250, *ante*.

261. — — — — —]—Where an instrument is in form a complete & immediate assignment, & of such a nature as to give the assignee a right

as between him & the assignor to take or receive the property comprised in it presently, it will, although voluntary, be supported in equity & considered as a perfect declaration of trust of such of the property as was not assignable at law.

Therefore, where A. by a voluntary deed, assigned to B. "all her personal estate," & appointed him her attorney to recover, receive & give receipts for the same:—*Held*: after A.'s death, two promissory notes, one payable to A. & the other to A. or order, & the moneys secured thereby, passed to the donee, though the notes were not endorsed to him.—*RICHARDSON v. RICHARDSON* (1867), L. R. 3 Eq. 686; 36 L. J. Ch. 653; 15 W. R. 690.

Annotations:—*Consd.* Warriner v. Rogers (1873), L. R. 16 Eq. 340. *Refd.* *Richards v. Delbridge* (1874), L. R. 18 Eq. 11. *Consd.* *Re Breton's Estate*, Breton v. Woolven (1881), 17 Ch. D. 416. *Refd.* *Penfold v. Mould* (1867), 17 L. T. 59; *Baddeley v. Baddeley* (1878), 9 Ch. D. 113; *Re King, Sewell v. King* (1879), 14 Ch. D. 179.

262. Cheque to infant son—Subsequently taken back.]—A father put a cheque into the hand of his son of nine months old, saying, "I give this to baby for himself," & then took back the cheque & put it away. He also expressed his intention of giving the amount of the cheque to the son. Shortly afterwards the father died, & the cheque was found amongst his effects:—*Held*: in the circumstances, there had been no gift to or valid declaration of trust for the son. A parol declaration of trust in favour of a volunteer may be valid, & may be enforced in equity.—*JONES v. LOCK* (1865), 1 Ch. App. 25; 35 L. J. Ch. 117; 13 L. T. 514; 11 Jur. N. S. 913; 14 W. R. 149, L. C.

263. Settlement—Complete alienation effected.]—The ct. will, in particular circumstances, convert an imperfect gift into a trust, although not supported by valuable consideration.

Residuary estate consisting of money funds was bequeathed to a mother & daughter in trust for the mother for life, & afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage the daughter assigned her interest under the will to trustees, upon trust for the issue of the marriage & for a niece of the daughter & the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death:—*Held*: even if the settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement, against the daughter & the trustees of another settlement which she made upon a second marriage inconsistent with the former settlement.

It is, on legal & equitable principles, we apprehend, clear that a person *sui juris*, acting freely, fairly & with sufficient knowledge, ought to have, & has it in his power to make, in a binding & effectual manner, a voluntary gift of any part

260 i. — Documents operating as assignment—Or declaration of trust—Assurance policy.]—*KREH v. MOSES* (1892), 22 O. R. 307.—*CAN.*

260 ii. — — — — —]—Written application to an insurance co. for \$2,000 insurance, the policy "to be

payable in case of death by accident under the provisions thereof to M.," wife of deceased. The co. issued its policy payable to the representatives or assigns of the assured. M.'s name was not mentioned in the policy, neither was there anything in it to indicate in any way her as a beneficiary:—*Held*: there was no complete

gift *inter vivos* of the policy & fund to M. from her husband; & the intended gift being purely voluntary & incomplete, the ct. would not complete it, & there was no trust created & declared in her favour.—*CORNWALL v. HALIFAX BANKING CO.* (1896), 35 N. B. R. 398.—*CAN.*

Sect. 2.—Completion of incomplete gifts inter vivos
Sub-sect. 1, B.; sub-sects. 2 & 3.]

of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, & howsoever circumstanced (KNIGHT BRUCE, L.J.).—*KEKEWICH v. MANNING* (1851) 1 De G. M. & G. 176; 21 L. J. Ch. 577; 18 L. T. O. S. 263; 16 Jur. 625; 42 E. R. 519, L. J.

Annotations:—Distd. Bridge v. Bridge (1852), 16 Beav. 315; Beech v. Keep (1854), 18 Beav. 285. *Consd.* Donaldson v. Donaldson (1854), Kay, 711; Voyle v. Hughes (1854), 2 Sm. & G. 18. *Distd.* Scales v. Maude (1855), 6 De G. M. & G. 43. *Fold.* Richardson v. Richardson (1867), L. R. 3 Eq. 686. *Consd.* Warriner v. Rogers (1873), L. R. 16 Eq. 340. *Distd.* Vasseaur v. Vasseaur (1909), 25 T. L. R. 250. *Refd.* Paterson v. Murphy (1853), 11 Hare, 88; Wilkinson v. Wilkinson (1857), 4 Jur. N. S. 47; Milroy v. Lord (1862), 4 De G. F. & J. 264; Penfold v. Mould (1867), L. R. 4 Eq. 562; Richards v. Delbridge (1874), L. R. 18 Eq. 11; Baddeley v. Baddeley (1878), 48 L. J. Ch. 36; Re King, Sewell v. King (1879), 14 Ch. D. 179; Re Walhampton Estate (1884), 26 Ch. D. 391; Re Lucan, Harding v. Cobden (1890), 45 Ch. D. 471; Johnstone v. Mappin (1891), 60 L. J. Ch. 241; Re Patrick, Bills v. Tatham, [1891] 1 Ch. 82; Re Ellenborough, Towry Law v. Burne, [1903] 1 Ch. 697; Re Spark's Trusts, Spark v. Massey, [1904] 1 Ch. 451. *Mentd.* Page v. Cox (1852), 10 Hare, 163; Cramer v. Moore (1855), 3 Sm. & G. 141; Crofts v. Middleton (1856), 8 De G. M. & G. 192; Pownall v. Anderson (1856), 2 Jur. N. S. 837; Bartlett v. Bartlett (1857), 3 Sm. & G. 533; Consolidated Investment & Insce. v. Riley (1859), 29 L. J. Ch. 123; Clarke v. Wright (1861), 6 H. & N. 849; Dilrow v. Bone (1862), 31 L. J. Ch. 417; Gilbert v. Overton (1864), 10 L. T. 900; Glegg v. Rees (1871), 7 Ch. App. 71; Price v. Jenkins (1876), 4 Ch. D. 483; Paul v. Paul (1880), 15 Ch. D. 580; Re Flavell, Murray v. Flavell (1883), 23 Ch. D. 89.

SUB-SECT. 2.—WHERE ALTERATION IN POSITION OF DONEE.

264. Expense incurred in anticipation of gift—House built on land subject of gift—Donee entitled to conveyance.]—A father placed one of his sons in possession of land belonging to the father, & at the same time signed a memorandum that he had presented the land to the son for the purpose of furnishing him with a dwelling-house. The son, with the assent & approbation of the father, built at his own expense a house upon the land & resided there:—*Held*: this was not a mere incomplete gift, but the son was entitled to call for a legal conveyance, & not merely of a life estate, but of the whole fee simple.—*DILLWYN v. LEWELYN* (1862), 4 De G. F. & J. 517; 31 L. J. Ch. 658; 6 L. T. 878; 8 Jur. N. S. 1068; 10 W. R. 742; 45 E. R. 1285, L. C.

Annotations:—Mentd. Plimmer v. Wellington Corpn. (1884), 9 App. Cas. 699; Re Williams & Parry's Contract (1895), 72 L. T. 869.

265. — School established.]—S. promised to leave pltf's. £3,000 by will for the maintenance

of a school, & in consequence, pltf's. established a school, but subsequently S. left all her property to deft.:—*Held*: pltf's. were entitled to be paid £3,000 from the estate by way of damages for breach of contract.—*Re SOAMES, CHURCH SCHOOLS CO., LTD. v. SOAMES* (1897), 13 T. L. R. 439.

266. Purported gift of leasehold house—Payment by donee of ground rent & rates.]—A., the owner of a leasehold house, verbally agreed to allow B. to occupy the house during her life, that she might maintain herself by letting lodgings, B. paying the ground rent & rates & taxes. B. accordingly broke off certain negotiations for a business she was then contemplating, & entered into possession of the house, & there remained until A.'s death, maintaining herself by letting lodgings, & duly paying the ground rent, rates & taxes. A.'s residuary legatee having brought an action of ejectment against B. & pleaded Stat. Frauds:—*Held*: there was a good gift of the house to B. for life, she having on the faith of A.'s representations, not only altered her mode of life but also entered into possession.—*COLES v. PILKINGTON* (1874), L. R. 19 Eq. 174; 44 L. J. Ch. 381; 31 L. T. 423; 23 W. R. 41.

Annotation:—Refd. Alderson v. Maddison (1880), 5 Ex. D. 293.

267. Possession by donee.]—In 1889 deft. was married to pltf.'s son, & pltf. gave to his son as a marriage present, but only by word of mouth, a certain business carried on at a certain house, & also, as deft. contended but pltf. denied, the lease of that house. Directly after the marriage, possession of the house was given up by pltf. & was held by the son, & he carried on the business there for his own benefit till his death, which occurred in April, 1891. Soon after that event a family disagreement arose, & pltf. brought an action of ejectment to recover possession of the house:—*Held*: the possession of the house given up to the son, equivalent to part performance, dispensed with the necessity of a writing; & as nothing was said to the contrary, the gift was free from incumbrances.—*SHARMAN v. SHARMAN* (1892), 67 L. T. 833; 9 T. L. R. 101; 37 Sol. Jo. 79; 4 R. 124, C. A.

See, generally, LANDLORD & TENANT; SPECIFIC PERFORMANCE.

SUB-SECT. 3.—APPOINTMENT OF DONEE AS EXECUTOR.

Appointment of exors. generally, *see* EXECUTORS, Vol. XXIII., pp. 26 *et seq.*

268. Intention expressed in donor's lifetime—Release of debt.]—Testator, having lent a sum of

reliance on the gift has entered into possession & done extensive improvements on the land.—*BROGDEN v. BROGDEN*, (1920) 2 W. W. R. 803; 53 D. L. R. 362.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 3.

268 i. Intention expressed in donor's lifetime—Release of debt.]—Testatrix lent her daughter money; & two documents were executed. By the first, signed by the daughter, she acknowledged the receipt of the sum as a loan. . . . By the second, signed by testatrix, she declared that, notwithstanding any testamentary disposal of her estate, the sum lent to her daughter was thereby given to her absolutely . . . the said gift . . .

PART IV. SECT. 2, SUB-SECT. 2.

s. Expense incurred in anticipation of gift—House built on land subject of gift—Death of donee—Rights of donee's widow.—Deft. made a gift of a piece of land to his son, R., for the purposing of erecting a house upon it in which to live. R. went into exclusive possession of the land with deft.'s consent, & made permanent improvements, including the erection of a house. Deft. promised to give it, a deed of the land, but failed so to do, & after the death of R., ejected his widow, & resumed possession of the land with the improvements:—*Held*: the ct. would protect the donee & those claiming under him in the enjoyment of the property, & it was

not open to deft., after having made an oral gift of the land to his son, & after the expenditure made on the face of that gift, to avail himself of Stat. Frauds.—*DAGLEY v. DAGLEY* (1905), 38 N. S. R. 313.—*CAN.*

t. — Improvements by donee—Right of donee on donor's death.]—*BIERN v. BIERN* (1871), 18 Gr. 497.—*CAN.*

u. — Rebuilding church—Promise of subscription.]—*BERKELEY STREET CHURCH v. STEVENS* (1875), 37 U. C. R. 9.—*CAN.*

a. Gift of land—By parol.]—A verbal gift of land is binding & will be perfected by the ct. where the donee, with the knowledge of the donor, in

money to a person, whom she afterwards appointed her exor., & having during her lifetime verbally forgiven him the debt:—*Held*: the appointment of the debtor as exor. was such a transfer at law as would make the gift complete.—*STRONG v. BIRD* (1874), L. R. 18 Eq. 315; 43 L. J. Ch. 814; 30 L. T. 745; 22 W. R. 788.

Annotations:—*Distd.* *Bottle v. Knockor* (1876), 46 L. J. Ch. 159. *Consd.* *Re Applebee, Leveson v. Beales*, [1891] 3 Ch. 422. *Distd.* *Re Hyslop, Hyslop v. Chamberlain*, [1894] 3 Ch. 522. *Apld.* *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408; *Re Stewart, Stewart v. McLaughlin*, [1908] 2 Ch. 251. *Consd.* *Vavasseur v. Vavasseur* (1909), 25 T. L. R. 250. *Distd.* *Re Innes, Innes v. Innes*, [1910] 1 Ch. 188. *Apld.* *Re Pink, Pink v. Pink*, [1912] 2 Ch. 528; *Re Goff, Featherstonehaugh v. Murphy* (1914), 111 L. T. 34. *Consd.* *Carter v. Hungerford*, [1917] 1 Ch. 260. *Mentd.* *Goddard v. O'Brien* (1889), De Colyar's County Court Cases 110. *Reid.* *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89. *Mentd.* *Sprange v. Lee*, [1908] 1 Ch. 424. *Reid.* *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149; *Re Westerton, Public Trustee v. Gray*, [1919] 2 Ch. 104.

269. ——— Proof of will unnecessary.]—Testatrix, who was a member of pltf.'s congregation, during her life paid to him or on his behalf various sums of money, & by her will she bequeathed legacies to him & appointed him joint exor. with deft., to whom she bequeathed her residuary estate. By a codicil she gave additional legacies to pltf., he being then considerably indebted to her. Deft. alone proved the will, & he refused to pay pltf.'s legacies, on the ground that at the date of her death pltf. was indebted to testatrix to an amount exceeding the value of such legacies. Pltf. alleged that the sums paid to him by testatrix were intended by her to be gifts. There was evidence that deft. was a party to the making of the codicil, & was aware of testatrix's intention that pltf.'s legacies should be paid to him in full:—*Held*: notwithstanding pltf. had not proved the will, his appointment as exor. was sufficient to release the debt at law, & any claim in equity was rebutted by the presumption of testatrix's intention to forgive the debt.—*Re APPLEBEE, LEVESON v. BEALES*, [1891] 3 Ch. 422; 60 L. J. Ch. 793; 65 L. T. 406; 40 W. R. 90.

Annotations:—*Reid.* *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408; *Re Pink, Pink v. Pink*, [1912] 1 Ch. 498.

270. ——— Part of debt.]—Testator during his life made advances of £9,800 to his son-in-law M. In testator's ledger there was an entry with respect to M.'s debt in 1905 that £5,000 had been given off the debt for an object arranged with M.'s wife; & in June, 1909, there was a further entry: "This debt is absolutely cancelled from this date, viz. £4,800 & interest. E. P." By his will made in Mar. 1908, testator appointed M. to be one of his exors. & settled a sum of £20,000 & one-fourth of his residue upon M.'s wife, & children, & directed that if M.'s wife should die within seven years of his death, any sum due from M. should be absolutely extinguished, & that any loss sustained in respect of any indebtedness of M. should be credited as a loss to the trust legacy of £20,000 & not as a loss to his residuary estate. Upon a summons by the legal personal representatives of testator to have it determined

whether the debts were still due, the ct. held that there was not sufficient evidence of an intention by testator to make a gift, but even if there were such an intention or an imperfect gift, it was not perfected by the appointment of M. as exor.; the case did not come within *Strong v. Bird*, No. 268, *ante*, & the whole debt of £9,800 was still due. M. & his wife appealed:—*Held*: as to £5,000 the indebtedness continued, but as to £4,800 it had been released by testator, & the defect in M.'s title had been cured by his appointment as exor.; the only debt therefore that could be enforced against him was for £5,000 & the order must be varied accordingly.—*Re PINK, PINK v. PINK*, [1912] 2 Ch. 528; 81 L. J. Ch. 753; 107 L. T. 241; 28 T. L. R. 528; 56 Sol. Jo. 608, C. A.

Annotation:—*Reid.* *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

271. ——— Continuing intention.]—Where testatrix wrote a letter offering a sum of £150 to her friend & making certain suggestions with regard to her giving her an I.O.U. & paying interest thereon & wound up the letter as follows: "I engage not to use the I.O.U. during your life, also not to call in the loan, but leave it with you as long as you want it & the interest is paid," & subsequently seemed offended when the friend offered to pay the capital & said "I thought it would just fall into your hands when I died. The I.O.U. is in an envelope with my papers directed to you, & when I die all you have to do is to destroy it," & finally appointed the friend her exor.:—*Held*: there was a sufficient legal release of the debt by the appointment of the friend as exor., coupled with the continuing intention to release the debt.—*Re GOFF, FEATHERSTONEHAUGH v. MURPHY* (1914), 111 L. T. 34; 58 Sol. Jo. 535.

272. ——— Gift of unexecuted lease with build- ings.]—*BOTTLE v. KNOCKER*, No. 246, *ante*.

273. ——— Gift of banker's deposit receipt—No notice to bank.]—The indorsement & delivery of a banker's deposit receipt (not transferable) is a complete gift where the donor appoints the donee his exor., although no notice is given to the bank by the donor.—*Re GRIFFIN, GRIFFIN v. GRIFFIN*, [1899] 1 Ch. 408; 68 L. J. Ch. 220; 79 L. T. 442; 15 T. L. R. 78; 43 Sol. Jo. 96.

Annotations:—*Consd.* *Re Westerton, Public Trustee v. Gray*, [1919] 2 Ch. 104. *Reid.* *Re Smith, Bull v. Smith* (1901), 84 L. T. 835.

274. ——— Donee one of several executors.]—An imperfect gift of personalty by a donor, who dies shortly afterwards, will be made effectual by the appointment of the donee to be the donor's exor., even if he is only one of several exors. The rule laid down in *Strong v. Bird*, No. 268, *ante*, applies not only to cases of release of debt, but also to cases of imperfect gift.—*Re STEWART, STEWART v. McLAUGHLIN*, [1908] 2 Ch. 251; 77 L. J. Ch. 525; 99 L. T. 106; 24 T. L. R. 679.

Annotations:—*Distd.* *Vavasseur v. Vavasseur* (1909), 25 T. L. R. 250. *Consd.* *Re Innes, Innes v. Innes*, [1910] 1 Ch. 188. *Reid.* *Re Pink, Pink v. Pink*, [1912] 2 Ch. 528.

was not to be considered a part of her estate or subject to any condition of her will. Testatrix died. By her will, her daughter was appointed one of her exors. The two documents were found enclosed in an envelope with this endorsement: "In the event of my death, this envelope is to be delivered, unopened, to my daughter":—*Held*: the intention to give being

plain & absolute, being communicated to the donee, & continuing until the death of testatrix, *donatio in presenti tradenda in futuro* was shown, & the daughter was not a debtor to her mother's estate in respect of the sum lent.—*Re BARNES* (1918), 42 O. L. R. 352; 14 O. W. N. 19.—*CAN.*

b. Necessity for continuance

of intention until death of donor.]—*Held*: the doctrine that an imperfect gift made by a testator during his lifetime may be perfected by the vesting of the subject matter of the gift in the donee as exor., is not applicable, unless testator at the time he made what is alleged to be an imperfect gift had the intention to make an immediate gift, & up to the

*Sect. 2.—Completion of incomplete gifts inter vivos :
Sub-sect. 3. Sects. 3, 4 & 5. Part V. Sect. 1.]*

275. Promise to give indefinite amount.—At future time.]—Pltf. lived with & kept house for her father, & frequently asked him to pay her a salary as housekeeper. In 1902 he gave her a document, whereby he declared that from & after Sept. 30, 1902, she should receive from his business £2 per week, or about fifty-two sums of equal amount *per annum*, & also an additional sum of £2 a week, to remain in the business & to be withdrawn by her, if necessary, after an investment lasting for five years, with increase of 5 per cent. *per annum*. The £2 a week was never paid, but she received from her father various sums amounting to £78 10s. In 1905, at his request, she gave back the document so that he might consult a solr. about it & see that there should be no doubt of her getting the money; & she found it amongst his papers after his death. By his will the father appointed pltf. to be an extrix. & directed that his estate should be equally divided between his children. Pltf. issued this summons for a declaration that she was entitled as a creditor to have the amounts specified in the document paid to her out of the estate, or that her father had constituted himself a trustee of the property specified in the document, or, thirdly, that the gift of the document coupled with her appointment as extrix. was a complete gift of the amounts, specified in the document:—*Held*: pltf. was not a creditor of testator's estate in respect of the sums mentioned in the document; testator had not constituted himself a trustee of them for her; & on the third point, the rule laid down in *Strong v. Bird*, No. 268, *ante*, & extended by *Re Stewart, Stewart v. McLaughlin*, No. 274, *ante*, ought not to be further extended so as to be applicable to a mere promise to pay an indefinite sum at a future time.—*Re INNES, INNES v. INNES*, [1910] 1 Ch. 188; 79 L. J. Ch. 174; 101 L. T. 633.

276. Incomplete delivery of chattels.]—*Re STONEHAM, STONEHAM v. STONEHAM*, No. 59, *ante*.

277. Intention not expressed in donor's lifetime.—Debt not released.—By testator.]—No parol evidence is admissible to control or take away a plain & express devise; & therefore where a man is indebted to another by bond, & the obligee makes him one of his exors. & residuary legatees, without saying anything about this bond debt, it shall constitute part of the residue of his estate; & no parol evidence, however clear & strong, shall be admitted to show testator's intention to discharge the party from the bond.—*SELWIN v. BROWN* (1735), 3 Bro. Parl. Cas. 607; 1 E. R. 1527, H. L.; *affg. S. C. sub nom. BROWN v. SELWIN* (1734), Cas. temp. Talb. 240, L. C.

Annotations:—Distd. Re Applebee, Leveson v. Beales, [1891] 3 Ch. 422. *Reid. Fox v. Fox* (1737), West temp. Hard. 162; *Ulrich v. Litchfield* (1742), 2 Atk. 372; *Mascal v. Mascal* (1749), 1 Ves. Sen. 323; *Robinson v. Gee* (1749), 1 Ves. Sen. 251; *Lake v. Lake* (1751), Amb. 126; *Clinton v. Hooper* (1791), 1 Ves. 173; *Nourse v. Finch* (1793), 4 Bro. C. C. 239; *Re Stewart, Stewart v. McLaughlin*, [1908] 2 Ch. 251. *Mentd. Smith v. Baker*

(1737), West temp. Hard. 98; *Lowfield v. Stoneham* (1746), 2 Stra. 1261; *Blinkhorn v. Feast* (1750), 2 Ves. Sen. 27; *Ellis v. Smith* (1754), 1 Hov. Supp. 1; *Rogers v. Earl* (1757), 1 Dick. 295; *Lansfield v. Banton v. Hodg* (1773), Loft, 230; *Clennell v. Lewthwaite* (1795), 2 Ves. 644; *Doe d. Small v. Allen* (1799), 8 Term Rep. 147.

278. ——— Although cancelled by testator.]—Testator in a letter of instructions to an exor. stated that a debt from the exor. was cancelled. The letter was not communicated to the debtor during the life of testator, nor properly executed as a will:—*Held*: the letter was inadmissible as evidence of the cancellation of the debt, & the debt was payable.—*Re HYSLOP, HYSLOP v. CHAMBERLAIN*, [1894] 3 Ch. 522; 64 L. J. Ch. 168; 71 L. T. 373; 43 W. R. 6; 38 Sol. Jo. 663; 8 R. 680.

Annotation:—Reid. Re Stewart, Stewart v. McLaughlin, [1908] 2 Ch. 251.

279. Whether debt released.—Admissibility of evidence.]—*SELWIN v. BROWN*, No. 277, *ante*.

280. ———.]—*Re HYSLOP, HYSLOP v. CHAMBERLAIN*, No. 278, *ante*.

SECT. 3.—AVOIDANCE OF INCOMPLETE GIFTS INTER VIVOS.

281. Delivery of documents.—Ineffectual to vest property.—Liability of donee to redeliver.]—*SEARLE v. LAW*, No. 203, *ante*.

282. ———.]—8 & 9 Vict. (c. clv.), s. 36, enacts, "that every transfer of Bristol & Exeter Ry. mtges. shall be by deed duly stamped," etc. A., having in his lifetime given by word of mouth & delivery to B. two such mtges. or debentures:—*Held*: assuming the property in the mtge. debts did not pass by such gift, nevertheless A.'s exor. could not maintain *debtine* for the documents against B.—*BARTON v. GAINER* (1858), 3 H. & N. 387; 27 L. J. Ex. 390; 31 L. T. O. S. 237; 4 Jur. N. S. 715; 6 W. R. 624; 157 E. R. 520.

Annotations:—Consd. Swanley Coal Co. v. Denton, [1906] 2 K. B. 873. *Reid. Rummen v. Hare* (1876), 1 Ex. D. 169; *Re Richardson, Shillito v. Hobson* (1885), 30 Ch. D. 396.

283. ———.]—*Re RICHARDSON, SHILLITO v. HOBSON*, No. 215, *ante*.

Compare No. 217, *ante*.

284. Purported transfer of interest in land.—By instrument not under seal.]—*DE HOGHTON v. MONEY*, No. 245, *ante*.

285. Transfer to trustees.—Rights of trustees against executor.]—A voluntary settlement of various properties numbered consecutively contained a covenant by the settlor to apply specific funds in the discharge of a mtgo. on the property numbered 8 to the intent that property 8 might be held on the trusts of the settlement free of the mtge. The trusts of the settlement were "for such persons & for such purposes & generally in

time of his death intended that that gift should stand & have effect.—*MATTHEWS v. MATTHEWS* (1913), 17 C. L. R. 8.—*AUS*.

c. — *Promise to give indefinite amount.]—*W. by will bequeathed a legacy of £3,457 16s. 8d. with interest at 4 per cent. to her son F. W., who was desirous of giving to her son F. property equal in value to that given

by her & her husband to their son A., informed F. that she desired to equalise the two gifts, & had provided for him a sufficient amount that he could have paid to him at any time. F. did not enquire as to the amount, nor was any portion of it or interest paid in his mother's lifetime. The accountant who kept W.'s books, however, with her approval made an entry of an

amount identical with that mentioned in the will as "hypothecated to credit" of F. F. was appointed exor.:—*Held*: there was no gift, & as there was no debt, the intention of a gift was not effectuated by F.'s appointment as exor.—*Re WEAVER (DECEASED)*, [1916] S. A. L. R. 167.—*AUS*.

such manner" as the settlor should from time to time during his lifetime in writing direct, & subject thereto upon trust for certain beneficiaries after his death. The settlement contained the usual power of revocation by deed. Instead of paying off the mtge. on property 8 the settlor applied the specific funds in purchasing three reversions which he subsequently arranged with the trustees' solr. to put into settlement in satisfaction of his covenant. By a letter of directions drafted by the trustees' solr. & subsequently confirmed by deed poll the settlor directed the trustees to hold property 8 subject to the mtge., in lieu of the same being paid off by him, & subject to that mtge. he directed them to hold the said premises upon the trusts of the settlement, & he thereby undertook to assign the three reversions to the trustees upon the trusts of the settlement. This undertaking was accepted by the trustees' solr. on behalf of the trustees in satisfaction of the covenant. The settlor died five months later without having assigned the second & third reversions, but his exors., not realising that there could be any possible doubt as to the effective operation of the letter of directions, treated them as belonging to the trustees, who paid the policy premiums on both reversions, & in the case of the third reversion paid off a mtge. & took a reconveyance from the mtgee. Nine years after the settlor's death the exors. claimed the second & third reversions on the ground that the settlor's undertaking to assign them was only an imperfect

voluntary gift. They offered to redeem any mtge. that the trustees had paid off. The trustees thereupon brought this action for a declaration that the two reversions belonged to them:—*Held*: the settlor had shown no intention of revoking his voluntary covenant, but merely intended to satisfy his liability thereunder by undertaking to assign the three reversions, & the acceptance by the trustees' solr. of that undertaking in satisfaction of the voluntary covenant was sufficient consideration to support the letter of directions & the undertaking therein contained.

Semble: even if the undertaking had been purely voluntary, & as such an imperfect gift, the trustees could have held their legal interest in the third reversion against the exors.—*CARTER v. HUNGERFORD*, [1917] 1 Ch. 260; 86 L. J. Ch. 162; 115 L. T. 857.

SECT. 4.—GIFTS MORTIS CAUSÂ.

See Part V., Sect. 4, *post*.

SECT. 5.—COMPLETION OF INCOMPLETE GIFTS MORTIS CAUSÂ.

See Part V., Sect. 4, *post*.

Part V.—Gifts mortis causâ.

SECT. 1.—IN GENERAL.

283. What constitutes — General rule.]—(1) The rule that delivery of a chattel is essential in order to constitute a valid *donatio mortis causâ* is satisfied by an antecedent delivery of the chattel *alio intuitu* to the donee.

(2) For an effective *donatio mortis causâ* three things must combine: first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; & thirdly, the gift must be made under such circumstances as show that the thing is to revert to the donor in case he should recover (*LORD RUSSELL OF KILLOWEN, C.J.*).

(3) A person, not in contemplation of death, gave a deposit note to her mother to take care of for her. Some time afterwards the note having remained all the time in the mother's possession, the donor, who was then in contemplation of death, & died a few days afterwards, gave the note absolutely to the mother in case she, the donor, should not recover:—*Held*: this latter gift, by changing the character in which the mother already held possession of the note, was a sufficient delivery for the purpose of an effective *donatio mortis causâ*.—*CAIN v. MOON*, [1896] 2

Q. B. 283; 65 L. J. Q. B. 587; 74 L. T. 728; 40 Sol. Jo. 500, D. C.

Annotations.—As to (1) & (3) *Apld. Re Weston, Bartholomew v. Menzies*, [1902] 1 Ch. 680. *Consd. Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

287. Cannot take effect immediately.]—*TATE v. HILBERT*, No. 321, *post*.

288. Not affected by Wills Act.]—(1) Donations *mortis causâ* are not abolished by Wills Act, 1837 (c. 26).

(2) Upon a loan the borrower gave the lender a receipt in the following form:—"Received of D. £500, to bear interest at £4 per cent. *per annum*":—*Held*: the delivery of this receipt to an agent of the borrower by the creditor on her death-bed, stating that she wished the debt to be cancelled, was a sufficient *donatio mortis causâ*.

The debt was due from M. himself, & the document the delivery of which is said to constitute a *donatio mortis causâ*, was placed in the hands of a person as agent of M. with an intention, which appears to me sufficient, to constitute its delivery a *donatio mortis causâ*. If therefore, by the law an interest of this description can be made the subject of a *donatio mortis causâ*, I am of opinion that there was such a gift of it in the present case . . . It is true, the delivery of a bond is

PART V. SECT. 1.

286 1. What constitutes — General rule.]—The characteristics of *donatio mortis causâ* are (1) it must be made in

the prospect of death; (2) it takes effect only in the event of death occurring from the then existing illness, otherwise it falls to be returned;

(3) there must, according to the law of Scotland, be delivery.—*MORRIS v. LUDDECK* (1867), 5 Macph. (Ct. of Sess.) 1036; 39 Sc. Jur. 630.—*SCOT.*

Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2, A.

not the delivery of the mere evidence of a debt for it is the delivery of that without which the debt would not have been a specialty. Its continuance in existence is not now material, however that might have been considered formerly. The delivery of an instrument creating a specialty debt without which it would not be a specialty debt as in the case of a bond, would be sufficient for the purpose of a *donatio mortis causa*. That does not go to the length of deciding that the delivery of the mere evidence of a debt would be sufficient. In this case there was something more. The document here has been called a receipt, & is a receipt in a sense, but it is not a receipt in the ordinary acceptance of that term. The debt was a debt carrying interest. A mere debt of £500 would have arisen from a loan, without any writing. But it would not have been a debt carrying interest without a contract to that effect beyond the advance. That particular contract, I agree, might have been entered into without any writing, but, as it was created by writing, proof of the writing, if possible, was essential to recovery upon the contract, this writing was, therefore, in a sense essential to the proof of the contract & it is this writing which was, in substance delivered *mortis causa* to the person owing the money. This was a sufficient delivery to constitute a *donatio mortis causa* (KNIGHT BRUCE, V.-C.).—MOORE v. DARTON (1851), 4 De G. & Sm. 517; 20 L. J. Ch. 626; 18 L. T. O. S. 24; 64 E. R. 938.

Annotations:—As to (2) Consd. Paterson v. Murphy (1853), 11 Hare, 88; Tate v. Leithhead (1854), Kay, 658; Re Dillon, Duffin v. Duffin (1890), 44 Ch. D. 76. Held. Re Andrews, Andrews v. Andrews, [1902] 2 Ch. 334; Re Weston, Bartholomew v. Menzies, [1902] 1 Ch. 680; Re Kirkley, Cort v. Watson (1909), 25 T. L. R. 522.

289. Nature of gift—Distinguished from legacy.]

—One C., after making his will, three or four days before his death, gave D. some bank-notes to her own use, if he died, else to be returned; on his death, A., who was his exor., on inquiring into the affair, said he was very well pleased that they were given her: she desired A. to keep the notes for her, & employ them to the best advantage for her; he took them, & gave her a note for them; she having after married contrary to his inclination, he refused to deliver up the notes; on which action was brought on his note, & a recovery & damages. Bill was brought here to be relieved, but relief denied.

You come here to be relieved against the note, which cannot be, but on the foot of fraud: at the time of giving it the whole affair was examined; it is not a legacy, nor is there any occasion for the exor.'s assent to it; it is not a gift at common law, but in view of death; here are express words; but if he had used no words, & had been near death, it had been looked on as a *donation mortis causa*; it is a testamentary legacy, of which the common law takes notice, but not provable in the Ecclesiastical Ct., it is only questionable here; & the exor.'s assent is not necessary, because might die intestate. This further differs from a legacy, which depends solely on the disposing words; but in a *donatio mortis causa* must be a delivery, which is something more. So bill dismissed with costs (per

CUR.).—ASHTON v. DAWSON & VINCENT (1725), 2 Coll. 363, n.; Cas. temp. King, 14; 25 E. R. 190, L. C.

290. — Assent by executor unnecessary.]—HILL v. CHAPMAN (1780), 2 Bro. C. C. 612; 29 E. R. 337, L. C.

Annotations:—Held. Blount v. Burrow (1792), 1 Ves. 546. Mentd. Walter v. Hodge (1818), 2 Swan. 92.

291. — No necessity for probate.]—TATE v. HILBERT, No. 321, post.

292. —.]—(1) On Feb. 19, 1901, B., who was very ill & in expectation of death, drew a cheque for £300 in favour of B., to whom it was at once handed. E. indorsed the cheque, & on Feb. 23, it was presented for payment at B.'s bank, where his account was overdrawn. The bank manager refused payment, stating that the signature of the drawer was not like the ordinary signature of B., & that he required some confirmation of the signature. The Ct. found that the manager was minded to "lend" the money to pay the cheque if he found that the signature was genuine. B. died on Feb. 25, 1901, without the cheque having been cashed:—*Held*: there was not a valid *donatio mortis causa*.

In all the cases [of *donatio mortis causa*], in order that the gift may be valid it must be shown that the donor handed over either property, or the *indicia* of title to property, which belonged to him. His own cheque is not property, it is only a revocable order such that if the banker acts on it the donee will have the money to which it relates. If the manager was minded to lend, there was no contract binding him to do so. An agreement to lend is not enforceable & no right of property passed to the drawee (BUCKLEY, J.).

(2) A *donatio mortis causa* is a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely *inter vivos* nor testamentary. It is an act *inter vivos* by which the donee is to have the absolute title to the subject of the gift, not at once, but if the donor dies. If the donor dies, the title becomes absolute, not under but as against his exor. In order to make the gift valid it must be made so as to take complete effect on the donor's death (BUCKLEY, J.).—*Re BEAUMONT, BEAUMONT v. EWBANK*, [1902] 1 Ch. 889; 71 L. J. Ch. 478; 86 L. T. 410; 50 W. R. 389; 46 Sol. Jo. 317.

Annotation:—As to (1) Apd. Re Leaper, Blythe v. Atkinson, [1916] 1 Ch. 579.

293. May be subject to condition—Other than death of donor—Gift for particular purpose.]—BLOUNT v. BURROW (1792), 4 Bro. C. C. 72; 1 Ves. 546; 29 E. R. 784.

Annotations:—Expld. & Apd. Hills v. Hills (1841), 8 M. & W. 401. Mentd. Walter v. Hodge (1818), 2 Swan. 92; Stanton v. Percival (1855), 5 H. L. Cas. 257.

294. — Trust to provide for funeral.]—A gift may be good as a *donatio mortis causa*, although it be coupled with a trust that the donee shall provide the funeral of the donor.—HILLS v. HILLS (1841), 8 M. & W. 401; 10 L. J. Ex. 440; 5 Jur. 1185; 151 E. R. 1095.

Annotation:—Consd. Treasury Solicitor v. Lewis, [1900] 2 Ch. 812.

289 i. Nature of gift—Distinguished from legacy.]—*Donatio mortis causa* differs from a legacy (1) in not requiring writing, but delivery; (2) in being preferable to legacies. It resembles a legacy (1) in being

revocable—either by demanding back possession, or *eo ipso* by recovery from the existing illness; (2) in being liable for the donor's debts if there be a deficiency of funds for their payment;

(3) in not affecting the *legitim* or *jus relictae*; (4) in being subject to legacy duty.—MORRIS v. RIDDICK (1867), 5 Macph. (Ct. of Sess.) 1036; 30 Sc. Jur. 630.—SCOT.

295. Precatory words accompanying gift—How far effective.]—A., being obligee on a bond given by his son for payment of money advanced for the purchase of an estate, being ill, handed the bond to him, saying, "Take this but do not wrong your children, & do not mortgage your property." A. died of his illness :—*Held* : there was a *donatio mortis causâ* of the bond, for the son alone.—*MEREDITH v. WATSON* (1853), 2 Eq. Rep. 5 ; 23 L. J. Ch. 221 ; 22 L. T. O. S. 141 ; 2 W. R. 66 ; *sub nom. MERIDETH v. WATSON*, 17 Jur. 1063.

See, further, TRUSTS & TRUSTEES.

296. Donor domiciled abroad—Action in England to enforce gift—Law by which gift governed—Lex situs.]—A *donatio mortis causâ* partakes of the nature of a gift *inter vivos* rather than of a testamentary disposition, & consequently, where a *donatio mortis causâ* is made in England by a person of foreign domicile, its validity is governed by English law & not by the *lex domicilii*.—*Re KORVINE'S TRUST, LEVASHOFF v. BLOCK*, [1921] 1 Ch. 343 ; 90 L. J. Ch. 192 ; 124 L. T. 500 ; 65 Sol. Jo. 205.

See, generally, CONFLICT OF LAWS, Vol. XI., pp. 309 et seq.

SECT. 2.—PROPERTY THE SUBJECT OF GIFTS MORTIS CAUSÂ.

SUB-SECT. 1.—IN GENERAL.

297. Capacity to transfer title by delivery—How far necessary.]—A. was possessed of a policy of insurance on his own life. Having made a will in 1880, by which he gave the income of his property to his wife B., he fell ill in 1887, & while in anticipation of death, signed the following document : " Mar., 1887. I give all my insurance money that is coming to me to my wife B., for her own use as well as £200 in the bank. This is my wish.—Witness, C." This document was placed at A.'s request with his will, & remained there until his death in Apr. 1887 :—*Held* : effect could not be given to the document as a *donatio mortis causâ*, or as an immediate assignment by A. to B. of the property therein mentioned.

If a chattel or a deposit note be handed over by a person in contemplation of death, so as to confer a complete title on the donee, there may be a good *donatio mortis causâ*. But the subject of the alleged gift in this case was not property ; the title to which, or the evidence of title to which, passes by delivery, to which property alone, speaking generally, the doctrine of *donatio mortis causâ* applies (*COTTON, L.J.*).

Now, it is perfectly true that there may be *donationes mortis causâ* of policies & bonds & other documents evidencing the title to choses in action ; but, speaking broadly, the subjects of *donationes mortis causâ*, must be things the title to which passes by delivery. Where, as in the present case, there is no change of possession operating as an immediate transfer, the doctrine of *donatio mortis causâ* is not applicable (*BOWEN, L.J.*).—*Re HUGHES* (1888), 59 L. T. 586 ; 36 W. R. 821, C. A.

Annotations :—*Appl. Re Davis, Griffith v. Davis* (1902), 86 L. T. 889. *Reid. Re Leaper, Blythe v. Atkinson*, [1916] 1 Ch. 579.

298.

—*]*—Testator who held a banker's

deposit note for £580, in his last illness & very shortly before his death, took out the note, filled in & signed upon a stamp a form of cheque indorsed on the note, "pay self or bearer £580 & interest," & handed the document to a relation who was attending him in his illness, telling her that she was to give it back to him if he recovered, & if not she would be all right :—*Held* : (1) there was a valid *donatio mortis causâ*, for assuming a *donatio mortis causâ* of a cheque not presented in the drawer's lifetime to be invalid, the intention here was not merely to give the cheque but the deposit note ; (2) a deposit note was a good subject of a *donatio mortis causâ*, & the gift was not defeated by the giving the cheque along with the note.

The case of *Moore v. Darton*, No. 288, *ante*, is very instructive as to the class of instruments which are subjects of *donatio mortis causâ*. There a document was executed when a deposit of money was made. The mere fact of the deposit would create a debt, but the document, besides acknowledging the receipt of the money, expressed the terms on which it was held, & showed what the contract between the parties was. It was held that the delivery of that document was a good *donatio mortis causâ* of the money deposited & so was the delivery of the deposit note in the present case. The delivery gives no legal title to the donee, nor did the delivery of the security in *Duffield v. Elwes*, No. 351, *post*, but the House of Lords there laid down that the exors. were trustees for the donee & must do what was necessary to perfect the transfer. This would not be so in the case of an incomplete gift *inter vivos*—the ct. would not interfere to compel either the donor or his exors. to perfect it ; the doctrine is an anomalous one peculiar to the case of a *donatio mortis causâ*, but it is established by the decision of the House of Lords (*COTTON, L.J.*).

(3) The principle according to which equity will not render its assistance in perfecting an incomplete gift has no application to a *donatio mortis causâ* & an instrument that does not pass by delivery may be the subject of a *donatio mortis causâ*, & the exors. of the donor will be considered as trustees for the donee for the purpose of giving effect to the gift.—*Re DILLON, DUFFIN v. DUFFIN* (1890), 44 Ch. D. 76 ; 59 L. J. Ch. 420 ; 62 L. T. 614 ; 38 W. R. 369 ; 6 T. L. R. 204, C. A.

Annotations :—*As to* (1) *Fold. Re Richards, Jones v. Rebbeck*, [1921] 1 Ch. 513. *Reid. Re Lee, Treasury Solicitor v. Parrott* (1918), 87 L. J. Ch. 594 ; *Re Westerton, Public Trustee v. Gray*, [1919] 2 Ch. 104. *As to* (2) *Expld. Re Beaumont, Beaumont v. Ewbank*, [1902] 1 Ch. 889. *Consd. Re Weston, Bartholomew v. Menzies*, [1902] 1 Ch. 680 ; *Re Richards, Jones v. Rebbeck*, [1921] 1 Ch. 513. *Reid. Re Andrews, Andrews v. Andrews*, [1902] 2 Ch. 394. *As to* (3) *Reid. Re Wasserberg, Union of London & Smiths Bank v. Wasserberg*, [1915] 1 Ch. 195.

299. Substituted property—For property lost since gift made—Not included as original subject-matter.]—*ANON.* (1634), 3 Swan. 400 ; 36 E. R. 924.

SUB-SECT. 2.—CHOSES IN ACTION.

A. Sufficiency of Documents of Title.

300. What document must show—Essential terms of contract—On which chose in action founded.]—*MOORE v. DARTON*, No. 288, *ante*.

301. —*]*—*Re DILLON, DUFFIN v. DUFFIN*, No. 298, *ante*.

Sect. 2.—Property the subject of gifts mortis causâ:
Sub-sect. 2, A. & B. (a) & (b).]

302. —.] — W. was possessed of eight investment shares in a building society of £25 each, & £130 in the Post Office Savings Bank. Some two months before his death, & while ill in hospital, W. asked deft., to whom he was engaged to be married, to go & get the certificates for his building society shares & savings bank book, gave her the key of the drawer in which they were placed, & told her to keep them; deft. went & obtained the certificates & savings bank book, took them & the key to the hospital, & offered them back to W., when he again said she was to keep them. On several subsequent occasions W. repeated his wish to deft. that all his property should belong to her in case of his death. Deft. claimed the building society shares & the money standing to the credit of deceased at the Post Office Savings Bank:—*Held*: the gift of the building society shares failed as being incomplete, but the Post Office Savings Bank book was capable of being well given so as to create a *donatio mortis causâ*.

As to the gift of the savings bank book it is well established, ever since the decision of the Ct. of Appeal in *Re Dillon, Duffin v. Duffin*, No. 298, *ante*, that a banker's deposit receipt in a form showing the terms of the contract & being more than an acknowledgment for the receipt of money is good subject for a *donatio mortis causâ*. . . . In the present case the question arises in reference to a Post Office Savings Bank deposit & book, & in considering whether or not this is a good subject of a *donatio mortis causâ*, the test appears to be whether or not the document, besides acknowledging the receipt of money, expresses the terms on which it is held & shows what the contract between the parties is. There is another matter I may mention, which is whether there had been a proper *traditio* at the time this gift was made; but on referring to *Cain v. Moon*, No. 286, *ante*, I am of opinion that it is not essential that the *traditio* should be at the actual moment of the gift. With reference to the building society shares, I am of opinion that they are not the proper subject-matter of *donatio mortis causâ*. The mere fact that under the rules of the society there was power to withdraw these investment shares at any time & obtain the money for them is not sufficient to differentiate this case from *Moore v. Moore*, No. 209, *ante* (BYRNE, J.).—*Re WESTON, BARTHOLOMEW v. MENZIES*, [1902] 1 Ch. 680; 71 L. J. Ch. 343; 86 L. T. 551; 50 W. R. 294; 18 T. L. R. 326; 46 Sol. Jo. 281.

Annotation:—Refd. Re Andrews, Andrews v. Andrews, [1902] 2 Ch. 394.

303. —.] — On Oct. 18, 1919, testator, who was suffering from a combination of maladies & about to undergo a critical operation, handed an envelope containing ten 4 per cent. Registered Victory Bonds of £100 each to a lady who had been his close friend for many years, saying to her, "Will you take them home & take charge of them till such time as I am able to go to London? But if anything happens to me you are to keep them for yourself." Testator was unable to undergo the contemplated operation & died on Oct. 20, 1919. The Victory Bonds were registered in the name of testator, & each bond expressed all the terms on which the money was held, & showed the whole contract between the Govt. & the lender:—*Held*: (1) there was a good *donatio mortis causâ*, inasmuch as there was

clear evidence that testator intended that the lady should retain the bonds for herself in the event of his death, & the *donatio* was not conditional upon death from a particular cause; (2) the bonds were good subject-matter of the *donatio mortis causâ*, & it was the duty of the exors. of testator to give effect thereto by such transfer as would enable the donee to be registered as owner.

The question whether these bonds were good subject-matter of a *donatio mortis causâ*, is, I think, disposed of by the judgment of the Ct. of Appeal in *Re Dillon, Duffin v. Duffin*, No. 298, *ante*. They were registered bonds & the delivery gave no legal title to the donee, but each bond not only acknowledges receipt of the money, but expresses all the terms on which the money is held & shows the whole contract between the Govt. & the lender (EVE, J.).—*Re RICHARDS, JONES v. REBECK*, [1921] 1 Ch. 513; 90 L. J. Ch. 300; 124 L. T. 597; *previous proceedings*, 90 L. J. Ch. 298.

Necessity for delivery.—*See Sect. 3, sub-sect 3, post.*

B. Particular Documents of Title.

(a) Bonds.

304. Whether valid subject of gift.—*PARTHURICK v. FREIND* (1724), 2 Coll. 362, n.; 63 E. R. 771.

305. —.] — *CLAVERING v. YORKE* (1725), 2 Coll. 363, n.; 63 E. R. 772.

306. —.] — A bond, though it be only a chose in action, is a good subject of a *donatio mortis causâ*.—*SNELLGROVE v. BAILY* (1744), 3 Atk. 214; *Ridg. temp. H.* 202; 26 E. R. 924; *sub nom. BAILY v. SNELGROVE*, 2 Ves. Sen. at pp. 436, 441, L. C.

Annotations:—Consd. Gardner v. Parker (1818), 3 Madd. 184; *Duffield v. Elwes* (1827), 1 Bl. N. S. 497. *Refd. Ward v. Turner* (1752), 1 Dick. 170.

307. —.] — Gift of a bond by delivering the same & saying, "There, take that & keep it," in the last sickness of the donor, he dying two days after, held to be a *donatio causâ mortis*, & donee directed to be at liberty to use the exors.' names in suing on the bond, he indemnifying them; & the costs of the suit to be paid out of testator's estate.

The doubt here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness & in contemplation of death; & it is to be inferred, that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death (LEACH, V.-C.).—*GARDNER v. PARKER* (1818), 3 Madd. 184; 56 E. R. 478.

Annotations:—Consd. Duffield v. Elwes (1827), 1 Bl. N. S. 497. *Expld. Edwards v. Jones* (1836), 1 My. & Cr. 226. *Refd. Staniland v. Willott* (1852), 3 Mac. & G. 664; *Re Beaumont, Beaumont v. Ewbank*, [1902] 1 Ch. 889.

308. —.] — *EDWARDS v. JONES*, No. 248, *ante*.

309. —.] — *Re RICHARDS, JONES v. REBECK*, No. 303, *ante*.

Compare Nos. 288, 298, 302, 303, ante.

(b) Deposit Receipts.

310. On loan transaction—Loan not made to banker.—*MOORE v. DARTON*, No. 288, *ante*.

311. Deposit note—Bankers.]—Money due on a policy & on a banker's deposit note held to pass as *donationes mortis causâ* by the delivery of the policy & note.—*AMIS v. WITT* (1863), 33 Beav. 619; 55 E. R. 509.

*Annotations:—***Expld.** *Hewitt v. Kaye* (1868), L. R. 6 Eq. 198. **Distd.** *Re Beak's Estate*, *Beak v. Beak* (1872),

L. R. 13 Eq. 489. **Foldd.** *Moore v. Moore* (1874), L. R. 18 Eq. 474. **Consd.** *Re Farman*, *Farman v. Smith* (1887), 57 L. J. Ch. 637; *Re Dillon*, *Duffin v. Duffin* (1890), 44 Ch. D. 76.

312. ———.]—*MOORE v. MOORE*, No. 209, ante.

313. ———.]—*Post Office Savings Bank.]—Re*

PART V. SECT. 2, SUB-SECT. 2.—
B. (b).

311 i. Deposit note—Bankers.]—Where a person in expectation of death had a deposit receipt drawn up in the joint names of himself & his house-keeper, & handed it to her saying, "Put this under lock & key, child, keep it safe," & she locked it up in his desk, & after his decease handed the key to his exors.:—*Held*: a good *donatio mortis causâ*.—*TIERNEY v. HALPENN* (1883), 9 V. L. R. 152.—**AUS.**

311 ii. ———.]—*CARTLEDGE v. HEALES* (1898), 21 V. L. R. 576.—**AUS.**

311 iii. ———.]—*A.*, shortly before his death, gave his wife a box containing certain things under circumstances which would amount to a *donatio mortis causâ* of the box & contents. In the box was a deposit receipt for £300, which *A.* had in the bank:—*Held*: this receipt being only evidence of a debt, & not a document that could have been transferred, so as to make the bank liable to a third party, this money did not pass to the wife as a *donatio mortis causâ*.—*Ex p. GEKOW* (1863), 10 N. B. R. (5 All.) 512.—**CAN.**

311 iv. ———.]—*P.*'s wife held a bank deposit receipt for \$1,000. Shortly before her death she directed the trunk containing this receipt to be sent for at the same time expressing her intention of giving the receipt to the wife of deft., & also delivering to her the key of the trunk. The trunk did not, however, arrive until after death:—*Held*: the instrument not having been actually delivered by the donor before her death, did not pass to deft.'s wife as a *donatio mortis causâ*.—*McCABE v. ROBERTSON* (1868), 18 C. P. 471.—**CAN.**

311 v. ———.]—*J.* & *B.*, his wife, were the holders of a deposit certificate of a bank to the following purport: "Received from *J.* & *B.* the sum of \$2,800, for which we are accountable to either with interest at current rate," &c. A few days before his death *J.* gave the certificate to his wife, saying she was to keep it for her own use, & unequivocally expressing an intention to make an absolute gift of the money to her:—*Held*: *J.* having died, his wife was entitled to the money in the bank.—*O'BRIEN v. O'BRIEN* (1881), 4 O. R. 450.—**CAN.**

311 vi. ———.]—*FREEMAN* (1888), 19 O. R. 141.—**CAN.**

311 vii. ———.]—In which it is stipulated that deposits recorded in it will not be repaid without its production, is a proper subject of *donatio mortis causâ*, & delivery of such a book in anticipation of death operates as a transfer of the debt to take effect upon death.—*BROWN v. TORONTO GENERAL TRUSTS CORP.* (1900), 21 C. L. T. 28; 32 O. R. 319.—**CAN.**

311 viii. ———.]—*McD.*, being ill & not expecting to recover, requested his wife to get from his trunk a bank deposit receipt for \$6,000, which he handed to his brother, telling him that he wanted the money equally divided among his wife, brother, & a sister. The brother drew out three cheques

or orders for \$2,000 each, payable out of the deposit receipt, to the respective beneficiaries, which *McD.* signed & returned to his brother, who handed to *McD.*'s wife the one payable to her & the receipt, & she placed them in the trunk from which she had taken the receipt:—*Held*: this was a valid *donatio mortis causâ*.—*McDONALD v. McDONALD* (1903), 23 C. L. T. 135; 33 S. C. R. 145.—**CAN.**

311 ix. ———.]—*DUNNE v. BOYD* (1874), 8 I. R. Eq. 609.—**IR.**

311 x. ———.]—A deposit receipt in the ordinary form used by banks may be the subject of a *donatio mortis causâ*, although the receipt is expressed to be not transferable.—*CASSIDY v. BELFAST BANKING CO.* (1887), 22 L. R. Ir. 68.—**IR.**

311 xi. ———.]—*PORTER v. WALSH*, [1896] 1 I. R. 148.—**IR.**

311 xii. ———.]—Deceased about a fortnight before her death told *pltf.* to go to the bank & get whatever money was in her name put in *pltf.*'s name. *Pltf.* took the bank-book out of the box of deceased at her request. Deceased handed it to *pltf.* & told her to keep it. She kept it in her possession up to time of deceased's death:—*Held*: the gift of the bank-book constituted a valid *donatio mortis causâ*.—*CURTIS v. EMERSON* (1888), 7 Nfld. L. R. 363.—**NFLD.**

311 xiii. ———.]—Deceased requested his sister, with whom he lived, to take from his trunk a bank deposit receipt, & saying that the money in that note was his sister's & her husband's, deceased handed his sister the note, which she placed in her own trunk & retained possession of till deceased's death:—*Held*: the facts as deposed to did not constitute a *donatio mortis causâ*.—*LEAHY v. O'KEEFE* (ADMINISTRATOR OF LEAHY) (1891), 7 Nfld. L. R. 527.—**NFLD.**

311 xiv. ———.]—*KEDDIE v. CHRISTIE* (1848), 11 Duil. (Ct. of Sess.) 145; 21 Sc. Jur. 26.—**SCOT.**

311 xv. ———.]—A servant uplifted, a few days before her mistress's death, the amounts of certain indorsed deposit receipts, & retained them on the ground of donation:—*Held*: competent for the mistress's exors. to apply for interdict against her & her agent using the funds, & for consignation, & to find that they belonged to the petitioner: & failing consignation, for decree for the amounts uplifted.—*ALLAN v. MUNNOCH* (1861), 23 Duil. (Ct. of Sess.) 417; 33 Sc. Jur. 209.—**SCOT.**

311 xvi. ———.]—Deceased had deposited money in a bank, & had taken a deposit receipt for it in the name of his brother-in-law, who received from him the deposit receipt, & uplifted the contents a few days after his death:—*Held*: there being no proof or allegation that the sum was deposited, or the receipt held, for any other purpose, or on any other footing, the transaction was to be regarded as a donation.—*KENNEDY v. ROSE* (1863), 1 Macph. (Ct. of Sess.) 1042; 35 Sc. Jur. 598.—**SCOT.**

311 xvii. ———.]—*WATT'S TRUSTEES v. MACKENZIE* (1869), 7 Macph. (Ct. of Sess.) 930; 41 Sc. Jur. 626.—**SCOT.**

311 xviii. ———.]—*CROSBIE'S TRUSTEES v. WRIGHT* (1880), 7 R. (Ct. of Sess.) 823; 17 Sc. L. R. 597.—**SCOT.**

311 xix. ———.]—*THOMSON'S EXECUTORS v. THOMSON* (1882), 9 R. (Ct. of Sess.) 911; 19 Sc. L. R. 653.—**SCOT.**

311 xx. ———.]—Delivery *animò donandi* of a deposit-receipt by the creditor therein without indorsation is not an effectual *donatio mortis causâ*.—*M'NICOL v. M'DUGGALL* (1889), 17 R. (Ct. of Sess.) 25; 27 Sc. L. R. 40.—**SCOT.**

311 xxi. ———.]—*MACFARLANE'S TRUSTEES v. MILLER* (1898), 25 R. (Ct. of Sess.) 1201; 35 Sc. L. R. 934; 6 S. L. T. 128.—**SCOT.**

311 xxii. ———.]—*ROSE v. CAMERON'S EXECUTOR* (1901), 3 F. (Ct. of Sess.) 337; 38 Sc. L. R. 247; 8 S. L. T. 353.—**SCOT.**

313 i. ———.]—*Post Office Savings Bank.]—*G., on his deathbed, in contemplation of his death, signed an order for the withdrawal of a sum of money lying to his credit in a branch of the Govt. Savings Bank, & also an order directing the officer in charge of the branch bank to pay the same to *W.* He then handed these documents to *W.*, & directed him to obtain the money, & after payment thereof of his debts, to divide the residue between himself & *G.*'s father:—*Held*: the gift to *W.* was valid as a *donatio mortis causâ*.—*Re GANNON*, *Ex p. DAVIS* (1898), 9 Q. L. J. 52.—**AUS.**

313 ii. ———.]—*C.* was possessed of moneys deposited in the Post Office Savings Bank & the N.S.W. Savings Bank. On his death bed *C.* handed the two savings bank books to *pltf.* stating that he desired the moneys represented by them to belong to *pltf.* after his death:—*Held*: the savings bank books could be the subject of a valid *donatio mortis causâ*.—*CORMACK v. PERMANENT TRUSTEES CO. OF NEW SOUTH WALES* (1903), 4 S. R. N. S. W. 17; 20 N. S. W. W. N. 264.—**AUS.**

313 iii. ———.]—Deceased in her last illness, & shortly before her death, handed to deft. a govt. savings bank pass-book, in which was credited in the names of deft. & deceased a sum of money deposited in their names, & at the same time told deft. to pay to *pltf.* \$400 out of the bank, pay some debts owing by deceased, & her funeral expenses: to which deft. assented. The money on deposit belonged to deceased, but could be withdrawn by deft. on delivery up of the pass-book, whether before or after deceased's death:—*Held*: the pass-book was a good subject of a *donatio mortis causâ*.—*THORNE v. PERRY* (1900), 21 C. L. T. 95; 2 N. B. Eq. Rep. 146; 35 N. B. R. 398.—**CAN.**

313 iv. ———.]—The money at the credit of a savings bank depositor may pass as a *donatio mortis causâ* by the delivery of the savings bank book by the depositor to the donee with apt words of gift, the deposit being subject to the condition that no part of it can be withdrawn without the production of the book.—*Re REID* (1903), 23 C. L. T. 334; 6 O. L. R. 421; 2 O. W. R. 918.—**CAN.**

313 v. ———.]—Deposit books
N N

Sect. 2.—Property the subject of gifts mortis causâ:
Sub-sect. 2, B. (b) & (c) i. & ii.]

WESTON, BARTHOLOMEW v. MENZIES, No. 302, ante.

314. ———.]—The delivery of a Post Office Savings Bank deposit book may constitute a good *donatio mortis causâ* of the balance standing to the credit of the depositor; but where a deposit is invested by the Post Office Savings Bank for the depositor in Govt. stock under the regulations contained in the deposit book by having the stock placed on the Savings Bank Investment Account of the National Debt Comrs. & credited to the depositor, the delivery of the investment certificate & the deposit book cannot constitute a good *donatio mortis causâ* of the Govt. stock.—*Re* ANDREWS, ANDREWS v. ANDREWS, [1902] 2 Ch. 394; 71 L. J. Ch. 676; 87 L. T. 20; 50 W. R. 569; 18 T. L. R. 646; 46 Sol. Jo. 585.

Annotation:—Distd. Re Lee, Treasury Solicitor v. Parrott, [1918] 2 Ch. 320.

315. ———.]—The delivery by the owner of a document of title in the form of a Post Office Savings Bank deposit-book, which certifies that the owner had been registered as the holder of an Exchequer bond to be issued on the request of the owner & surrender of the book, is a good *donatio mortis causâ* of the bond.—*Re* LEE, TREASURY SOLICITOR v. PARROTT, [1918] 2 Ch. 320; 87 L. J. Ch. 594; 119 L. T. 562; 34 T. L. R. 559; 62 Sol. Jo. 682.

(c) Bills of Exchange, Promissory Notes and Negotiable Instruments.

i. Payable to Donor.

316. Indorsement not necessary—To transfer interest to donee.]—Bills of exchange payable to order [or to the donor] may be made the subject of a *donatio mortis causâ*, though they were not indorsed to the donee.—*RANKIN v. WEGUELIN* (1832), 27 Beav. 309; 29 L. J. Ch. 323, n.; 54 E. R. 121.

Annotations:—Folld. Veal v. Veal (1859), 27 Beav. 303. *Consd. Re* Mead, Austin v. Mead (1880), 15 Ch. D. 651; *Reid. Clement v. Cheesman* (1884), 54 L. J. Ch. 158; *Re* Dillon, Duffin v. Duffin (1890), 38 W. R. 369; *Re* Beaumont, Beaumont v. Ewbank, [1902] 1 Ch. 889.

317. ———.]—Testatrix, by will, disposed of her personal estate. She afterwards put two promissory notes, which were payable to her or her order, into a box, which her niece used as her own, & gave her the key off her bunch, requesting her not to look into that division of the box in which she had placed the notes until after her decease. Testatrix did not indorse the notes; she lived nearly three months afterwards, but died of the complaint in which her illness originated:—*Held*: it was a good *donatio mortis*

causâ.—*VEAL v. VEAL* (1859), 27 Beav. 303; 6 Jur. N. S. 527; 8 W. R. 2; 54 E. R. 118; *sub nom. Re* VEAL, *VEAL v. VEAL*, 29 L. J. Ch. 321; 2 L. T. 228.

Annotations:—Apld. Moore v. Moore (1874), 22 W. R. 729. *Folld. Re* Mead, Austin v. Mead (1880), 15 Ch. D. 651; *Clement v. Cheesman* (1884), 27 Ch. D. 631. *Reid. Re* Dillon, Duffin v. Duffin (1890), 44 Ch. D. 76; *Re* Beaumont, Beaumont v. Ewbank, [1902] 1 Ch. 889.

318. ———.]—(1) Testator, who held a banker's deposit note for £2,700, in his last illness two days before his death, expressed a wish to give £500, part of the amount, to his wife. At his request a friend filled up a seven days' notice to the bank to withdraw the deposit, & testator signed it. The friend then took the notice to the bank. Testator afterwards signed a form of cheque, which was on the back of the note, "Pay self or bearer £500." The note was then handed to the wife. Testator died before the expiration of the seven days' notice. The practice of the bank was, when a customer withdrew part of a sum which he had placed on deposit, to give him a fresh note for the balance:—*Held*: there had not been a valid *donatio mortis causâ* of the £500, inasmuch as the cheque for that amount was not payable till after testator's death.

I propose to deal at present with the question of the £500: the authorities stand in this way. A gift of a banker's deposit note with a view of giving the donee the whole sum secured by it has been held to be a good *donatio mortis causâ*. A gift of a cheque upon a banker, the cheque not being payable during the donor's life has been held to be not a good *donatio mortis causâ*. To which of these two classes of decisions does the present case belong? In my judgment it belongs to the latter class. It does not appear to me that the delivery of the note was made with the intention of giving either it or the money to the wife. The intention was to deliver the cheque & that is not a good *donatio mortis causâ* (FRY, J.).

(2) Testator also, shortly before his death, gave to his wife two bills of exchange, which were payable to himself or order. They did not fall due until after his death. They had not been indorsed by him:—*Held*: there had been a valid *donatio mortis causâ* of the bills.

I am prepared to follow *Veal v. Veal*, No. 317, ante, & I hold that the two bills passed to the widow by way of *donatio mortis causâ* (FRY, J.).—*Re* MEAD, AUSTIN v. MEAD (1880), 15 Ch. D. 651; 50 L. J. Ch. 30; 43 L. T. 117; 28 W. R. 891.

Annotations:—As to (1) *Consd. Re* Farman, Farman v. Smith (1887), 57 L. J. Ch. 637. *Distd. Re* Dillon, Duffin v. Duffin (1890), 44 Ch. D. 76. *As to* (2) *Reid. Clement v. Cheesman* (1884), 54 L. J. Ch. 158; *Re* Beaumont, Beaumont v. Ewbank, [1902] 1 Ch. 889.

319. ———.]—A cheque payable to the donor or order &, without having been indorsed

issued by savings banks under the regulations made by virtue of the powers contained in Savings-banks Act, 1908, are a valid subject matter of a *donatio mortis causâ*. They are not ordinary bank pass-books, but contain the terms of the contract between the bank & the depositor under which the money is deposited.—*Re* ARCHER, ARCHER v. ARCHER (1914), 33 N. Z. L. R. 1464.—N.Z.

313 vi. ———.]—A person earning a small sum per week lodged £13 in a savings bank in 1862, in the name of himself & his wife "conjunctly & severally & the longest liver of them."

In five years the sums deposited amounted to £150 the limit of principal allowed by the savings bank. The husband died in 1882, at which date, although occasionally small drafts had been made upon it, the deposit with interest amounted to £182. His wife, by his instructions, had always drawn upon an account in another bank for the household expenses. She had always had the savings bank pass book in her keeping & had made all the deposits after the first, & got the interest added. The wife & her brother deposed that the husband had frequently said that the money would be hers after his death:—*Held*: a

mortis causâ donation had been constituted in favour of the wife.—*BLYTH v. CUBLE* (1885), 12 R. (Ct. of Sess.) 674; 22 Sc. L. R. 420.—SCOT.

PART V. SECT. 2, SUB-SECT. 2.—
B. (c) i.

d. Note not transferable by delivery only—Note endorsed by donor.]—A man, in expectation of death, indorsed a negotiable note specially to his wife & delivered it to her:—*Held*: (1) the wife acquired no right by the indorsement; (2) it could not operate as a *donatio mortis causâ*, the note not being transferable by delivery only.—

by him, given by the donor during his last illness, to his son, stands on the same footing as a promissory note or bill of exchange payable to the donor, or order, & will pass to the son by way of *donatio mortis causâ*.—*CLEMENT v. CHEESMAN* (1884), 27 Ch. D. 631; 54 L. J. Ch. 158; 33 W. R. 40.

Annotation:—*Reid*. *Re* Beaumont, *Beaumont v. Ewbank*, [1902] 1 Ch. 889.

ii. Drawn by Donor.

320. Instruments drawn by donor—Contrasted to those payable to donor.—A donor's own promissory note is not the subject of a *donatio mortis causâ*.

If the donor is giving somebody else's promissory note, he is then handing over the *indicia* of title to a species of property belonging to the donor. If he is handing over his own promissory note or cheque, particularly in the former case, he seems to me to be doing something quite different. The note, while in the donor's hands, is not property; & by handing it to the donee, he is not transferring or attempting to transfer property, but is merely making an attempt, in itself imperfect, to create a general liability against himself, or rather against the estate. It may be that to deprive the exors. of the donor in such a case of the right to plead want of consideration is no greater interference than to compel them in the ordinary case to perfect an imperfect transfer. But it is a different interference, & its adoption would, I think, involve the creation of a new class of *donatio mortis causâ* (*SARGANT, J.*).—*Re LEAPER, BLYTHE v. ATKINSON*, [1916] 1 Ch. 579; 85 L. J. Ch. 644; 114 L. T. 1157; 60 Sol. Jo. 539.

321. Promissory note.—(1) An absolute gift, to take effect immediately, cannot be considered as *donatio mortis causâ*.

(2) A cheque on a banker given in a man's last illness is revoked by his death unless before offered for payment, & is not good as a *donatio mortis causâ*.

(3) A promissory note in the last illness not a good *donatio mortis causâ*.

(4) [*Donatio mortis causâ*] does not require any act by the exor. to constitute a title in the donee The only doubt with regard to the case [*Lawson v. Lawson*, No. 324, *post*] was whether it was not necessary in point of form to have authority from the Ecclesiastical Ct.; but I think the Master of the Rolls was right in not requiring probate (*LORD LOUGHBOROUGH, C.*).—*TATE v. HILBERT* (1793), 2 Ves. 111; 4 Bro. C. C. 286; 30 E. R. 548, L. C.

Annotations:—*As to* (1) *Reid*. *Walter v. Hodge* (1818), 2 Swan. 92; *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Stainland v. Willott* (1852), 3 Mac. & G. 664. *As to* (2) *Consd.* *Bromley v. Branton* (1868), 37 L. J. Ch. 902; *Rolls v. Pearce* (1877), 5 Ch. D. 730; *Cotton v. Missings* (1815), 1 Madd. 176. *As to* (4) *Reid*. *Walter v. Hodge* (1818), 2 Swan. 92.

322. —.—[A promissory note is not good as a *donatio mortis causâ* (*ABBOTT, C.J.*).—*HOLLIDAY v. ATKINSON* (1826), 5 B. & C. 501; 8 Dow. & Ry. K. B. 163; 108 E. R. 187.

Annotations:—*Consd.* *Re Leaper, Blythe v. Atkinson*, [1916] 1 Ch. 579. *Mentd.* *Milnes v. Dawson* (1850), 5 Exch. 948.

323. —.—[*Re LEAPER, BLYTHE v. ATKINSON*, No. 320, *ante*.

324. Bill of exchange.—(1) Husband on his death-bed delivers to his wife a purse of 100 guineas, & bids her apply it to her own use. This is *donatio causâ mortis*, & a good legacy to the wife, & shall not go to the exors. or administrators of the husband, if there is sufficient to pay debts.

(2) So likewise if the husband being ill, *ut supra*, draws a bill on his goldsmith to pay his wife £100 for mourning, this is a good appointment, More doubtful, if the money on the bill were received in the husband's lifetime.—*LAWSON v. LAWSON* (1718), 1 P. Wms. 441; 24 E. R. 463.

Annotations:—*As to* (1) *Consd.* *Walter v. Hodge* (1818), 2 Swan 92; *Edwards v. Jones* (1836), 1 My. & Cr. 226. *Reid*. *Ward v. Turner* (1752), 2 Ves. Sen. 431; *Gardner v. Parker* (1818), 3 Madd. 181. *As to* (2) *Appl.* *Snelgrave v. Bayly* (1744), *Ridge, temp. H.* 202. *Expld.* *Tate v. Hilbert* (1793), 2 Ves. 111. *Consd.* *Hewitt v. Kaye* (1868), L. R. 6 Eq. 198. *Appl.* *Rolls v. Pearce* (1877), 46 L. J. Ch. 791. (*Generally*, *Mentd.* *Carr v. Eastbrooke* (1797), 3 Ves. 561.

325. —.—[*ROLLS v. PEARCE*, No. 335,

326. Cheque—Not presented before death.—*TATE v. HILBERT*, No. 321, *ante*.

327. —.—[The delivery of the donor's cheque on his banker, which was not presented before the donor's death:—*Held*: not a good *donatio mortis causâ*.

When a man on his death-bed gives to another an instrument such as a bond, a promissory note or an I.O.U., he gives a chose in action & the delivery of the instrument confers upon the donee all the rights to the chose in action arising out of the instrument. That is the principle on which *Amis v. Witt*, No. 311, *ante*, was decided. But a cheque is nothing more than an order to obtain a certain sum of money, & it makes no difference whether the money is at a banker's or anywhere else. It is worth nothing until acted upon, & the authority to act upon it is withdrawn by the donor's death. All the authorities decide there must be a complete delivery; the only case tending the other way is *Lawson v. Lawson*, No. 324, *ante*, but that has been explained by *LORD LOUGHBOROUGH* on the principle that the drawing of the bill was in the nature of an appointment (*LORD ROMILLY, M.R.*).—*HEWITT v. KAYE* (1868), L. R. 6 Eq. 198; 37 L. J. Ch. 633; 32 J. P. 776; 16 W. R. 835.

Annotations:—*Follid.* *Re Mead, Austin v. Mead* (1880), 43 L. T. 117; *Re Beaumont, Beaumont v. Ewbank*, [1902] 1 Ch. 889. *Reid*. *Clement v. Cheesman* (1884), 54 L. J. Ch. 158; *Re Weston, Bartholomew v. Monzie*, [1902] 1 Ch. 680.

328. —.—[*Nor delivered to donee.*]—*RE MERCER, DREWE-MERCER v. DREWE-MERCER* (1889), 6 T. L. R. 95.

329. —.—[An invalid lady with the help of a friend sent three cheques, each for the sum of £100, made out to three different persons, to another friend of hers with a letter couched in the following terms: "Miss D. wishes me to send you the three inclosed cheques for you to keep for her, & in case of her death, & then see the said persons have the money, etc." Miss D. died upon the following day. Upon an originating summons taken out by the exor. to ascertain whether he was

WELDON v. WELDON (1853), 7 N. B. R. 405.—*IR.* (2 All. 590).—*CAN.*

e. I.O.U.—An I.O.U. cannot be the subject of a *donatio mortis causâ*.—*DUCKWORTH v. LEE*, [1899] 1 I. R.

PART V. SECT. 2, SUB-SECT. 2.—*B. (c) ii.*

321 i. *Promissory note.*—[The donor's

own promissory note cannot be the subject of a gift either *mortis causâ* or *inter vivos*.—*PEDEN v. GEAR* (1921), 64 D. L. R. 439; 50 O. L. R. 384.—*CAN.*

Sect. 2.—Property the subject of gifts mortis causâ: Sub-sect. 2, B. (c) ii., (d), (e) & (f). Sect. 3: Sub-sects. 1 & 2.]

justified in paying the three sums of £100:—*Held*: there had been no valid *donatio mortis causâ*, & the exor. was not at liberty to honour the cheques.

A cheque is not the proper subject-matter of a *donatio mortis causâ* (FARWELL, J.).—*Re DAVIS, GRIFFITH v. DAVIS* (1902), 86 L. T. 880.

330. — Presented but not paid before death.]—*Re BEAUMONT, BEAUMONT v. EWBANK*, No. 292, *ante*.

331. Accompanied by delivery of pass-book—Whether pass-book material to gift.]—The delivery by a donor, in his last illness, of a cheque on his bankers, was accompanied by a delivery of his bankers' pass-book. The cheque not having been presented until after the donor's death:—*Held*: the gift was not a good *donatio mortis causâ*.

I cannot see that the delivery of the bank pass-book makes any difference. It is said to amount to a representation by intestate that the bank was indebted to him in the amount stated. I am not sure it did amount to such representation, & if it did, I do not see how such a representation distinguishes the case from the authorities cited (BACON, V.-C.).—*Re BEAK'S ESTATE, BEAK v. BEAK* (1872), L. R. 13 Eq. 489; 41 L. J. Ch. 470; 26 L. T. 281; 36 J. P. 436.

Annotations:—Folld. Re Mead, Austin v. Mead (1880), 43 L. T. 117; *Re Beaumont, Beaumont v. Ewbank*, [1902] 1 Ch. 889.

332. On back of deposit note or cheque.]—*Re MEAD, AUSTIN v. MEAD*, No. 318, *ante*.

333. How far material—Where gift of note intended.]—*Re DILLON, DUFFIN v. DUFFIN*, No. 298, *ante*.

334. Dealings with cheque before death.]—Testator, on his deathbed, gave his wife his cheque for £1,000, saying, "she would want money before his affairs were wound up, & that the gift was to be for her sole use, besides what she should receive from his estate." The cheque being crossed was exchanged some days after for a friend's cheque of the same amount, in favour of the wife. Testator stated to his friend that he wished to give his, the friend's, cheque to her, & she received & kept it till after her husband's death. Testator's cheque was paid before his death, but this friend's cheque, which was post-dated & also crossed, was exchanged for another, & was duly paid after testator's death:—*Held*: this constituted a valid gift of the £1,000 by the husband to the wife, & constituted a good *donatio mortis causâ*.—*BOUTS v. ELLIS* (1853), 17 Beav. 121; 1 Eq. Rep. 176; 22 L. J. Ch. 716; 21 L. T. O. S. 112; 17 Jur. 405; 1 W. R. 297; 51 E. R. 978; *affd.*, 4 De G. M. & G. 249, L. J.J.

Annotations:—Distd. Re Mead, Austin v. Mead (1880), 43 L. T. 117. *Reid. Hewitt v. Kaye* (1868), 37 L. J. Ch. 633.

335. — For valuable consideration.]—Testator, while in a foreign country, & during his last illness, drew two cheques on his London bankers, in favour of his wife or her order. The wife, in his lifetime, discounted the cheques with a foreign banker. After testator's death the holders presented the cheques in London, when payment was refused, on account of the drawer's

death. The widow thereupon refunded the amount she had received on the cheques out of testator's estate:—*Held*: testator intended to make an immediate gift of the amount of the cheques, & the widow was entitled to payment of the amount out of testator's estate.

The law with reference to such cases seems to be in a very curious state, for according to the authorities, a gift of a bill of exchange or of a promissory note not arrived at maturity, is a good *donatio mortis causâ*, but a gift of a cheque is not if the drawer dies before the cheque is presented. I confess that upon principle I cannot see any difference between drawing a bill on a goldsmith & drawing a cheque on a banker. However, the distinction has been drawn. I think the whole of the judgment in *Lawson v. Lawson*, No. 324, *ante*, with reference to the bill drawn on the goldsmith, applies to this case & I find then, that if this had been a bill of exchange or a promissory note, it would have been held to be a valid gift. The cheques had both been discounted by deft. & she having thus paid them away for valuable consideration, that made them similar to bills of exchange which had been discounted, & thus the gift was completed in testator's lifetime (MALINS, V.-C.).—*ROLLS v. PEARCE* (1877), 5 Ch. D. 730; 46 L. J. Ch. 791; 36 L. T. 438; 25 W. R. 890.

Annotations:—Expld. Re Mead, Austin v. Mead (1880), 43 L. T. 117. *Reid. Re Beaumont, Beaumont v. Ewbank* (1902), 71 L. J. Ch. 478.

(d) Mortgage Deeds.

336. How far valid.]—A delivery up of mtge. deeds does not cancel the debt; but the delivery up of such deeds & of a bond given at the time of the mtge., for the purpose of releasing or acquitting the debt, in case the donor should not recover from the illness with which she was then afflicted is, it seems, an effectual donation *mortis causâ*.—*HURST v. BEACH* (1821), 5 Madd. 351; 56 E. R. 929.

Annotations:—Mentd. Lord v. Sutcliffe (1828), 2 Sim. 273; *Guy v. Sharp* (1833), Coop. temp. Brough. 80; *Thorne v. Rooke* (1841), 2 Curt. 799; *Sulsee v. Lowther* (1843), 2 Hare, 424; *Kirk v. Eddowes* (1844), 3 Hare, 509; *Lee v. Pain* (1844), 4 Hare, 201; *Roch v. Callen* (1848), 6 Hare, 531; *Sayre v. Cramp* (1854), 2 W. R. 438; *Thurnall v. Rayner* (1856), 4 W. R. 404; *Gordon v. Anderson* (1858), 32 L. T. O. S. 119; *Wilson v. O'Leary* (1871), L. R. 12 Eq. 525.

337. —.]—*DUFFIELD v. ELWES*, No. 351, *post*.

See, generally, MORTGAGE.

(e) Share Certificates.

338. Not valid subject of gift.]—*MOORE v. MOORE*, No. 209, *ante*.

339. —.]—*Re ANDREWS, ANDREWS v. ANDREWS*, No. 314, *ante*.

340. — Though convertible into money — At any time.]—*Re WESTON, BARTHOLOMEW v. MENZIES*, No. 302, *ante*.

(f) Insurance Policies.

341. Life insurance policy.]—*AMIS v. WITT*, No. 311, *ante*.

342. — Document not delivered to donee.]—*Re HUGHES*, No. 297, *ante*.

See, generally, INSURANCE.

SECT. 3.—REQUISITES FOR VALIDITY.

SUB-SECT. 1.—MADE IN CONTEMPLATION OF DEATH.

343. Donor need not be in extremis.]—HILL v. CHAPMAN (1789), 2 Bro. C. C. 612; 29 E. R. 337, L. C.

Annotation:—**Consd.** Walter v. Hodge (1818), 2 Swan. 92.

344. Mere ailing state insufficient.]—WOODBRIDGE v. SPOONER (1819), 3 B. & Ald. 233; 1 Chit. 601; 106 E. R. 647.

Annotations:—**Mentd.** Moseley v. Harford (1830), L. & Welsb. 176; Solly v. Hinds (1834), 4 Tyr. 305; Abbot v. Hendricks (1840), 2 Scott, N. R. 183; Brown v. Langley (1842), 12 L. J. C. P. 62; Fletcher v. Fletcher (1844), 4 Hare, 67; Hulce v. Hulce (1850), 17 C. B. 711; Stott v. Fairlamb (1883), 52 L. J. Q. B. 420.

345. Expectation of death—Necessity for.]—CAIN v. MOON, No. 286, *ante*.

346. ———.]—*Re* KIRKLEY, CORT v. WATSON, No. 390, *post*.

347. ———. Suicide—Invalidity of gift.]—When at the time a gift is made the donor contemplates suicide, & does in fact commit suicide shortly afterwards, the gift is not a valid *donatio mortis causâ*.—*Re* DUDMAN, DUDMAN v. DUDMAN, [1925] 1 Ch. 553.

348. Proof—Explicit reference in words unnecessary—Surrounding circumstances material.]—To a bill against a widow, who was one of her husband's exors., for an account of his personal estate, she put in an answer stating that testator, shortly before his death, gave her bank notes amounting to £600, saying they were for her own private use, & that he gave them to her to be at her own disposal, & therefore claiming them as her own separate property. A witness gave the following account of the transaction: that testator first gave his wife a note-case containing part of the notes, saying that if anything should happen to him, the contents of the note-case

were to be hers, & shortly afterwards, on the same day, gave her other bank notes, saying "these are to be yours also," but the witness did not state the amount of the notes:—*Held*: the wife was not entitled to the £600 either as a *donatio mortis causâ*, or as an absolute gift by her husband to her separate use, the most clear & satisfactory evidence being necessary to establish it either as the one or the other.

It is evident that, as stated by *deft.* in her answer the gift possesses none of the essential requisites of a *donation mortis causâ*. It had no reference to death; certainly it is not necessary that there should be in words a reference to death, circumstances may supply it; as when a man, an hour before his decease, made a gift the better to provide for his wife: but here a person who had been in a situation to sell stock, returning without being visited by any illness at that time, takes bank notes out of his pocket, & gives them to his wife, for her own use. What is there to render this a *donation mortis causâ*? Not a single circumstance, which characterises these gifts, except the *traditio*, occurs in this account (PLUMER, M.R.).—WALTER v. HODGE (1818), 1 Wils. Ch. 445; 2 Swan. 92; 37 E. R. 190.

Annotations:—**Distd.** Grant v. Grant (1865), 34 Beav. 623. **Refd.** Edwards v. Jones (1835), 7 Sim. 325. **Mentd.** Price v. Price (1851), 18 L. T. O. S. 131; Mews v. Mews (1852), 15 Beav. 529. **Mentd.** Hoxes v. Kindersley (1854), 2 Sim. & G. 195; Ashworth v. Outram (1877), 5 Ch. D. 923.

349. Onus on donee.]—COSNAHAN GRICE, No. 375, *post*.

SUB-SECT. 2.—CONDITIONAL ON DEATH.

350. General rule.]—WOODMAN v. MORRELL [MORIN] (1678), Freem. Ch. 32; 22 E. R. 1040; *on appeal*, Freem. Ch. 34, n., L. C.

351. ———.]—E. having by his will made a

PART V. SECT. 3, SUB-SECT. 1.

345 i. Expectation of death—Necessity for.]—Gifts made by testator to resp. during his lifetime would not be avoided under Civil Code, Art. 762, where there was neither allegation nor evidence that they were made in expectation of death.—ARCHAMBAULT v. ARCHAMBAULT, [1902] A. C. 575.—**CAN.**

345 ii. ———.]—*Deft.*'s father, ninety-eight years of age, who had been living in her house, was taken suddenly ill, retired to his room & lay down on his bed, & while she was endeavouring to make him comfortable, he handed her a small wallet containing three keys, & said, "All the money & notes I have got are yours." One of the keys was that of a trunk in his room & another of a cash box (in which the money & notes were) in the trunk. There was evidence that he had a foreboding that it would be his last illness, & that he intended to give his property to *deft.* She retained the keys until his death:—*Held*: there was a good *donatio mortis causâ*.—CHARLTON v. BROOKE (1903), 23 C. L. T. 286; 6 O. L. R. 87; 2 O. W. R. 684.—**CAN.**

345 iii. ———.]—One of the characteristics of *donatio mortis causâ* is that it must be made in the prospect of death.—MORRIS v. RIDDICK (1867), 5 Macph. (Ct. of Sess.) 1036; 39 Sc. Jur. 630.—**SCOT.**

345 iv. ———.]—ROSE v. CAMERON'S EXECUTOR (1901), 3 F.

(Ct. of Sess.) 337; 38 Sc. L. R. 247; 8 S. L. T. 353.—**SCOT.**

345 v. ———.]—To uphold a *donatio mortis causâ* the jury must be satisfied that the donor intended, in contemplation of death, from his then illness, to confer the property.—CARTER v. KELLY (1882), 6 Nfld. L. R. 370.—**NFLD.**

f. ———. Suicide.]—A., few days before his death, & while in good health, handed to F. a box with a letter addressed to *deft.*, & requested F. to forward the box to *deft.* "in case anything should happen" to him, A. The box contained a number of debentures & other valuables labelled for different persons, & also a will insufficiently executed, disposing of the same articles in substantial accordance with the labelling of them. A. a few days afterwards committed suicide. After his death, F. delivered the box to *deft.*—*Held*: this did not constitute a valid *donatio mortis causâ*.—EARLE v. BOISFORD (1883), 23 N. B. R. 407.—**CAN.**

g. ———.]—F., the owner of securities & money, handed them to a friend, to be given to P. in the event of F.'s death. F. died within a few days in circumstances which pointed to suicide:—*Held*: the attempted gift was not a valid *donatio mortis causâ*.—*Re* FANNING, [1923] 3 D. L. R. 925; 53 O. L. R. 86.—**CAN.**

h. ———.]—AGNEW v. BELFAST BANKING CO., [1896] 2 I. R. 204.—**IR.**

349 i. Proof—Onus on donee.]—MCLELLAN v. MCLELLAN (1911), 20 O. W. R. 673; 3 O. W. N. 388; 25 O. L. R. 214.—**CAN.**

k. ———. Necessity for corroboration.]—Deceased, when on her death-bed, no one else being present, handed to her sister a sum of money saying "This is for you, I want you to keep it as I have willed you nothing"—*Held*: the gift was a *donatio mortis causâ* but, under Evidence Act, R. S. (1900), c. 163, s. 35, must fail for want of corroboration.—MCGUIRE v. MCGUIRE (1917), 50 N. S. R. 477; 33 D. L. R. 103.—**CAN.**

PART V. SECT. 3, SUB-SECT. 2.

350 i. General rule.]—Where a donor executes a deed of gift in contemplation of death, the law implies a condition that the subject of the gift is to be returned in the event of the donor's recovery.—ANNING v. ANNING (1800), 21 N. S. W. Eq. 13; 16 N. S. W. N. 147.—**AUS.**

350 ii. ———.]—One of the characteristics of *donatio mortis causâ* is that it takes effect only in the event of death occurring from the then existing illness, otherwise it falls to be returned.—MORRIS v. RIDDICK (1867), 5 Macph. (Ct. of Sess.) 1036; 39 Sc. Jur. 630.—**SCOT.**

l. Condition for return of securities.]—A testator, having agreed to sell part of his real estate, had taken the vendee's note for \$900, being the interest accrued due on the purchase money. This note & the

Sect. 3.—*Requisites for validity: Sub-sects. 2 &*

certain provision for his daughter, an only child with whom he had been offended on account of a clandestine marriage, but was reconciled to her & her husband, declared to a common friend his purpose to make a further provision for his daughter. Being on his death bed, & unable to write, he was urged by that friend to make a gift to his daughter of certain moneys secured by mtge. & bond, & expressly assented to that proposal. In the evening of the same day, being then unable to speak, he was reminded by the same friend of the transaction of the morning, & the deeds of mtge. & bond securing the moneys, being produced, he was informed that it was necessary to confirm the gift by a delivery of the deeds; & the friend proposed with the father's permission, to hand over the deeds to his daughter. Upon this proposal, the father made an inclination of his head, & the friend then handed the deeds across the bed where the father was lying, to the daughter on the opposite side; whereupon the father placed the hand of the daughter upon the deeds, & pressed it with his own hand for some minutes, & appeared satisfied with what he had done. The deeds in question consisted of a conveyance in fee of lands to secure £2,927, with the usual covenant for payment of the money lent, & bond by way of collateral security, & an assignment of a mtge. debt of £30,000, & of a judgment for that sum recovered on a bond with a conveyance of the land, & the usual covenant for payment of the money:—*Held*: this was a valid *donatio mortis causa*; the property in the deeds & the right to recover the money secured by them, passed by the delivery followed by the death of the donor, & the real & personal representatives of the donor were trustees for the donee, to make the gift effectual.

Nothing can be more clear than that this *donatio mortis causa* must be a gift made by a donor in contemplation of the conceived approach of death, that the title is not complete till he is actually dead (LORD ELDON, C.).—*DUFFIELD v. ELWES* (1827), 1 Bli. N. S. 497; 4 E. R. 959; *sub nom.* *DUFFIELD v. HICKS*, 1 Dow. & Cl. 1, H. L.

Annotations:—*Consd.* *Staniland v. Willott* (1852), 3 Mac. & G. 664; *Veal v. Veal* (1859), 27 Beav. 305; *Re Richardson, Shillito v. Hobson* (1885), 53 L. T. 746; *Re Dillon, Duffin v. Duffin* (1890), 44 Ch. D. 76. *Expld.* *Re Beaumont, Beaumont v. Ewbank*, [1902] 1 Ch. 889. *Reid.* *Re Patterson, Mitchell v. Smith* (1864), 4 New Rep. 131; *Re Mead, Austin v. Mead* (1880), 43 L. T. 117; *Re Wasserberg, Union of London & Smiths Bank v. Wasserberg*, [1915] 1 Ch. 195; *Re Lee, Treasury Solicitor v. Parrott* (1918), 87 L. J. Ch. 594. *Mentd.* *Duffield v. Duffield* (1829), 1 Dow. & Cl. 395.

352. —.]—CAIN v. MOON, No. 286, *ante*.

353. Condition may be presumed.]—GARDNER v. PARKER, No. 307, *ante*.

354. Rebuttable presumption.]—The obligee in a bond, gave it to her niece, & afterwards, in her last illness & five days before her death, signed a memorandum, purporting to be

papers relating to the sale testator had been frequently heard to say he intended to give to his son, who was named as an exor. of his will. Shortly before his death, & in anticipation of it, he desired the case containing his papers to be brought to him, & from them directed certain notes to be selected, & delivered them to his wife for her own use; the rest of the papers,

including the note for \$900, & the papers relating to the sale, together with several notes & documents including his will, testator handed to his son, with a direction that if he recovered they were to be brought back; but in the event of his death then that he (the son) should keep them:—*Held*: not a good *donatio mortis causa* of any of the securities.—

an immediate & absolute assignment of the bond to her:—*Held*: the transaction could not be considered as a *donatio mortis causa*, as there was no evidence to show at what time or under what circumstances the bond first came into the niece's possession, & as the assignment was immediate & unconditional.

In order to constitute a *donatio mortis causa*, the circumstances must be such as to show that the donor intended the gift to take effect if he should die shortly afterwards, but that, if he should recover, the thing should be restored to him. When, however, we look at the memorandum in this case, which was intended to have the effect of making pltf.'s possession of the bonds more secure, we find that words more absolute, unqualified & unconditional could hardly have been used; & therefore, if there had been nothing but the memorandum in this case, it would have been totally impossible to hold that the gift was a *donatio mortis causa* (SHADWELL, V.-C.).—*EDWARDS v. JONES* (1835), 7 Sim. 325; 4 L. J. Ch. 163; 58 E. R. 862; *affd.* (1836), 1 My. & Cr. 226, L. C.

Annotations:—*Reid.* *Staniland v. Willott* (1852), 3 Mac. & G. 664. *Mentd.* *Beatson v. Beatson* (1841), 12 Sim. 281; *M'Fadden v. Jenkins* (1842), 1 Hare, 458; *Meek v. Kettlewell* (1843), 1 Ph. 342; *Ward v. Audland* (1845), 8 Beav. 201; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Price v. Price* (1851), 14 Beav. 598; *Bridge v. Bridge* (1852), 16 Beav. 315; *Donaldson v. Donaldson* (1854), Kay, 711; *Voyle v. Hughes* (1854), 2 Sm. & G. 18; *Pownall v. Anderson* (1856), 2 Jur. N. S. 557; *Moore v. Moore* (1874), L. R. 18 Eq. 474; *Re Richardson, Shillito v. Hobson* (1885), 53 Ch. D. 396; *Re Shield, Pethybridge v. Burrow* (1885), 53 L. T. 5.

355. Recovery of donor from illness.—Sufficiently to resettle estate—Effect on gift.]—MAPLETOFT v. MAPLETOFT & CLERK (1708), Gilb. Ch. 8; 25 E. R. 6, L. C.

356. Death from subsequent illness.—Gift does not operate.]—Pltf. being possessed of shares in a public co., when in a state of extreme sickness transferred the shares into the name of deft.; pltf. being recovered from his sickness, but having subsequently become lunatic, a bill was filed in his name by his committee, to have deft. declared a trustee of the shares:—*Held*: as pltf. had survived the sickness during which the transfer was made, the gift could not operate as a *donatio mortis causa*, & it appearing that the gift had been received by deft. upon the distinct understanding that it was to be absolute only in the event of the death of pltf., deft. must be considered as trustee of the shares for pltf.—*STANILAND v. WILLOTT* (1852), 3 Mac. & G. 664; 42 E. R. 416; *sub nom.* *STANILAND v. WILLOTT*, 18 L. T. O. S. 338, L. C.

Annotation:—*Reid.* *Re Hughes* (1888), 59 L. T. 586.

SUB-SECT. 3.—DELIVERY.

A. In General.

357. Necessity for delivery.]—ASHTON

BLAIN v. TERRYBERRY (1862), 9 Gr. 286.—CAN.

PART V. SECT. 3, SUB-SECT. 3.—A.

357 I. Necessity for delivery.]—A *donatio mortis causa* by deed of gift requires delivery to the donee of the subject matter of the gift to make it effectual.—*ANNING v. ANNING* (1800),

DAWSON & VINCENT (1725), 2 Coll. 363, n.; Cas. temp. King, 14; 25 E. R. 196, L. C.

358. —.]—MILLER v. MILLER, No. 404, post.

359. —.]—To constitute a *donatio mortis causa* there must be a transfer of the thing itself immediately.—HUNGERFORD v. WINTOR (1730), Amb. 839; 27 E. R. 525, L. C.

Annotation:—Mentd. Northumberland v. Egremont (1768), Amb. 657.

360. —.]—M. shortly before her death told her servant that she had put in the drawer where her will was laid a purse with fifty guineas in it, which, when she was dead she desired her servant to take & give to deft. :—Held: the gift was void. It could not operate as a *donatio mortis causa* because there was no delivery, nor as a nuncupative will, the requisites of the statute not having been complied with.—HARDY v. BAKER (1738), West temp. Hard. 519; 25 E. R. 1063, L. C.

361. —.]—WARD v. TURNER, No. 372, post.

362. —.]—Qu.: whether a gift of a chattel, not in the possession of the donor at the time of making the gift, will so pass the property therein, as to entitle the donee, who has never obtained possession, to maintain trover against the exor. of the donor. If A. on his death-bed, desire B. to call at a certain place, & fetch away a watch, adding, "that he will then make her a present of it," but no possession is resumed by A. & no delivery made to B. Qu.: if this would be good as a *donatio mortis causa*.—SPATLEY v. WILSON (1815), Holt, N. P. 10, N. P.

Annotation:—Reid. Bunn v. Markham (1816), 2 Marsh. 532.

363. & continuing possession.]—In order to constitute a good *donatio mortis causa*, there must be an absolute & unconditional delivery of possession to the donee, or to a third person in trust for him, which possession must continue, uninterrupted, to the time of the donor's death. A. believing himself to be on his death-bed, desired B. to fetch from a chest adjoining his bed-room three parcels, containing India bonds, bank notes, & guineas, to the amount of £3,830, which were counted over on the bed, & then sealed up, directed to C. & D., D. being A.'s natural daughter, by C., & returned to the chest, the key of which A. kept in his possession, till his death, six months afterwards; A. requesting B. to see the property delivered to C. & D. at his decease, & observing that it ought to be made up to £4,000. That

addition was never made, but on the same day with the above transaction, A. made a codicil to his will, by which he gave C. & D. £4,000 :—Held: the jury were warranted in finding that A. intended the gift, supposing there had been a good legal delivery, to be absolute & unconditional; but A. having only expressed his intention in favour of C. & D. & having never parted with the possession, there had not been such a delivery as to constitute a good *donatio mortis causa*.—BUNN v. MARKHAM (1816), 7 Taunt. 224; 2 Marsh. 532; Holt, N. P. 352; 129 E. R. 90.

Annotations:—Consd. Irons v. Smallpiece (1819), 2 B. & Ald. 551; Re Wasserberg, Union of London & Smiths Bank v. Wasserberg, [1915] 1 Ch. 195. Reid. Hills v. Hills (1841), 10 L. J. Ex. 440; Powell v. Hellcar (1858), 26 Beav. 261; Cochran v. Moore (1890), 25 Q. B. D. 57; Re Hawkins, Watts v. Nash, [1924] 2 Ch. 47.

364. —.]—IRONS v. SMALLPIECE, No. 3, ante.

365. —.]—FARQUHARSON v. CAVE, No. 370, post.

366. —.]—CAIN v. MOON, No. 286, ante.

Effect of redelivery to donor.]—See Sub-sect. 3, B., post.

367. Imperfect or inchoate delivery—How far effectual.]—Re WASSERBERG, UNION OF LONDON & SMITHS BANK, LTD. v. WASSERBERG, No. 378, post.

368. Intention accompanying delivery—Materiality of—Intention to make gift necessary.]—ASHTON v. DAWSON & VINCENT (1725), 2 Coll. 363, n.; Cas. temp. King, 14; 25 E. R. 196, L. C.

369. — — —.]—The short point was—whether the words which, on pltf.'s evidence, testator used when he handed over the parcel containing the property which was the subject-matter of the *donatio mortis causa* were sufficient to constitute a good *donatio mortis causa* (COTTON, L.J.).

There was no expression by him which showed that he intended to give her what was in the parcel. Testator did not consider that that was the effect of his words, nor did pltf., because she put the parcel in his bookcase, & when she put it on the chair he looked angry, apparently thinking that she was not taking sufficient care of it. But the parcel contained a letter which pltf. relied on as making the words used by testator sufficient, but that letter, not being signed & not being operative as a will, could not be relied upon by pltf., as it was not shown to her by testator & was never seen by her until after his death (COTTON,

21 N. S. W. Eq. 13; 16 N. S. W. W. N. 147.—AUS.

357 ii. —.]—An oral gift of personal chattels does not confer any property on the donee, if there be no actual delivery to him.—TRAVIS v. TRAVIS (1886), 12 A. R. 438.—CAN.

357 iii. —.]—Delivery is an essential requisite to a *donatio mortis causa*.—McKINNON v. McKINNON (1895), 28 N. S. R. 189.—CAN.

357 iv. —.]—Deceased left a letter directed to his solicitor, asking that certain chattels be given to the parties designated & that a cheque he had drawn be given to the payee.—Held: these dispositions could only be supported as *donationes mortis causa*, & as there was neither actual nor constructive delivery they must fail.—Re ALDRIDGE'S ESTATE (1915), 32 W. L. R. 748.—CAN.

357 v. —.]—Where a man on his death-bed gave to a friend a cheque

for the whole amount to his credit in a savings-bank account & also the bank pass-book, which were presented to the bank by the payee after the death of the drawer, the bank having no notice of the death, it was held, that the handing over of the cheque & the book constituted a good *donatio mortis causa*.—KENDRICK v. DOMINION BANK & BOWNAS (1920), 47 O. L. R. 372; 18 O. W. N. 138.—CAN.

357 vi. —.]—Deceased a little time before death made a will. She directed that certain bonds should go to her husband. A few days after this she signed a letter to the bank as follows: "Please turn over my bonds to my husband." Deceased's will was invalid. The husband claimed the bonds as a *donatio mortis causa*, or alternatively as a gift *inter vivos*.—Held: the gift was invalid since there had been no delivery of the bonds, which was necessary to a valid gift of each kind.—PHINN v. GLOVER (1922), 63 D. L. R. 523.—CAN.

357 vii. —.]—It is essential to the validity of a *donatio mortis causa*, that the money, or the subject of the gift, should be actually handed over at the time.—THOMPSON v. HEFFERNAN (1843), 4 Dr. & War. 285.—IR.

357 viii. —.]—There must be a delivery of & parting with possession & dominion over the subject matter of the gift in the lifetime of the donor to constitute a *donatio mortis causa*.—HUGHES v. WINNER (1882), 6 Nfld. L. R. 461.—NFLD.

357 ix. —.]—CURTIS v. EMERSON (1888), 7 Nfld. L. R. 365.—NFLD.

357 x. —.]—LEAHY v. O'KEEFE (ADMINISTRATOR OF LEAHY) (1891), 7 Nfld. L. R. 527.—NFLD.

357 xi. —.]—According to the law of Scotland one of the characteristics of *donatio mortis causa* is that there must be delivery.—MORRIS v. RIDDICK (1867), 5 Macph. (Ct. of Sess.) 1036; 39 Sc. Jur. 630.—SCOT.

Sect. 3.—Requisites for validity: Sub-sect. 3, A. & B.]

L.J.]—WILDISH v. FOWLER (1890), 6 T. L. R. 422, C. A.; *affd.* (1892), 8 T. L. R. 457, H. L.

370. — Attempt to evade legacy duty.]—A person having some Dutch bonds & the title-deeds of certain estates which he kept in a box delivered the key of the box to J., in whose house he lived & with whom he was on terms of intimacy, & told a third person that the contents of the box belonged to J. He, however, kept possession of the box, directing J. to open it for him from time to time as occasions required. He also received the dividends due on the bonds. A few weeks before his death, being in his eightieth year & infirm in health, he directed his nurse to deliver the box to J., which she accordingly did, & J. kept the box till his death. Upon the box being subsequently opened the envelope in which the bonds were contained was found to be addressed, in the handwriting of the deceased, to the wife & sisters of J., with a direction that it was to be delivered "unopened;" & attached to the envelope was a letter addressed, by the deceased to the same persons, stating the shares in which each was to have the benefit of the bonds, stating also, by way of postscript, to J., that the writer took this course solely to evade the legacy duty, & that he recommended perfect silence on the subject. The transaction amounts neither to a gift *inter vivos*, nor to a *donatio mortis causâ* in favour of the wife & sisters of J.

I had some doubt at first whether the transaction might not be considered to amount to a *donatio mortis causâ*, but, to arrive at that conclusion I must be satisfied that there was a complete delivery in such circumstances as the law requires for that purpose. A mere delivery to an agent in the character of agent for the giver would amount to nothing. It must be a delivery to the legatee, or someone for the legatee (KNIGHT BRUCE, V.-C.).—**FARQUHARSON v. CAVE** (1846), 2 Coll. 356; 15 L. J. Ch. 137; 6 L. T. O. S. 363; 10 Jur. 63; 63 E. R. 768.

Annotations:—*Refd.* **POWELL v. HELICAR** (1858), 26 Beav. 261; **MOORE v. MOORE** (1871), L. R. 18 Eq. 474; *Re* **WASSERBERG**, Union of London & Smiths Bank v. **WASSERBERG**, [1915] 1 Ch. 195. **Mentd.** **KELKOWICH v. MANNING** (1851), 1 De G. M. & G. 176.

371. — Intention to make disposition by will.]—An old lady, shortly before her death & in anticipation thereof, expressed a desire to give all her property to deft. upon certain conditions, & directed him to record her wishes in writing, which he did. The document purported to give to deft. all the property she might have at her death, subject to his settling up her affairs, seeing to her burial, & making certain specified payments to named charities. She then delivered to deft. a deposit note & share certificates, saying, "Take charge of them. If I get better you will bring them back; if not, you will know what to do with them." She subsequently told him where to find some gold & notes, but gave him no further directions as to them:—**Held**: looking at the transactions as a whole, the intention of the deceased was that the specific articles should be dealt with simply as part of the property which

she meant to dispose of as from her death & over which she meant to reserve dominion during her life; consequently there was no valid *donatio mortis causâ*.—**TREASURY SOLICITOR v. LEWIS**, [1900] 2 Ch. 812; 69 L. J. Ch. 833; 83 L. T. 139; *sub nom.* **Re DASH**, **TREASURY SOLICITOR v. LEWIS**, 48 W. R. 694; 16 T. L. R. 559.

Annotations:—*Refd.* *Re* **JOHNSON**, **SANDY v. KELLY** (1905), 49 Sol. Jo. 314; *Re* **WASSERBERG**, Union of London & Smiths Bank v. **WASSERBERG**, [1915] 1 Ch. 195.

B. What Amounts to Delivery.

372. Where no physical delivery—[Sufficiency.]—In the case *donationum mortis causâ*, an actual delivery is indispensable to vest the property, if the subject-matter is capable of delivery. If it be not so, there must be a delivery of what is equivalent to it at law. In the case of stock, etc., delivery of the receipts, etc., not sufficient to constitute such a gift, though strong evidence of the intent. Formerly, there could be no action at law on a bond without a proferat.—**WARD v. TURNER** (1752), 1 Dick. 170; 2 Ves. Sen. 431; 21 E. R. 234, L. C.

Annotations:—*Consd.* **BUNN v. MARKHAM** (1816), 7 Taunt. 224; **WALTER v. HODGE** (1818), 2 Swan. 92; **DUFFIELD v. ELWES** (1827), 1 Bl. N. S. 497; *Re* **HARCOURT**, **DANBY v. TUCKER** (1883), 31 W. R. 578. *Refd.* **TATE v. HILBERT** (1793), 4 Bro. C. C. 286; **MOORE v. DARTON** (1851), 20 L. J. Ch. 626; **VEAL v. VEAL** (1859), 27 Beav. 303; **JOHNSON v. STEAR** (1863), 33 L. J. C. P. 130; **MOORE v. MOORE** (1874), L. R. 18 Eq. 474; **HUDSON v. SPENCER**, [1910] 2 Ch. 285; **DUBLIN CITY DISTILLERY v. DOHERTY**, [1914] A. C. 823; *Re* **WASSERBERG**, Union of London & Smiths Bank v. **WASSERBERG**, [1915] 1 Ch. 195; **WRIGHTSON v. MCARTHUR & HUTCHINSON** (1919), Ltd., [1921] 2 K. B. 807; *Re* **HAWKINS**, **WATTS v. NASH**, [1924] 2 Ch. 47. **Mentd.** **FLETCHER v. FLETCHER** (1814), 4 Hare, 67.

373. — Symbolic delivery—[Parcels inscribed with names of intended donees.]—**BUNN v. MARKHAM**, No. 363, *ante*.

374. Delivery of key—[Of receptacle containing securities.]—**JONES v. SELBY** (1710), Prec. Ch. 300; 2 Eq. Cas. Abr. 573; 24 E. R. 143.

Annotations:—*Consd.* **SNEELGRAVE v. BAYLY** (1744), Ridg. temp. H. 202; **WARD v. TURNER** (1752), 1 Dick. 170; **HUDSON v. SPENCER**, [1910] 2 Ch. 285; *Re* **WASSERBERG**, Union of London & Smiths Bank v. **WASSERBERG**, [1915] 1 Ch. 195. *Refd.* **DOWNES v. TOWNSEND** (1755), Amb. 280; **DOWNING v. BAGNALL** (1755), Amb. 818; **GARDNER v. PARKER** (1818), 3 Madd. 184; *Re* **MUSTAPHA**, **MUSTAPHA v. WEDLAKE** (1891), 8 T. L. R. 160; **WRIGHTSON v. MCARTHUR & HUTCHINSON** (1919), Ltd., [1921] 2 K. B. 807.

375. — [—]—(1) To constitute a *donatio mortis causâ*, the evidence must be clear that the donor gave it in contemplation of death.

(2) The burthen of proof is necessarily on the donee, as in the first place, so many opportunities, & such strong temptations, present themselves to unscrupulous persons to pretend deathbed donations, that there is always danger of having an entirely fabricated case set up; & secondly, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of a person languishing in mortal illness, & by a slight change of words, to convert the expressions of intended benefit into an actual gift of property; & no case of this description ought to prevail, unless it is supported by evidence of the clearest & most unequivocal character.

(3) A person having a considerable amount of banknotes concealed in her stays, being on her

PART V. SECT. 3, SUB-SECT. 3.—B.

374 i. Delivery of key—[Of receptacle containing securities.]—The delivery of the key of a chest containing money, with the expression, "All the money

in that chest I give to you," is not sufficient to constitute a *donatio mortis causâ*.—*Re* **HARTMAN'S ESTATE** (1856), 2 Thom. 62.—**CAN.**

374 ii. — [—]—**YOUNG v. DERENZY** (1879), 26 Gr. 509.—**CAN.**

374 iii. — [—]—**HALL v. HALL** (1891), 20 O. R. 684; 19 A. R. 292.—**CAN.**

374 iv. — [—]—**WALKER v. FOSTER** (1900), 30 S. C. R. 299.—**CAN.**

deathbed, took the stays & said to G., her cousin, who was standing by her bedside, that "she was longing to give her these"; at the same time holding the stays in her hands. G. took them, & put them at the foot of the bed; but on deceased saying, "Don't leave them, take them, keep them, & take care of them"; G. asked for the key of a box in the room belonging to deceased, which deceased handed to her; & thereupon G. locked them up in the box. Immediately after deceased's death, G. ripped up the stays, took out the bank notes, & replaced the stays in the box. She also took away a watch & several trinkets belonging to deceased from deceased's house, of which she gave no immediate account, nor did she mention the amount she had found in the stays:—*Held*: having regard to the looseness of the alleged expressions used by deceased when she handed the stays to G., of which the evidence itself was unsatisfactory, coupled with the conduct of G. in taking other property of deceased, the circumstances could not be considered to be such a delivery as constituted a *donatio mortis causâ*.—*COSNAHAN v. GRICE* (1802), 15 Moo. P. C. C. 215; 7 L. T. 82; 15 E. R. 476, P. C.

Annotation:—*As to* (1) *Refd.* *Wildish v. Fowler* (1890), 6 T. L. R. 422.

376. ———. ———.]—T. in his last illness showed a deposit note to his daughter, pltf. & told her in effect that it was to belong to her in the event of his death. Pltf. took the note, & by her father's directions placed it for safe custody in a cash-box which was kept in her father's bedroom, but of which she had the key, & to which she had resort for household purposes:—*Held*: this was a good *donatio mortis causâ*.—*Re TAYLOR, TAYLOR v. TAYLOR* (1887), 56 L. J. Ch. 597.

Annotations:—*Refd.* *Re Farman, Farman v. Smith* (1887), 57 L. J. Ch. 637; *Wildish v. Fowler* (1888), 5 T. L. R. 113; *Re Wasserberg, Union of London & Smiths Bank v. Wasserberg*, [1915] 1 Ch. 195.

377. ———. ———.]—The intention of the father had always been that his children should live together & that the money should be divided between them. The evidence showed that he was not unconscious at the time the alleged gift was made. I am bound judicially to find that there was a valid *donatio mortis causâ*, but no *donatio mortis causâ* of furniture. It has been argued that there was no delivery of bonds, such as to make it in law a valid *donatio mortis causâ*. The keys that were given were those of the wardrobe, which contained the key of the safe, & there must be judgment for pltf. (*MATHEW, J.*).—*Re MUSTAPHA, MUSTAPHA v. WEDLAKE* (1891), 8 T. L. R. 160; 36 Sol. Jo. 125.

Annotations:—*Refd.* *Re Wasserberg, Union of London & Smiths Bank v. Wasserberg*, [1915] 1 Ch. 195; *Wrightson v. McArthur & Hutchisons* (1919), Ltd., [1921] 2 K. B. 807.

378. ———. ———.]—An inchoate or imperfect delivery of chattels may be sufficient for effectuating a *donatio mortis causâ*. There is no distinction for this purpose between chattels &

choses in action. Testator, who was about to undergo a serious operation, was possessed of certain bonds to bearer in the custody of his bank which he was desirous to give to his wife in the event of his death. He visited his bank & put the bonds in a sealed parcel. He discussed the matter with the assistant manager, to whom he ultimately expressed his intention of putting his wife's name on the outside of the parcel & locking it up in his locked box, so that when his exors. opened it they would hand over the parcel to her. This he did in the presence of his wife who had followed him to the bank, & left the locked box with the bank, still, however, retaining the key, which he showed to his wife in order that she might recognise it, & he also gave her a list of bonds & told her to keep it safely. They left the bank together, & when they reached their home testator gave to his wife the bunch of keys containing the key of the locked box, & told her to lock them up with the list of bonds. Accordingly she, under his direction, locked both the list & the bunch of keys in a drawer in her own room, of which she had & always kept the key. The same day testator went to a nursing home, where he shortly afterwards died:—*Held*: the delivery of the key transferring to the wife a partial dominion over, or part of the means of getting at, the bonds, though not a sufficient delivery to support a gift *inter vivos*, was, in the circumstances, a sufficient delivery to effectuate a *donatio mortis causâ*.—*Re WASSERBERG, UNION OF LONDON & SMITHS BANK, LTD. v. WASSERBERG*, [1915] 1 Ch. 195; 84 L. J. Ch. 214; 112 L. T. 242; 59 Sol. Jo. 176.

Annotations:—*Consd.* *Re Hawkins, Watts v. Nash*, [1924] 2 Ch. 47. *Refd.* *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

379. Delivery of receptacle containing securities—*Retention of key by donor.*—Testatrix shortly prior to her decease had entrusted a parcel containing a box to the care of a friend, & had requested this friend to carry out her instructions. At a subsequent interview testatrix drew the friend's attention to a small key with a label attached thereto, saying, "If I die, that will be sent to you." On the day of testatrix's death the key with the label was received by the friend, & the box was found to contain share certificates & valuables, with a paper giving directions as to the box to be given:—*Held*: inasmuch as testatrix had retained the key, she had not parted with her dominion over the property contained in the box, & consequently the handing over of the box did not constitute a valid *donatio mortis causâ*.—*Re JOHNSON, SANDY v. REILLY* (1905), 92 L. T. 357; 49 Sol. Jo. 314.

Annotations:—*Refd.* *Re Wasserberg, Union of London & Smiths Bank v. Wasserberg*, [1915] 1 Ch. 195. *Mentd.* *Re Craven, Crowdon v. Craven* (1908), 24 T. L. R. 750.

380. Transfer of subject-matter—From one receptacle to another—Both under donor's control.—A gift of money due on a mtge. & a bond by testator some time before his death to a daughter

379 i. Delivery of receptacle containing securities—Retention of key by donor.—

A testator, who was suffering from an incurable disease, went to stay with his married daughter, one of the defts., & was tended & nursed by her, & was afterwards joined by his wife, who remained with him until his death which took place shortly after. Nearly three months after he had been at deft.'s house, another daughter asked him to give deft. the price of a piano, when he said he would not do that,

but pointing to a box in which he kept some money & promissory notes, & which he kept locked, retaining the key, said it was deft.'s to do what she liked with, & that there was sufficient for all. No change was made in the possession of the box & its contents, it continuing in his possession up to the time of his death, he taking what money he required for his own use & for presents to his wife & daughters, deft. at his request sometimes taking out money for him for such purposes.

The notes were never otherwise alluded to:—*Held*: neither a good *donatio mortis causâ* nor gift *inter vivos* to deft. was shown.—*BROWN v. DAVY* (1889), 18 O. R. 559.—*CAN.*

379 ii. ———. ———.]—*Re MULROY, M'ANDREW v. MULROY*, [1924] 1 L. R. 98.—*IR.*

m. ———. *For safe keeping.*—A person on his death-bed handed to his wife \$2,000 in bonds & \$1,550 in cash, telling her to "take them & pu-

Sect. 3.—Requisites for validity: Sub-sect. 3, B. & C. Sects. 4 & 5.]

not sustained upon the circumstances; merely a change of the securities from one drawer of a bureau to another by the wife of testator by his direction: the fact & the declared purpose proved only by the examination of the daughter, claiming the benefit, & the widow, discharging herself, as extrix. by payments under the gift. *Qu.*: whether the interest in money due upon a mtge. or bond passes by a mere delivery of the security as a gift *inter vivos*.—*BRYSON v. BROWNRIGG* (1803), 9 Ves. 1; 32 E. R. 499.

381. Resumption of control by donor — After delivery to donee.]—To give effect to a *donatio mortis causâ*, deceased must, at the time of the supposed gift, part with all dominion over them.—*HAWKINS v. BLEWITT* (1798), 2 Esp. 663, N. P.

Annotations:—*Reid*. Treasury Solicitor v. Lewis, [1900] 2 Ch. 812; *Re Johnson, Sandy v. Reilly* (1905), 92 L. T. 357; *Re Wasserberg*, Union of London & Smiths Bank v. Wasserberg, [1915] 1 Ch. 195.

382. —.]—Testator some months before his death, but being sick of the disease which afterwards destroyed him, deposited a box with a party whom he desired to take care of it, as it contained money for herself & her sister, with directions how she was to obtain possession of the key, the box being locked, after his death, but adding that he would want to have the box every three months whilst he lived. Prior to testator's decease, the box was twice delivered up to, & as often redelivered by, testator.—*Held*: *pltf.* was not entitled to the box or its contents.—*KEDDEL v. DOBREE* (1839), 10 Sim. 244; 59 E. R. 607; *sub nom.* *RIDDELL v. DOBREE*, 3 Jur. 722.

Annotations:—*Reid*. Powell v. Hellicar (1858), 26 Beav. 261; Treasury Solicitor v. Lewis, [1900] 2 Ch. 812; *Re Wasserberg*, Union of London & Smiths Bank v. Wasserberg, [1915] 1 Ch. 195.

383. —.]—*CANT v. GREGORY* (1894), 10 T. L. R. 584, C. A.

384. For safe custody — Effect.]—Although it is essential to the creation of a valid *donatio mortis causâ* that, after delivery of the

subject-matter of the gift, the donee should continue in possession of it until the death of the donor, the mere fact of the donor agreeing to take back the property for safe custody does not affect the validity of the previous gift.—*Re HAWKINS, WATTS v. NASH*, [1924] 2 Ch. 47; 93 L. J. Ch. 319; 131 L. T. 446; 68 Sol. Jo. 561.

385. Donee already in possession — In another capacity—Supervening intention to make gift.]—*CAIN v. MOON*, No. 286, *ante*.

386. —.]—*Re WESTON, BARTHOLOMEW v. MENZIES*, No. 302, *ante*.

Compare No. 359, *ante*.

Delivery to agent.]—*See* Sub-sect. 3, C., *post*.

C. Delivery to Agent.

387. Must be agent for donee.]—*FARQUHARSON v. CAVE*, No. 370, *ante*.

388. —.]—*MOORE v. DARTON*, No. 288, *ante*.

389. —.]—A lady had a dressing-case & a box, both containing jewellery; the dressing-case was in her possession at the place where she died, the box was at her residence. On her death-bed she delivered the keys to her servant, with directions to deliver both to *pltf.* in the event of her dying:—*Held*: that this did not amount to a *donatio mortis causâ*.—*POWELL v. HELLICAR* (1858), 26 Beav. 261; 28 L. J. Ch. 355; 5 Jur. N. S. 232; 7 W. R. 171; 53 E. R. 898.

Annotation:—*Reid*. *Re Wasserberg*, Union of London & Smiths Bank v. Wasserberg, [1915] 1 Ch. 195.

390. —.]—A. when eighty-six years of age & confined to bed by feebleness, although not really ill, handed to his servant a packet containing a promissory note & a memorandum of gift, & on the outer cover of the packet A. had written, "June 3, 1907, a present to W., care of C. (A.'s servant), to be forwarded in due season. It would be well to register the enclosed." A. told his servant to put the packet in a safe place, & she put it in a safe in A.'s house. A. died in Oct. 1907:—*Held*: the gift did not constitute a

them away; wrap them up & lock them up in your trunk." At the same time he handed to her a pocket book containing \$150, saying that it was for present expenses. Subsequently he made a will bequeathing legacies to his wife, his partner, two grand-nephews & nieces & nephews. When giving directions for the drafting of his will, on the amount of the legacies to his wife & grand-nephews being counted up, he said, "There is more than that":—*Held*: there was not a *donatio mortis causâ* to the wife, deceased intending no more than a delivery for safe-keeping.—*EASTERN TRUST CO. v. JACKSON* (1905), 26 C. L. T. 386; 3 N. B. Eq. Rep. 180.—*CAN.*

n. Resumption of control by donor — After delivery to donee—For safe custody.]—Although delivery of possession necessary to a valid *donatio mortis causâ* may be antecedent to the words of gift (as in the case of a gift of a chattel to the bailee thereof) the delivery of a chattel by a master into the custody of his servant is not such a delivery of possession as followed at a subsequent date by words of gift, will constitute an effective *donatio mortis causâ*.—*NATIONAL TRUSTS EXECUTORS & V. L. R. 814—AUS.*

o. — — — —.]—Deceased

requested her son, with whom she resided, to draw from the Savings' Bank, for her, \$1,200, which he accordingly did, & having brought it home, she placed it in her box. This was six months previous to her death, & a short time after the execution of her last will, in which her properties & her moneys had been bequeathed in detail to her children. It was stated by the son that this sum was afterwards in the presence of witnesses allocated by his mother to various parties (including himself for the largest amount), conditional in the event of her not living. Some weeks before her death deceased gave her son the key of the box, & requested him to take out the said sum, which he did, & count it; she then directed him to replace it in her box, confirming her previous directions with some additions. After her death the son distributed the amount as directed:—*Held*: the facts as deposed to did not constitute a *donatio mortis causâ*.—*MORRIS v. MURPHY* (1888), 7 Nid. L. R. 295.—*NFLD.*

p. Delivery of receipts to donee-debtor—By donor creditor—With instructions to burn.]—Defts. were granted loans by deceased & gave receipts for the sums advanced, such receipts naming the interest payable & the security upon which they were made. Shortly before his death

deceased gave the receipts to defts., with instructions to burn them:—*Held*: this amounted to a good *donatio mortis causâ* of the sums advanced.—*HEITMAN v. MACE* (1912), 31 N. Z. L. R. 1242.—*N.Z.*

PART V. SECT. 3, SUB-SECT. 3.—C.

387 i. Must be agent for donee.]—A. had lent money to M., & the loan was secured by a promissory note & by title deeds which were handed by M. to A. shortly before his death, & in expectation of death, handed the promissory note & the title deeds to *pltf.* with instructions to hand them to M. in the event of his (A.'s) death:—*Held*: the documents were delivered to *pltf.* as M.'s agent & there was a valid *donatio mortis causâ*.—*MATHIE v. McDONALD* (1916), 16 S. L. N. S. W. 446; 33 N. S. W. N. 131.—*AUS.*

387 ii. —.]—To effect a *donatio mortis causâ*, delivery to a third person for the use of the donee is sufficient, provided that such third person is not a mere trustee, agent, or servant of the donor.—*WALKER v. FOSTER* (1900), 20 C. L. T. 196; 30 S. C. R. 299.—*CAN.*

387 iii. —.]—*HUTCHIESON'S EXECUTRIX v. SHEARER*, [1909] S. C. 15; 46 Sc. L. R. 15; 16 S. L. T. 404.—*SCOT.*

valid *donatio mortis causa*, inasmuch as the evidence did not establish that the gift was made in expectation of death, & as there had been no delivery to the donee or to any agent for him.—*Re KIRKLEY, COURT v. WATSON* (1909), 25 T. L. R. 522.

SECT. 4.—INCOMPLETE GIFTS.

391. Court will complete.]—*Re DILLON, DUFFIN v. DUFFIN*, No. 298, *ante*.

392. Defective delivery—How far material.]—*Re WASSERBERG, UNION OF LONDON & SMITHS BANK, LTD. v. WASSERBERG*, No. 378, *ante*.

393. Right of donee against executors—For transfer of legal title.]—*DUFFIELD v. ELWES*, No. 351, *ante*.

394. —.]—*WILDISH v. FOWLER*, No. 33, *ante*.

395. —.]—*Re DILLON, DUFFIN DUFFIN*, No. 298, *ante*.

SECT. 5.—PROOF.

396. Presumption of gift—Circumstances insufficient to raise—Delivery during last illness.]—A paragraph in a paper in the following words: "the above-named bonds were restored by A., & are placed in the hands of B. in trust for the use of C. after my decease":—*Held*: to be testamentary, notwithstanding a delivery of the bonds had taken place, & in the donor's last illness.

Seem: what otherwise was a trust created in

C.'s favour or rather a gift of the nature of a *donatio inter vivos*, or, perhaps, a *donatio mortis causa*, was converted into a testamentary bequest by the words—"after my decease."—*TAPLEY v. KENT* (1845), 1 Rob. Eccl. 400; 4 Notes of Cases, 292; 9 Jur. 1041; 163 E. R. 1080.

397. Failure to make valid testamentary disposition.]—Where the circumstances are such as to indicate an intention to make a testamentary gift, & the intention fails for want of proper attestation, a *donatio mortis causa* will not be presumed.—*Re PATTERSON'S ESTATE, MITCHELL v. SMITH* (1864), 4 De G. J. & Sm. 422; 4 New Rep. 310; 33 L. J. Ch. 596; 10 L. T. 801; 12 W. R. 941; 46 E. R. 982, L. J.

398. Onus of proof—On donee.]—*COSNAHAN v. GRICE*, No. 375, *ante*.

399. Evidence of donee alone—Whether corroboration necessary.]—A *donatio mortis causa* can only be supported on the clear & decisive testimony of disinterested witnesses.—*WILTON v. HAYES* (1843), 1 L. T. O. S. 263, L. C.

400. —.]—A gift by a dying man of a banker's deposit receipt under such circumstances as to constitute it a good *donatio mortis causa* will be upheld, even though the only evidence in support of the claim be that of the donee, if the ct. considers that evidence trustworthy.—*Re FARMAN, FARMAN v. SMITH* (1887), 57 L. J. Ch. 637; 58 L. T. 12; 4 T. L. R. 168.

Annotation:—*Reid. Wildish v. Fowler* (1888), 5 T. L. R. 113.

401. —.]—*WILDISH v. FOWLER*, No. 33, *ante*.

See, generally, EVIDENCE, Vol. XXII., pp. 133

PART V. SECT. 4.

a. Absence of seal—On assignment of mortgage debt.]—The holder of a mtge. security while labouring under an attack of sickness, of which he subsequently died, indorsed on the indenture a memorandum assigning the same to his wife for the benefit of herself & his children, which he signed, but did not seal, although the memorandum expressed it to be under seal:—*Held*: the wife took no interest under such assignment, as a *donatio mortis causa*.—*TIFFANY v. CLARKE* (1858), 6 Gr. 474.—*CAN.*

r. Death of donor—Before presentation of order to pay.]—A person shortly before his death gave to a friend the following document "£2,500. On demand pay to bank of N. S. W. or order the sum of £2,500 & charge same to debit on my account in your books."

Deceased who was in weak health, wished to give J. the manager of the Bank & a friend, the sum to be held in trust for him if he recovered & in case of his death to be distributed in accordance with other instructions to J. The document was prepared & executed because there was not time to draw a new will. Deceased died before the order was presented:—*Held*: it was intended to be a *donatio mortis causa* but that it was incomplete owing to death taking place prior to presentation.—*Re HUGGART, JENKINS v. PUBLIC TRUSTEE* (1914), 33 N. Z. L. R. 1202.—*N.Z.*

PART V. SECT. 5.

398 i. Onus of proof—On donee.]—*MORRISON v. FORBES* (1890), 17

R. (Ch. of Sess.) 958; 27 Sc. L. R. 775.—*SCOT.*

399 i. Evidence of donee alone—Whether corroboration necessary.]—*McGUIRE v. McGUIRE* (1917), 50 N. S. R. 477; 33 D. L. R. 103.—*CAN.*

399 ii. —.]—To constitute a good *donatio mortis causa*, corroboration of claimant's testimony in some material respect is essential. This may come from circumstantial evidence & fair inference of fact arising out of other facts proven.—*YOUNG v. BENTLEY*, [1920] 1 W. W. R. 341.—*CAN.*

399 iii. —.]—*DOMINION TRUST CO. v. ENGLISH*, [1921] 1 W. W. R. 677.—*CAN.*

399 iv. —.]—Where articles are claimed under a *donatio mortis causa* & on claimant's evidence the necessary attributes exist to constitute such a gift, it is open to the ct., notwithstanding Evidence Act, R. S. B. C., 1911, c. 78, s. 11, to find the gift established without corroboration of the donee's evidence, especially where there are circumstances which tend to corroborate it.—*IMPERIAL CANADIAN TRUST CO. v. WINSTANLEY*, [1923] 1 D. L. R. 1148; 31 B. C. R. 448; [1923] 1 W. W. R. 935.—*CAN.*

399 v. —.]—A *donatio mortis causa* can only be supported on the clear & decisive testimony of disinterested witnesses.—*WILTON v. HAYES* (1843), 1 L. T. O. S. 263.—*IR.*

399 vi. —.]—A *donatio mortis causa* may be established by the evidence of the donee alone.—*McGONNELL*

v. MURRAY (1869), 3 L. R. Eq. 460.—*IR.*

s. Evidence too vague—To establish gift.]—Action by administrator of an estate to recover \$530.95, then in a chartered bank to the credit of defts. Deft. Keyes, sister of deceased, claimed that the money in question had been transferred to her credit in the bank, & deceased had intended to make a gift of the same to her:—*Held*: the evidence had not established a gift *mortis causa*.—*MUNN v. KEYSER* (1912), 23 O. W. R. 292; 4 O. W. N. 250; 6 D. L. R. 878.—*CAN.*

t. Corroborative evidence—What constitutes.]—It is not evidence in corroboration of the gift that the donee was a sister of deceased, or that on the previous night deceased directed her brother to take from her safe a satchel containing money & placed a part of the money in the hands of her sister for safe keeping, or that, after the death of the donor, the donee paid a sum of money in accordance with directions said to have been given by deceased.—*McGUIRE v. McGUIRE* (1917), 50 N. S. R. 477; 33 D. L. R. 103.—*CAN.*

a. Parol evidence—Admissibility of.]—The delivery of movables with the purpose of donation *mortis causa* may be proved by parole.—*MORRIS v. RIDDICK* (1867), 5 Macph. (Ct. of Sess.) 1036; 39 Sc. Jur. 630.—*SCOT.*

b. —.]—*ROBERTSON v. TAYLOR* (1868), 6 Macph. (Ct. of Sess.) 917; 40 Sc. Jur. 526.—*SCOT.*

c. —.]—*GIBSON v. HUTCHISON* (1872), 10 Macph. (Ct. of Sess.) 923.—*SCOT.*

SECT. 6.—EFFECT OF SUBSEQUENT EXECUTION OF WILL.

402. General rule—Gift not affected.]—One by will disposes of his personal estate, & afterwards by parol gives £100 bill to one, to deliver over to his nephew, if testator should die of that sickness; such gift decreed good.—*DRURY v. SMITH* (1717), 1 P. Wms. 404; 2 Eq. Cas. Abr. 575; 24 E. R. 446, L. C.

Annotations :—*Refd.* *Snellgrove v. Baily* (1741), 3 Atk. 214. *Mentd.* *Ward v. Turner* (1752), 1 Dick. 170.

403. —Where a donor has made a *donatio mortis causâ*, the mere fact that he subsequently makes a will by which he gives to the donee a legacy of equal amount does not raise the presumption that the legacy was intended as a satisfaction of the donation.

Testator gave to plff., who was his housekeeper, certain deposit notes for sums representing in the aggregate £2,000 under such circumstances as to constitute a valid *donatio mortis causâ* of the sums thereby represented. Two days later he made a will by which he gave her a legacy of £2,000 :—*Held* : the will was not a revocation of the donation, & there being no circumstances from which the ct. could infer that testator intended that the legacy should be a satisfaction of the donation, plff. was entitled both to the donation & the legacy.—*HUDSON v. SPENCER*, [1910] 2 Ch. 285; 79 L. J. Ch. 506; 103 L. T. 276; 54 Sol. Jo. 601.

Annotation :—*Mentd.* *Re Wasserberg, Union of London & Smiths Bank v. Wasserberg*, [1915] 1 Ch. 195.

404. Gift by will of identical amount—How far satisfaction.]—One having by his will given his wife £600 in money, on his death-bed ordered his servant to deliver to his wife, then present, two bank notes, payable to bearer, amounting to £600,

saying, he had not done enough for his wife; this gift is additional, & shall not be construed a payment of the former legacy in testator's lifetime.

There cannot be a gift of a bond or chose in action by way of *donatio mortis causâ*. Neither can anything operate as such without having been delivered in testator's lifetime by him or his order. In every *donatio mortis causâ* delivery must be made by the party in his last sickness.—*MILLER v. MILLER* (1735), 3 P. Wms. 356; 2 Eq. Cas. Abr. 575; 24 E. R. 1099.

Annotations :—*Refd.* *Gardner v. Parker* (1818), 3 Madd. 184; *Walter v. Hodge* (1818), 2 Swan. 92; *Veal v. Veal* (1859), 27 Beav. 303. *Mentd.* *Ward v. Turner* (1752), 1 Dick. 170.

405. —.] —*Qu.* : whether a *donatio mortis causâ* is avoided by the fact, that a will or codicil is subsequently made; (2) whether a remainder may be limited on a *donatio mortis causâ*; (3) whether, the *donatio mortis causâ* being of a mtge. debt, a gift of the same sum, with the same remainder over, in a subsequent codicil, is to be considered a satisfaction.—*HAMBROOKE v. SIMMONS* (1827), 4 Russ. 25; 38 E. R. 714.

406. —Intention to satisfy must be shown.]—*HUDSON v. SPENCER*, No. 403, *ante*.

See, generally. *WILLS*.

SECT. 7.—LIABILITIES ATTACHING TO GIFTS.

407. Subject to debts.]—*SMITH v. CASEN* (1718), 1 P. Wms. App. 406; 24 E. R. 447.

408. —.]—*TATE v. LEITHEAD*, No. 226, *ante*.

Subject to death duties.]—*See* *ESTATE & OTHER DEATH DUTIES*, Vol. XXI., p. 10, Nos. 43, 44.

GLEANING.

See AGRICULTURE.

GLEBE.

See ECCLESIASTICAL LAW.

GOLDSMITH'S LICENCE.

See REVENUE.

GOODS, SALE OF.

See SALE OF GOODS.

GOODWILL.

See PARTNERSHIP ; TRADE AND TRADE UNIONS.

GOVERNMENT.

See CONSTITUTIONAL LAW ; PARLIAMENT.

GRAND JURY.

See JURIES.

GRAVE.

See BURIAL AND CREMATION.

GRAZING.

See AGRICULTURE ; ANIMALS.

GREAT SEAL.

See CONSTITUTIONAL LAW.

GROUND GAME.

See GAME.

GROUND RENTS.

See LANDLORD AND TENANT ; REAL PROPERTY AND CHATTELS REAL ; SALE OF LAND.

GROWING CROPS.

See AGRICULTURE ; BILLS OF SALE ; DISTRESS ; LANDLORD AND TENANT ; SALE OF LAND.

END OF VOL. XXV.